

IN THE SUPREME COURT OF IOWA
Docket No. 19-1644

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, PHYLLI SREIMER, 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.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

THE HONORABLE Robert B. Hanson; CASE NO. EQCE084330

BRIEF OF *AMICI CURIAE* THE IOWA CATTLEMEN'S ASSOCIATION, IOWA CORN GROWERS ASSOCIATION, IOWA FARM BUREAU FEDERATION, IOWA PORK PRODUCERS ASSOCIATION, IOWA POULTRY ASSOCIATION, IOWA SOYBEAN ASSOCIATION, IOWA STATE DAIRY ASSOCIATION, AND IOWA TURKEY FEDERATION

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IDENTITY AND INTEREST OF AMICI CURIAE

The Iowa Cattlemen’s Association (“ICA”) is the largest grassroots membership organization dedicated to Iowa’s beef cattle industry through its producer members. ICA represents more than 8,500 independent cattle producers who will be impacted by the Court’s ruling in this case. ICA producer members take great pride in stewarding the land and our natural resources. ICA staff, leaders, and membership are well-positioned to provide credible information regarding beef cattle production in the state of Iowa that will assist the Court in assessing the impacts related to any decision rendered in this case.

The Iowa Corn Growers Association (“ICGA”) is a 7,500 member grassroots-driven organization, headquartered in Johnston, Iowa, serving members across the state, and lobbying on agricultural issues on behalf of its farmer members to create opportunities for long-term Iowa corn grower profitability. ICGA members have made significant investments in their corn farms to implement water quality practices in support of Iowa’s Nutrient Reduction Strategy. In addition, livestock feed is the number one market for Iowa corn. The outcome of this case could significantly reduce this market and long-term corn grower profitability.

The Iowa Farm Bureau Federation (“IFBF”) is a non-governmental, voluntary organization of farm families united to analyze their problems and formulate action to achieve educational improvement, economic opportunity, and social

advancement. With almost 157,000 members, IFBF is dedicated to creating a vibrant future for agriculture, farm families, and their communities. IFBF members include farmers whose operations would be impacted by the regulation of their crops planted, fertilizer strategy and their land management practices. IFBF members also include livestock farmers whose farms would be impacted by a moratorium on change and growth.

The Iowa Pork Producers Association (“IPPA”) is a grassroots commodity organization representing more than 4,500 Iowa pork producers. The members of IPPA include members who own pigs and producer members who own the barns and raise and care for pigs across the state. The relief that ICCI seeks in this lawsuit threatens the financial stability and very existence of pork producers across Iowa. IPPA possesses a unique perspective and a wealth of information regarding Iowa environmental regulation as it impacts pork production that will assist the Court in assessing the ramifications of any decision rendered in this case.

Iowa Poultry Association (“IPA”) is a non-profit, grassroots, member focused association established to educate, advocate, and lead poultry and egg production in Iowa. IPA is dedicated to poultry farmers and their families in Iowa. As a leader in the global food production system, IPA helps drive growth and sustainability of the entire egg and poultry community. Iowa egg and poultry farmers continually evaluate best practices for the animals and industry with the goal of being able to

update existing operations and grow, so they remain competitive with farmers in other parts of the country. This lawsuit has the potential to hinder poultry farm families in Iowa and impact their livelihoods by stifling the innovation, progression, and growth of the industry.

Iowa Soybean Association (“ISA”) has the mission of expanding opportunities and delivering results for Iowa soybean farmers. In that capacity, ISA advocates for farmers, works to increase soybean exports out of Iowa, and helps build consumer confidence in today’s farm and food system. Representing over 12,000 member-producers, the issues before the Court are of vital concern to the ISA.

Iowa State Dairy Association (“ISDA”) represents over 1,100 dairy farmers in the state of Iowa at all dairy supply chain levels, from dairy farms to consumers’ tables. ISDA is dedicated to building a strong communication link between producers, processors, consumers, legislators and environmental organizations. ISDA serves as a cohesive voice on legislative issues and reports the latest industry-relevant information to our members.

Iowa Turkey Federation represents, supports and promotes for approximately 150 Iowa turkey farmers, including multi-generation turkey farms within the Raccoon River watershed. This case impacts the sustainability of their family farm and future generations in rural Iowa.

RULE 6.906(4)(D) STATEMENT OF AUTHORSHIP

The Amici Curiae are represented by the undersigned counsel of the Parker & Geadelmann, P.L.L.C. and Brick Gentry, P.C. law firms. No party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

ARGUMENT

This lawsuit is not simply about water quality. It strikes at the heart of gigantic policy issues that touch every corner of Iowa and beyond. Many of these sweeping policy issues were already addressed by the Iowa government's elected branches with the adoption and funding of the Iowa Nutrient Reduction Strategy in 2018 and decades of livestock regulation. Dissatisfied with the political outcome, two advocacy organizations are attempting to circumvent the political process by unilaterally imposing their preferred policy choices on unrepresented Iowans.

This lawsuit must be dismissed. First, the relief requested by the Iowa Citizens for Community Improvement and Food & Water Watch ("ICCI") is not justiciable because it asks the Court to dictate broad declarations of policy. Second, the Iowa Legislature made a well-founded initial policy decision when it adopted the Iowa Nutrient Reduction Strategy ("INRS"). Third, ICCI's request for a judicially imposed mandatory remedial plan is neither justiciable nor an effective solution to the problem. And fourth, a moratorium on certain livestock farms would reverse

decades of legislative and executive branch actions regulating potential water quality impacts.

I. Summary of the Law.

“When a challenge to a legislative action involves a ‘political question,’ the judiciary may not intervene or attempt to adjudicate the matter. This principle stems primarily from the separation of powers doctrine which requires we leave intact the respective roles and regions of independent of the coordinate branches of government.” *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996) (citations omitted). *See generally* Iowa Const. Art. III, § 1 (separating powers of Iowa government and vesting legislative authority in general assembly).

The following factors are used to determine the existence of a political question:

- (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 the issue;
- (3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- (4) The impossibility of a court’s undertaking independent resolution without expressing a lack of the respect due coordinate branches of government;
- (5) An unusual need for unquestioning adherence to a political decision already made; or
- (6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Dwyer, 542 N.W.2d at 495 (emphasis added) (citations omitted).

This lawsuit implicates the first four factors. The relief requested in this lawsuit is squarely legislative in nature, and it is impossible to decide without making an initial policy determination. In fact, ICCI seeks to reverse *the* initial policy determination made by the Iowa Legislature when it adopted the INRS. Furthermore, because this case purely involves debates over policy choices, there are not judicially discoverable or manageable standards for resolving the issue. *See King v. State*, 818 N.W.2d 1, 17–18 (Iowa 2012). Recognizing as much, ICCI simultaneously asks the Court to create standards—legislative in nature—through vague requests for declaratory relief that are purportedly tied to the public trust doctrine.

However, the public trust doctrine does not vest the judiciary with *carte blanche*, legislative authority to make sweeping policy decisions. The doctrine is rooted in navigation and centers on *access* to navigable waterways. *E.g.*, *State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989). The doctrine does not turn the courtroom into a super-legislature where dissatisfied political advocates are entitled to a second debate on any environmental policy. *See North Quinault Props., LLC v. Washington*, No. 76017-3-1, 2017 WL 401397, at *4–5 (Wash. Ct. App. Jan. 30, 2017) (noting public trust doctrine vests legislature with substantial discretion). Otherwise, the Iowa Legislature would never be able to enact any environmental law because, undoubtedly, it would not go as far as some individual or advocacy group

desired. For every step forward, ICCI's desired application of the public trust doctrine would take environmental laws two steps back.

II. The Iowa Nutrient Reduction Strategy Is Based on a Well-Founded Policy Choice.

ICCI's requested relief asks the Court to revisit the seminal policy choices underlying the Iowa Nutrient Reduction Strategy and Senate File 512. Ultimately, ICCI wants the Court to impose their preferred policy choices and value determinations in the Iowa Legislature's stead. As this Court has recognized numerous times, it is not the role of the judicial branch to second-guess the legislature and impose alternative policy choices. *See, e.g., Iowa State Education Ass'n v. State*, 928 N.W.2d 11, 13 (Iowa 2019); *see also In re Estate of Whalen*, 827 N.W.2d 184, 194 (Iowa 2013) ("Policy arguments to amend the statute should be directed to the legislature." (citation omitted)).

A. Introduction

Agriculture is the foundation to Iowa's economy. Iowa is a national leader in the production of corn, hogs, eggs, soybeans, and many other farm commodities. U.S. Dep't of Agric., *Iowa's Rank in United States Agriculture* (July 2019), https://www.nass.usda.gov/Statistics_by_State/Iowa/Publications/Rankings/IA-2019-Rankings.pdf. The industry contributes billions of dollars and hundreds of thousands of jobs to Iowa's economy. *Id.*; Decision Innovation Solutions, *2019 Iowa Agricultural Economic Contribution Study* 7 (Aug. 2019),

https://www.supportfarmers.com/wp-content/uploads/2019/09/Web_190814-FINAL-2019-Iowa-AECS-Report.pdf.

Agriculture necessarily relies on local farmers. Of the 36 million acres in this state, over 30 million acres are held in over 86,000 farms, including almost 33,000 livestock farms. U.S. Dep't of Agric., *2017 Census of Agriculture: United States Summary and State Data* 256 (Apr. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf; U.S. Dep't of Agric., *2017 Census of Agriculture: Iowa State and County Data* 19 (Apr. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Iowa/iav1.pdf. Nearly all of these farms are family owned. Decision Innovation Solutions, *supra*, at 10. However, as the backbone of the industry, family farms are facing increasing financial stress as margins shrink and farm bankruptcies rise. See John Newton, *Farm Bankruptcies Rise Again* (Oct. 30, 2019), <https://www.fb.org/market-intel/farm-bankruptcies-rise-again>; see also Donnelle Eller, *ISU Report: Iowa Farm Finances Continue to Erode*, Des Moines Register, Nov. 14, 2019, <https://www.desmoinesregister.com/story/money/agriculture/2019/11/14/iowa-farmers-struggling-financially-ag-economy-downturn-trade-war/4115343002/>.

Local farmers and the broader agricultural industry depend on high yields and economic profitability of crop production. Nitrogen and phosphorus are macronutrients that are critical for plant growth, quality, and production. John E. Sawyer, *Nitrogen Use in Iowa Corn Production* 1 (Mar. 2018), <https://store.extension.iastate.edu/product/Nitrogen-Use-in-Iowa-Corn-Production>; John Sawyer et al., *Phosphorus Basics*, Iowa State University Extension and Outreach <https://crops.extension.iastate.edu/encyclopedia/phosphorus-basics> (last visited Jan. 2, 2020). Corn, for example, relies on nitrogen present in the soil in addition to applied manure or commercial fertilizer to ensure acceptable yields. Sawyer, *supra*, at 1, 9.

Nitrogen and phosphorus are also essential in aquatic ecosystems. Iowa Dep't of Agric. and Land Stewardship et al., *2017 Iowa Nutrient Reduction Strategy* 6 (Dec. 2017), http://www.nutrientstrategy.iastate.edu/sites/default/files/documents/2017%20INRS%20Complete_Revised%202017_12_11.pdf. (hereinafter "2017 INRS"). However, these nutrients can contribute to water quality problems when they reach excessive levels. *Id.* Nutrient over-enrichment can be caused for a variety of reasons, including population growth; urban stormwater runoff; soil erosion; atmospheric deposition; migration of fertilizer from fields, golf courses, and lawns; animal manure; sewage treatment plant discharges; and industrial discharges. Nancy K.

Stoner, U.S. Env'tl. Prot. Agency, *Working in Partnership with States to Address Phosphorus and Nitrogen Pollution* 1 (Mar. 16, 2011), https://www.epa.gov/sites/production/files/documents/memo_nitrogen_framework.pdf; U.S. Env'tl. Prot. Agency, *Hypoxia in the Northern Gulf of Mexico* 10 (Dec. 2007), [https://yosemite.epa.gov/sab/SABPRODUCT.NSF/C3D2F27094E03F90852573B800601D93/\\$File/EPA-SAB-08-003complete.unsigned.pdf](https://yosemite.epa.gov/sab/SABPRODUCT.NSF/C3D2F27094E03F90852573B800601D93/$File/EPA-SAB-08-003complete.unsigned.pdf). It is anything but an isolated issue. The Environmental Protection Agency (“EPA”) has estimated that over 50 percent of streams in the United States have medium to high levels of nitrogen and phosphorus. Stoner, *supra*, at 1; 2017 INRS, *supra*, at 6 (“To some degree, every state faces problems associated with nutrient over-enrichment caused primarily by too much nitrogen and phosphorus in waters.”)).

“The Iowa Nutrient Reduction Strategy is a science and technology-based framework to assess and reduce nutrients to Iowa waterways and the Gulf of Mexico.” 2017 INRS, *supra*, at 1. Its development was prompted by the 2008 Gulf Hypoxia Action Plan, and it was created in accordance with EPA’s recommended framework for managing nitrogen and phosphorus pollution. *Id.* In this way, the INRS is designed as a comprehensive approach, working with point and nonpoint sources to reduce nutrients in Iowa surface waters in a “scientific, reasonable and cost-effective manner.” *Id.* Iowa Code Section 455B.177—entitled “Declaration of

Policy”—codifies the INRS as the State of Iowa’s approach to nutrient over-enrichment, ensuring funding and a consistent framework going forward. Iowa Code § 455B.177(3) (2019) (declaring “that it is in the interest of the people of Iowa to assess and reduce nutrients in surface waters over time by implementing the Iowa nutrient reduction strategy”).

B. Challenges to Nonpoint Source Pollution and Measurable Short-Term Water Quality Improvement.

ICCI asks the Court to prematurely delve into the policy choices underlying the adoption of the INRS. But the premise to the lawsuit—that not enough measurable change in water quality has occurred—completely misses the mark. The INRS was designed to address the unique challenges presented by nonpoint source pollution, and those challenges make large watershed scale change in such a short amount of time wholly unrealistic.

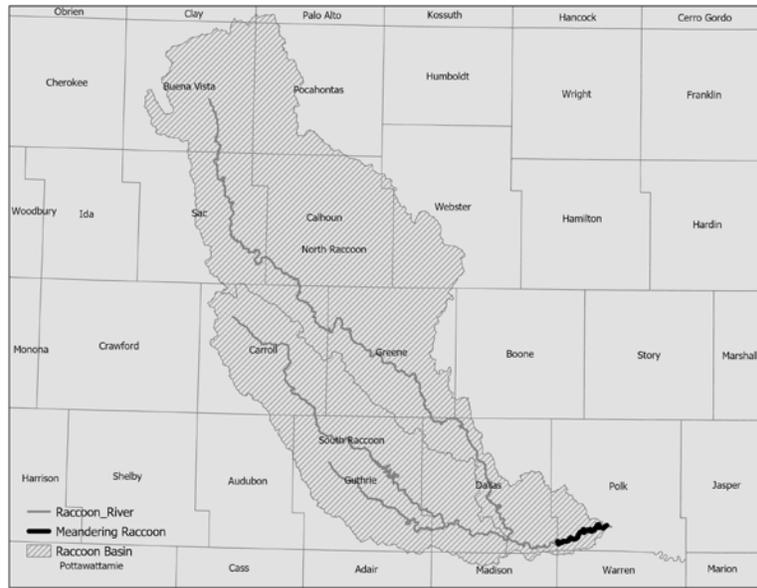
One of the significant challenges to nonpoint source pollution is accounting for uncontrolled variables, like the timing and amount of rainfall and snowmelt. Precipitation events and resulting streamflow have the largest known impact on nutrient concentrations and stream loads, and there is substantial variation in precipitation and stream flow from year-to-year. Iowa Dep’t of Nat. Res., *Stream Water-Quality Monitoring Conducted in Support of the Iowa Nutrient Reduction Strategy* 1, 9 (Aug. 24, 2016), <http://www.nutrientstrategy.iastate.edu/sites/default/files/documents/Water%20Mo>

nitoring%20and%20the%20NRS%20_%20Final%208-24-16.pdf (hereinafter “Stream Water-Quality Monitoring”); Iowa Dep’t of Agric. and Land Stewardship et al., *Iowa Nutrient Reduction Strategy: 2017-18 Annual Progress Report* 51 (Mar. 2019), http://www.nutrientstrategy.iastate.edu/sites/default/files/documents/NRS2018AnnualReportDocs/INRS_2018_AnnualReport_PartOne_Final_R20190304_WithSummary.pdf (hereinafter “INRS Progress Report”). As the overall amount of rain and extreme rainfall events increases, it becomes more difficult to measure progress and identify the sources of nitrogen and phosphorus. Stream Water-Quality Monitoring, *supra*, at 8; *see also* INRS Progress Report, *supra*, at 48. This is one reason why long-term data is necessary to “distinguish water-quality changes caused by short-term weather patterns from those resulting from implementation of nutrient reduction practices.” Stream Water-Quality Monitoring, *supra*, at 9, 12; *see also* INRS Progress Report, *supra*, at 51 & tbl. 12.

The inherent characteristics of nonpoint source pollution also make it extraordinarily challenging to identify cause and effect. For example, legacy nutrients—nitrogen and phosphorus already present in the soil and groundwater—are more likely to get transported to streams during heavy rainfall. INRS Progress Report, *supra*, at 8. Transportation of legacy nutrients occurs at a much greater scale with groundwater movement and stream bank erosion. *Id.* at 48; *see also* 2017 INRS,

supra, at 10 (“Ongoing research at Iowa State University . . . indicates in-channel scouring and streambank erosion contributes a previously unrecognized higher contribution to the phosphorus loading of streams.”). In this way, the widespread adoption of best management practices does not guarantee a measurable improvement in water quality. Stream Water-Quality Monitoring, *supra*, at 18–19 & tbl. 2 (“[E]ven if reductions in nitrate were achieved . . . it may not be possible to show that the reductions result in a statistically significant change in water quality.”).

Lag time is another significant challenge because natural systems are inherently complex. It takes time *after* the implementation of best management practices before there can be a measurable change in water quality. Stream Water-Quality Monitoring, *supra*, at 6–7. As the size of the watershed increases, the natural system becomes even more complex and it takes a progressively longer time—even when best management practices are adopted—to see a measurable change in water quality. 2017 INRS, *supra*, at p. 47 & fig. 24. It can take upwards of ten years just to see measurable progress in a farm field, and more than twenty years before a measurable change is seen in larger watersheds. *Id.* The meandered portion of the Raccoon River is the largest segment in the watershed.



Mapping extracted from datasets located at <https://geodata.iowa.gov> (last visited 12/30/2019); *see also* Iowa Admin. Code r. 571-13.3 (2019) (listing meandered sovereign rivers);

Because of the enormous challenges to nonpoint source pollution, continued research and technology advancement are critical to develop new insights on the effectiveness and implementation of conservation practices. Stream Water-Quality Monitoring, *supra*, at 18; *see also* INRS Progress Report, *supra*, at 18. For example, the BMP Mapping Project is a new development that improves the ability to track structural conservation practices, such as terraces or wetlands. INRS Progress Report, *supra*, at 4; *see also* Iowa State University, Iowa BMP Mapping Project, <https://www.gis.iastate.edu/gisf/projects/conservation-practices> (last visited Dec. 31, 2019). Previously, conservation practices were tracked with data obtained from government cost-share programs (*i.e.*, government assisted practices), which did not

account for privately funded conservation efforts. INRS Progress Report, *supra*, at 4. Although the project does not capture in-field practices like nutrient management, tillage, and cover crops, it is a significant step toward obtaining more comprehensive data. *Id.* at 46.

Funding is another crucial component to the INRS because it impacts the ability to implement and scale up the strategy. Before its adoption by the Iowa Legislature, the INRS was a conglomeration of organizations, federal and state agencies, programs, and existing funding that prioritized resources towards the most cost effective and efficacious solutions. 2017 INRS, *supra*, at 24. A significant limitation was long term funding. *Id.* Senate File 512 answered the call by providing \$270 million in reliable long-term funding that will help the INRS scale up. INRS Progress Report, *supra*, at 3, 14 (noting capacity to accelerate implementation with new long-term funding).

Measurable water quality changes at the terminus of a large Iowa watershed will take time, and the INRS is still in its very nascent stages. There are significant challenges to this environmental issue, and there is considerable progress being made. The Court should not second-guess a brand-new law and impose alternative policy choices.

C. The INRS is Designed to Reach Successful Outcomes Through the Development of Public-Private Partnerships.

The central policy choice underlying the INRS is to create “local-state-federal partnerships” that achieve sustained progress. 2017 INRS, *supra*, at 13. Recognizing that there is no one-size-fits-all solution, the INRS provides a framework that allows innovation and flexibility through cooperation and stakeholder engagement. 2017 INRS, *supra*, at 13. This allows for better, more tailored responses to local water quality needs, which is a necessary building block to improving water quality statewide.

The Middle Cedar Partnership Project is nationally recognized collaboration between water users, conservation entities, and local farmers that is an excellent example of early INRS success. The partnership—led by the City of Cedar Rapids—jointly develops watershed plans to prioritize where BMPs should be placed to achieve the greatest benefit. Cedar Rapids, *MCCP Update 7*, (Dec. 2018), <http://cms.revize.com/revize/cedarrapids/Utilities/MCCP-Update-2018-12.pdf>.

Through financial and technical assistance, the partnership helps implement BMPs that improve soil health, water quality, and water quantity. *Id.* at 8.

The Middle Cedar Partnership Project shows how urban and rural communities can work together toward shared goals. The City, agricultural producers, landowners, farmers’ associations, and conservation entities have all yielded common benefits through their innovative, cross-sector collaboration. The sharing of resources has unlocked additional funding toward the implementation of in-field

practices. Technical assistance, which would have been unavailable to landowners without this partnership, has provided the documentation required to spend federal dollars on private land.

Id. at 20. See generally *Cedar River Solutions*, North Iowa Agronomy Partners, <https://www.cedarriversolutions.com/> (last visited Dec. 31, 2019) (discussing projects and partnerships in the Cedar River Watershed).

Other communities have also formed successful partnerships. The North Raccoon Farm to River Partnership recently expanded its coverage area to include parts of Sac, Carroll, Greene, and Calhoun Counties. The partnership is raising awareness and increasing BMP implementation in the North Raccoon watershed, a tributary of the Raccoon River. Iowa Dep't of Agric. and Land Stewardship, *North Raccoon Farm to River Partnership*, <https://www.cleanwateriowa.org/elk-run-watershed-water-quality-initiative-project> (last visited Dec. 31, 2019). In just three years, the partnership intends to install “15 bioreactors, 15 saturated buffers, 2 targeted wetlands and 11,500 new acres of cover crops” and collect more data. *North Raccoon Farm to River Partnership*, Agriculture's Clean Water Alliance, <https://www.acwa-rrws.org/farm-to-river-partnership/> (last visited Dec. 31, 2019). And, the Rathbun Land & Water Alliance, where nearly 600 landowners have contributed more than \$5 million to installing BMPs, has been successful in reducing sediment and phosphorus delivery to Rathbun Lake. *Protect Rathbun Lake Project*,

Rathbun Land & Water Alliance, <http://rathbunlandwateralliance.blogspot.com/> (last visited Dec. 31, 2019).

The INRS is designed to achieve successful outcomes through public-private partnerships, rather than a command and control approach. With substantial investment from stakeholders and government, partnerships are growing, forming, and helping improve Iowa's water quality. These partnerships would not be possible without the cooperative approach taken by the INRS and adopted by the Iowa Legislature. ICCI's lawsuit directly undermines the central policy of the strategy, not to mention the partnerships that are still in their infancy.

III. ICCI's Request for a Mandatory Remedial Plan is an Ineffective Policy Choice.

The relief requested in this lawsuit is not justiciable. ICCI seeks to impose a different policy choice by mandating a command and control approach, instead of a cooperative partnership approach. Debating underlying policy choices is for the legislature and the executive branch, not the courts. Moreover, a command and control policy approach is neither desired nor appropriate for this complex environmental issue.

To start, developing a mandatory remedial plan involves many public policy decisions that could take many different forms. If the district court were to require a mandatory remedial plan, who would decide content, standards, resources, enforcement, timeline, or scope of the plan? The courts will be forced to supervise

(and possibly dictate) every step of the plan’s development. Whereas the current system encourages cooperation and adaptation to local variables, a regulatory system would reverse the incentives and stifle cooperation and innovation. ICCI—not to mention other groups—would be incentivized to file suit every time the plan deviates from their preferences. Simply the development of any plan will take years. It will take longer to implement, and even longer to see results.

ICCI’s Petition illustrates the challenges with developing a remedial plan and the lack of judicially manageable standards. They allege: “Exposure to nitrate levels both above *and* below the Class C drinking water quality standard of 10 mg/l results in adverse health risks to the people of Iowa.” Petition ¶ 39 (emphasis added). EPA already made a policy decision when it set the standard at 10 mg/L. *National Primary and Secondary Drinking Water Regulations*, 54 Fed. Reg. 22062, 22076–78 (May 22, 1989) (codified at 40 C.F.R. pts. 141, 142, and 143) (“EPA has reviewed the literature and concluded that an MCLG for nitrate of 10 mg/l is at a level at which there would be no adverse effects and which would allow an adequate margin of safety, because the available studies provide no evidence that any adverse health effect is seen at nitrate levels of 10 mg/l or below.”). It is not the Court’s role to set a new standard. *See King*, 818 N.W.2d 17–18.

Beyond the logistics of regulating 30 million acres and 86,000 farm operations, agricultural runoff is not well-suited for a command and control

approach. Conservation practices may not provide reductions in nitrogen and phosphorus losses in any given year. Research demonstrates the standard deviation of the performance of many practices can vary widely. John Lawrence & Jamie Benning, Iowa State University, *Reducing Nutrient Loss: Science Shows What Works* (Oct. 2019), <https://store.extension.iastate.edu/product/13960>. Setting a hard limit on individual farms' nitrate and phosphorus losses is antithetical to achieving ICCI's stated objectives. "[E]xperience shows us that nutrient management outcomes are influenced by several factors across many scales, most uncontrollable, which must be considered when transferring science into policy and when establishing realistic public expectations." Andrew Sharpley et. al., *Managing Crop Nutrients to Achieve Water Quality Goals*, 704 J. of Soil and Water Conservation 91A, 91A (2019), <http://www.jswconline.org/content/74/5/91A.full.pdf+html>. With the uncontrollable variables in farming (and nature), farmers cannot guarantee compliance for every day of every year with a mandatory remedial plan.

Because approaches to address one nutrient may have the inverse effect on the other, there are trade-offs in adopting practices. In a regulatory scheme, farmers will be put in the impossible position of deciding which nutrient is most important to control and which will be noncompliant. Conservation practices that decrease the loss of nitrogen can increase the loss of phosphorus and vice versa. *Id.* at 98A. The

trade-offs vary depending on the practice, the specific location, and the climatic variable conditions in any given year.

“With few exceptions, an iterative approach to management strategies has proven to be most effective, adapting to lessons learned from stakeholders and scientist alike, modifying initial strategies, and reprioritizing investments.” *Id.* at 97A. Regulation to meet a specific standard does not allow for an adaptive approach to improving water quality. Allowing experimentation is essential to improvement over time. Other practices, including practices yet to be developed, are needed for improved potential outcomes. Due to the costs and variables impacting these options, it is important to allow the flexibility to test and adapt these newly emerging options in all types of Iowa landscapes and varied climate conditions. The issues of a regulatory approach are summarized in the INRS:

Despite what some believe, there are few “win-win” situations, and those associated with rate of nutrient inputs will not get Iowa to currently targeted water quality goals. Reaching those goals will come at considerable effort and costs, and therefore, it is imperative to be sure that the practices promoted will secure those goals; and furthermore, that reaching those goals will result in the anticipated environmental benefits. *But it will be difficult given the variable nature of weather and Iowa’s modified landscape, major reasons why many say a regulatory approach on nonpoint sources is not likely to achieve aggressive water quality outcomes.*

2017 INRS, *supra*, at 9–10 (emphasis added).

Finally, trading the Iowa Legislature’s policy decision for ICCI’s preferred policy would have severe economic implications. Whether the remedial plan’s standard is a nutrient concentration limit or mandatory conservation practices imposed on a subset of Iowa farmers, compliance costs and restrictions will only add to farmers’ financial stress. *See, e.g.,* Alejandro Plastina, Iowa State University, *Financial Stress in Iowa Farms: 2014–16* at 1–4 (Sep. 2017), <https://store.extension.iastate.edu/product/15261>. Farmers in the Raccoon River watershed would be put at a competitive disadvantage with other Iowa farmers, not to mention farmers in other states and competing countries. The added compliance costs would ripple into other areas of the economy. Many agricultural commodities are turned into products that support other industries, like food and transportation. Instead of uniformly passing the added compliance costs to consumers, a mandatory remedial plan would disparately impact farmers in the watershed by increasing expenses and decreasing production, potentially pushing farmers out of business. Mandatory limitations, especially if they are unattainable, could decrease agricultural land values in the watershed, impacting farmers’ ability to finance their agricultural operations or forcing them into bankruptcy. *See* Cynthia Nickerson et al., U.S. Dep’t of Agric., *Trends in U.S. Farmland Values* 14 (Feb. 2012), https://www.ers.usda.gov/webdocs/publications/44656/16748_eib92_2_.pdf?v=41055.

A mandatory remedial plan is not the policy solution. There are unique challenges that make a command and control approach unworkable. The Iowa Legislature rejected the idea when it made the policy decision to commit to a nutrient reduction strategy centered around stakeholder participation. The judiciary is not the appropriate venue to reopen the policy debate.

IV. IOWA HAS LEGISLATIVELY AND ADMINISTRATIVELY ENACTED EXTENSIVE WATER QUALITY REQUIREMENTS FOR ANIMAL FEEDING OPERATIONS.

There are few if any sectors of Iowa business, let alone agriculture, that are subject to more pervasive environmental regulation than Iowa's animal feeding operations. ICCI has misrepresented the extent of Iowa's water quality regulation program. This failure to accurately set forth the law undoubtedly contributed to the district court's denial of the motion to dismiss. The following section more comprehensively details Iowa's legislative and administrative actions to regulate Iowa's animal feeding operations over more than 40 years.

A. The Iowa Executive Branch, Iowa Legislature, and IDNR Have a Long History of Extensive Water Quality Regulation of Animal Feeding Operations.

ICCI's request for relief would reverse decades of policy decisions made through different legislatures and administrations when developing the current Iowa livestock regulations. The foundation of the modern regulatory structure began with House File 519, adopted in 1995. H.F. 519, 76th Leg. (1995); 1995 Iowa Acts ch.

195, at 497–514 (codified as amended Iowa Code chs. 459, 459A, 459B). This legislation codified various administrative rules on minimum manure control which were first adopted in 1976. Iowa Admin. Code., Env'tl. Quality, Water Quality Comm'n, Ch. 20 (Jul. 12, 1976), <https://www.legis.iowa.gov/docs/publications/IACS/802054.pdf>. Those rules included the following provisions now codified as Iowa Code § 459.311, subsections 1 and 3:

1. A confinement feeding operation shall retain all manure produced by the operation between periods of manure disposal. For purposes of this section, dry manure may be retained by stockpiling as provided in this subchapter. A confinement feeding operation shall not discharge manure directly into water of the state or into a tile line that discharges directly into water of the state.

[. . .]

3. Manure from an animal feeding operation shall be disposed of in a manner which will not cause surface water or groundwater pollution. Disposal in accordance with the provisions of state law, including this chapter, rules adopted pursuant to the provisions of state law, including this chapter, guidelines adopted pursuant to this chapter, and section 459.314, shall be deemed as compliance with this requirement.

The 1995 legislation included requirements for separation distances for new animal feeding operations and land application of manure, and it established manure management plans which limited the amount of nitrogen that a confinement feeding operation with a construction permit could apply. 1995 Iowa Acts 508–09. The Iowa Department of Natural Resources (“IDNR”) rule implementing H.F. 519 extended the manure management plan requirement to any new confinement feeding operation

with an animal weight capacity of more than 200,000 pounds, which was every operation other than a small animal feeding operation. 18 Iowa Admin. Bull. 534–36 (Sep. 1995) (ARC 5933A).

The next major legislation was House File 2494, enacted in 1998. H.F. 2494, 77th Leg. (1998); 1998 Iowa Acts 658–81 (Chapter 1209) (codified as amended Iowa Code chs. 459, 459A, 459B). This legislation expanded water quality requirements by extending the IDNR construction permit requirements to smaller operations; extending the manure management plan requirements to existing confinement operations other than small animal feeding operations; requiring manure applicator certification; increasing manure application restrictions; and increasing manure storage structure construction standards and inspection requirements. *Id.*

Senate File 2293, enacted in 2002, established more water quality-related requirements for confinement feeding operations. S.F. 2293, 79th Leg. (2002). It established the master matrix system; expanded manure management plan requirements by requiring annual filings with the IDNR and county board of supervisors, and restricting manure application to regulate soil phosphorus levels; established manure application separation distances from creeks, rivers, wetlands, and other surface and ground water access points; and established construction design standards for manure storage structures at new confinement feeding

operations. 2002 Iowa Acts 355–87 (Chapter 1137) (codified as amended in Iowa Code chs. 459, 459A, 459B).

Legislation was again enacted in 2005, 2009 and 2015. The 2005 legislation increased regulations on open feedlot operations codified today in Iowa Code Chapter 459A. H.F. 805, 81th Leg. (2005); 2005 Iowa Acts 423–38 (Chapter 136) (codified as amended Iowa Code chs. 459, 459A, 459B). Among those requirements are feedlot construction design standards, nutrient management plans and standards for open feedlot effluent control. Iowa Code §§ 459A.205, 459A.208, 459A.401 (2019). Senate File 432, adopted in 2009, established restrictions on liquid manure application on snow or frozen ground for confinement feeding operations with a manure management plan. S.F. 432, 83rd Leg. (2009); 2009 Iowa Acts 639–47 (Chapter 155) (codified as amended Iowa Code chs. 459, 459A, 459B). The law is very detailed and any accommodations that allow manure application on snow or frozen ground are subject to Iowa’s restrictions in Iowa Code §459.311 that prohibits discharge of manure to a water of the state. This legislation also created new Iowa Code Chapter 459B to separately regulate cattle and swine dry bedded confinement feeding operations. The 2015 legislation established water quality standards for animal truck wash facilities. H.F. 583, 86th Leg. (2015); 2015 Iowa Acts 1–12 (Chapter 92) (codified in Iowa Code ch. 459A).

As the foregoing list of the most pertinent legislative and administrative actions demonstrates, Iowa has taken numerous steps in the last forty-plus years to address water quality impacts from livestock operations. As with any legislative or administrative action, some will argue that it should have been done differently or that more should be done. But that is simply the nature of the democratic process. ICCI's request for remedial action by this Court against livestock farmers in the Raccoon River watershed is an attempt to subvert the democratic process and must be rejected.

B. EPA's Review of Iowa's Animal Feeding Operation Program Confirmed that the Iowa Animal Feeding Operations Regulatory Program is in Full Compliance with the Clean Water Act.

In 2007, Iowa Citizens for Community Improvement, the Sierra Club and the Environmental Integrity Project filed a petition with the EPA alleging that IDNR's implementation of the federal NPDES permit program for livestock operations does not comply with the Clean Water Act and that EPA should take the program from IDNR. Petition ¶ 42. In July 2012, EPA issued a preliminary report noting several areas that EPA believed IDNR needed to correct. Petition ¶ 43. Among those was that IDNR was not issuing NPDES permits to CAFOs when appropriate, and that IDNR had not conducted comprehensive inspections to determine whether any CAFOs without a NPDES permit needed one. Petition ¶ 43.

In September 2013, IDNR and Region 7 of the EPA signed a workplan agreement to, among other things, establish details of evaluations over the next five years to determine if medium and larger-sized animal feeding operations should also comply with the NPDES permit requirements under the federal Clean Water Act. *Work Plan Agreement Between the Iowa Dept. of Nat. Res. And U.S. Env'tl. Prot. Agency Region 7 (Sep. 11, 2013)*, https://www.iowadnr.gov/Portals/idnr/uploads/afo/epa_dnr_workplan.pdf. The primary focus of the workplan was an evaluation over five-years of all livestock farms with more than 300 animal units to determine if these operations discharge pollutants to waters of the United States. *See id.* at 3–4.

On April 3, 2019, EPA issued a Response to Petition to Withdraw Iowa's NPDES Permit Program declining to initiate program withdrawal proceedings against IDNR's animal feeding operation NPDES permit program under the Clean Water Act. James B. Gulliford, U.S. Env'tl. Prot. Agency, *Response to Petition to Withdraw Iowa's NPDES Permit Program* 1–2 (Apr. 3, 2019), <https://www.iowadnr.gov/Portals/idnr/uploads/afo/EPAPetitionResponse.pdf?ver=2019-04-18-115240-473> (hereinafter "EPA Response"). EPA stated that based on its comprehensive review, "EPA has determined that the allegations do not warrant initiating program withdrawal proceedings." *Id.* at 2.

In its petition, ICCI alleges that despite numerous documented manure spills, IDNR has not issued “a single Clean Water Act NPDES permit to a hog confinement Animal Feeding Operation in Iowa.” Petition ¶ 45. While ICCI’s statement is correct, ICCI fails to acknowledge the valid reasons for this, the foremost being Iowa Code §459.311(1), which provides that “[a] confinement feeding operation shall retain all manure produced by the operation between periods of manure disposal.” There is no basis to issue an NPDES permit, a permit to discharge, when a confinement feeding operation is prohibited by Iowa law from discharging and is penalized for such accidental discharge. Regarding manure spills as alleged by ICCI, in its Response to Petition to Withdraw Iowa’s NPDES Permit Program, EPA stated: “Although IDNR has not required or received a NPDES permit application from any of the confinement operations that have discharged to a WOUS, IDNR is requiring that facilities with past discharges remedy the cause of the discharge.” EPA Response, *supra*, at 7. This is consistent with EPA’s national policy. *Revised NPDES Permit Regulation and Effluent Limitations Guidelines for CAFOs in Response to the Waterkeeper Decision*, 73 Fed. Reg. 70418, 70,423 (Nov. 20, 2008) (codified at 40 CFR pts. 9, 122, and 412).

ICCI also alleges that IDNR discovered more than 5,000 potential AFOs that weren’t in the IDNR database. Petition ¶ 44. ICCI fails to point out that in IDNR’s final report issued before EPA’s Response to their petition, IDNR noted that as of

July 31, 2018 IDNR had vetted 54.8% of the “unknown” AFOs and 99.4% of those were not required to be regulated by state or federal law. Iowa Dept. of Nat. Res., *2018 Annual Report for Work Plan Agreement Between IDNR and EPA* 5 (Jul. 31, 2018), http://www.iowadnr.gov/Portals/idnr/uploads/afo/cafo_annual_report.pdf. Of the 0.6%, ten needed manure management plans and eight were large CAFOs, none of which were discharging to water of the state. *Id.* at 5. In its response, EPA noted that as of December 31, 2018, IDNR had completed all of these determinations and identified approximately 1,240 facilities that should be assessed as part of the comprehensive survey to confirm compliance. EPA Response, *supra*, at 12.

ICCI also alleges that the Iowa legislature has appropriated insufficient funds to IDNR to implement and enforce water quality protections on animal feeding operations. Petition ¶ 47. However, EPA found otherwise. EPA stated that IDNR has in fact committed the necessary resources for implementation and enforcement of the NPDES program for animal feeding operations. EPA Response, *supra*, at 13-14.

EPA concluded that IDNR’s program did not warrant the remedies that the Petitioners requested. To date, the Petitioners have not appealed or in any way otherwise challenged EPA’s review and approval of IDNR’s animal feeding operation NPDES permit program. For this Court to adopt ICCI’s requested

remedies against livestock operations in the Raccoon River watershed would undermine not only Iowa's regulatory actions, but also EPA's approval.

C. ICCI's Request for an Injunction Against Construction of New and Expanding Medium and Large AFOs and CAFOs in the Raccoon River Watershed is Unwarranted by the Law and Would Be Devastating to Iowa Agriculture.

There is no better example of the wisdom of the political question and separation of powers doctrine than ICCI's request to overrule the decisions of the Iowa Legislature, specifically bills that the democratically-elected Iowa Legislature declined to pass which would have established a moratorium on medium and large animal feeding operations. Petition ¶ 48. This action by the Iowa Legislature supports the State's position that this type of policy decision must be left to the elected branches of state government. The Legislature is best equipped to evaluate the impact of an extreme measure such as a moratorium on Iowa's farmers and the agricultural economy. This is the fundamental function of the legislative branch and should not be disturbed by this Court. *See U.S. Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450, 455 (Iowa 1988) ("If changes in a law are desirable from a standpoint of policy or mere practicality, it is for the legislature to enact them, not for the court to incorporate them by interpretation." (citing *State v. Wedelstedt*, 213 N.W.2d 652, (Iowa 1973))). ICCI's request for injunctive relief is nothing more than an attempt to have the courts order legislation that the legislative branch expressly declined to pass.

Livestock production is a significant contributor to Iowa's economy and the economic impact of ICCI's requested moratorium would devastatingly extend beyond the Raccoon River watershed. This Court recognizes the economic and overall impact agriculture has on Iowa. Defendants/Appellants' Proof Br. 17 (citing *Worth County Friends of Agriculture v. Worth County*, 688 N.W.2d 257, 259 (Iowa 2004)). As an update to this recognition of agriculture's importance to Iowa, the Coalition to Support Iowa's Farmers recently commissioned a study to document the economic contribution of agriculture to Iowa.

The 2019 Iowa Agricultural Economic Contribution Study notes: The Livestock category includes industries such as beef cattle production, hog production, dairy cattle, poultry production (layers (egg production), broilers and turkeys), meat/poultry processing rendering and more. Total value-added contributed to the economy from livestock and related economic activity in Iowa was about \$15.8 billion. Livestock production and related economic activity in Iowa accounted for approximately 185,985 jobs, \$48.5 billion in output, and \$10.5 billion in household income. In addition to the production of livestock and poultry, meat processing is a large contributor to Iowa's economy.

Decision Innovation Solutions, *supra*, at 18. The study notes the additional economic contribution of \$12.9 billion, 101,681 jobs, nearly \$35.0 billion in output and about \$6.7 billion in household income from related industries such as animal feed production, farm machinery and equipment manufacturing, ethanol production, dog and cat food manufacturing, veterinary services, and many food manufacturing industries. *Id.* at 19. As can easily be determined from this information, any

restriction of the ability of Iowa livestock farmers, including those in the Raccoon River watershed, to expand and update their operations would have a severe negative effect on Iowa's economy.

In conclusion, water quality regulation of Iowa livestock farms has been carefully and thoughtfully crafted by the legislative and executive branches to protect Iowa water quality while at the same time respecting the consequences such regulation has on farmers and the agriculture economy. Only the elected branches of government are equipped for this task. ICCI's requested judicial remedies violate sound and established legal principles of separation of powers. Beyond that, and more importantly from a practical perspective, the requested remedies would irreparably harm Iowa's livestock industry and undo years of regulatory work by the Iowa Legislature and IDNR.

V. Conclusion

ICCI's requested relief is not justiciable. The Iowa Legislature weighed the options to address excess nutrient challenges and made the initial policy decision to use a cooperative, partnership approach. ICCI seeks to trade the cooperative approach for a regulatory approach and undo decades of regulatory work by the Iowa Legislature and IDNR. This type of policy work is not for the judicial branch.

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2020, I, or a person acting on my behalf, electronically filed this document with the Supreme Court Clerk using the EDMS system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) and 6.906(4) because this brief contains 6,997 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally space typeface using Microsoft Office 2010 in 14-point font size and Times New Roman type style.

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