SUPREME COURT NO. 20-0575
BLACK HAWK COUNTY CASE NO. EQCV139257

IN THE SUPREME COURT OF IOWA

THE IOWA ASSOCIATION OF BUSINESS AND INDUSTRY,
Plaintiff-Appellant,

v.

THE CITY OF WATERLOO, THE WATERLOO COMMISSION ON HUMAN RIGHTS AND MARTIN L. PETERSON, IN HIS OFFICIAL CAPACITY
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY
HONORABLE JOHN BAUERCAMPER, DISTRICT COURT JUDGE

AMENDED **FINAL BRIEF OF *AMICI CURIAE:***
AMERICAN CIVIL LIBERTIES UNION OF IOWA
IOWA CHAPTER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
NATIONAL EMPLOYMENT LAW PROJECT
LAW PROFESSORS
IN SUPPORT OF DEFENDANTS-APPELLEES

Shefali Aurora
ACLU of Iowa
505 Fifth Ave., Ste. 808
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: shefali.aurora@aclu-ia.org

Rita Bettis Austen
ACLU of Iowa
505 Fifth Ave., Ste. 808
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

Counsel for amicus curiae ACLU of Iowa

Leonard Bates
NEWKIRK ZWAGERMAN
521 E. Locust St., Suite 300
Des Moines, IA 50309
PHONE: (515) 883-2000
EMAIL: lbates@newkirklaw.com

Melissa C. Hasso
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave., Suite 212
Des Moines, IA 50309
PHONE: (515) 224-2079
EMAIL: mhasso@sherinianlaw.com

Counsel for amicus curiae Iowa NELA

Elizabeth Avery*
NATIONAL EMPLOYMENT LAW PROJECT
2030 Addison Street, Suite 420
Berkeley, CA 94704
PHONE: (510) 663-5708
EMAIL: bavery@nelp.org

Counsel for amicus curiae NELP

* *Pro Hac Vice* Application filed

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IOWA SUPREME COURT

OTHER CASES

STATUTES & CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

Evan Comen, *For Black Americans moving to a city, these are some of the worst places to settle,* 24/7 Wall Street, (Nov. 8, 2019), https://www.usatoday.com/story/money/2019/11/08/moving-the-worst-us-cities-for-black-americans/40553101/. 18

Fed. Bureau of Investigation, *Crime in the United States, 2018: Table 43* (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43 14

Iowa General Assembly, Session, *House File 259* video recording of debate on 2017-03-09, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170309150416798&dt=2017-03-09&offset=708&bill=HF%20295&status=i 26

Kevin Hardy, *Local smackdown: GOP bill would freeze Iowa minimum wages at $7.25, ban city, county increases,* Des Moines Register (Feb. 8, 2017), https://www.desmoinesregister.com/story/news/politics/2017/02/08/gop-bill-freezes-iowa-minium-wage-725-rescinds-local-increases/97625588/ ... 26

National League of Cities, *Principles of Home Rule for the 21st Century* 16-19(2020), https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf. 29

Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record*, 54 Criminology 387, 36-40 (2016), http://bit.ly/2ngY3zn. 15

Terry-Ann Craigie, *Employment After Incarceration: Ban the Box and Racial Discrimination*, Brennan Cent. for Just. (2017), https://www.brennancenter.org/blog/employment-after-incarceration-ban-box-and-racial-discrimination. 17

Radio Iowa, *Des Moines Adds Special Protection for Homosexuals* (June 5, 2001), https://www.radioiowa.com/2001/06/05/des-moines-adds-special-protection-for-homosexuals/. 22

Tory Brecht, Quad City Times, *Bettendorf makes it official, City adds sexual orientation to civil rights ordinance*, (Nov. 3, 2004), https://qctimes.com/news/local/bettendorf-makes-it-official-city-adds-sexual-orientation-to-civil/article_04042a4b-6cca-5c55-8598-f2095c68b3f3.html. 22

STATEMENT REQUIRED BY IOWA R. APP. PRO. 6.906(4)(d)

Neither party nor their counsel participated in the drafting of this brief, in whole or in part. Neither party nor their counsel contributed any money to the undersigned for the preparation or submission of this brief. The drafting of this brief was performed *pro bono publico* by amici curiae.

STATEMENTS OF IDENTITY AND INTEREST OF AMICI CURIAE

The **ACLU of Iowa** is the statewide affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the state and federal Constitutions and laws, with thousands of Iowa members. Founded in 1935, the ACLU of Iowa is the fifth oldest state affiliate of the national American Civil Liberties Union. The ACLU of Iowa works in the courts, legislature, and through public education and advocacy to safeguard the rights of everyone in our state. This case challenges Waterloo Ordinance 5522, which was passed to address the racial disparities in employment in the city of Waterloo. The ACLU of Iowa has a longstanding interest in ensuring that the law provides individuals with meaningful protection from employment discrimination, including based on race. The ACLU of Iowa has actively worked for years to further racial justice and for an Iowa where all people, regardless of the color of their skin, are treated

fairly and given equal opportunities. The proper resolution of this case, which concerns racial justice in employment, therefore is a matter of substantial interest to the ACLU of Iowa and its members. And, because of its experience, record of dedication, and accumulated expertise in the preservation of civil rights, the ACLU of Iowa can materially contribute to the legal dialogue in this case, and ultimately assist the Court in rendering a decision in the matter.

The **Iowa chapter of the National Employment Lawyer's Association ("Iowa NELA")** is committed to advancing the unique role that Iowa's approach to equality and recognition of implicit bias have played in the progression of Iowa jurisprudence, from *In re Ralph*, 1 Morris 1 (Iowa 1839), to *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) and beyond. Its members share the goals of upholding and defending the Constitutions of the United States and of the State of Iowa; advancing the science of jurisprudence; training in all phases of advocacy in employment and civil rights law; promoting the administration of justice for the public good; upholding the honor and dignity of the legal profession; and advancing the cause of those whose rights to equal treatment under the law have been violated. Accordingly, Iowa NELA has a strong interest in supporting ordinances like the one challenged in this case: ordinances that help Iowa communities address systemic racial disparities with common-sense, easy-to-

understand rules that guide employers to only disqualify individuals with criminal convictions if disqualification is a legitimate business necessity.

The **National Employment Law Project (NELP)** is a non-profit legal research and advocacy organization with 50 years of experience advocating for the rights of low-wage workers and those struggling to access the labor market. In important part, NELP specializes in advancing the employment rights of people with arrest and conviction records, who are disproportionately people of color because of race disparities prevalent across the nation's criminal legal system. NELP has helped to lead the national movement to restore fairness to employment background checks that often hold back workers with records. NELP works with allies in Iowa and across the country to promote enforcement of federal, state, and local antidiscrimination laws, thereby minimizing barriers to employment faced by Black and Latinx workers with records. NELP has litigated, supported litigation, and participated as amicus in numerous cases addressing the rights of workers with arrest and conviction records, the rights of workers under the Fair Labor Standards Act and related state fair pay laws, and the question of whether state laws preempt local minimum wage laws. NELP has an interest in ensuring that the Waterloo Fair Chance Ordinance is fully enforced according to its terms and that the challenges raised by Appellant be rejected.

Amici Curiae **Law Professors** are law professors at U.S. law schools specializing in issues of state constitutional law and local government. Amici Curiae Law Professors share particular expertise on the relationship between state and local authority and are interested in the proper interpretation of home rule authority and preemption across the country. They are listed below, with their institutional affiliations provided for informational purposes only.

Richard Briffault
Joseph P. Chamberlain
Professor of Legislation
Columbia Law School

Daniel Farbman
Assistant Professor of Law
Boston College Law School

Erin Adele Scharff
Associate Professor of Law
Arizona State University's
Sandra Day O'Connor College
of Law

Rick Su
Professor of Law
University at North Carolina
School of Law

Sarah Fox
Assistant Professor
Northern Illinois College of Law

Nestor M. Davidson
Albert A. Walsh Professor
of Real Estate, Land Use
and Property Law and
Faculty Director of the
Urban Law Center,
Fordham Law School

Laurie Reynolds
Research Professor and
Prentice H. Marshall
Professor of Law Emeritus
University of Illinois College
of Law

Richard Schragger
Perre Bowen Professor of
Law
University of Virginia Law
School

ARGUMENT

This Court should affirm the district court's finding that Waterloo's Ordinance 5522 ("Fair Chance Ordinance" or "Ordinance") is not preempted by Iowa law. Iowa Code section 364.3(12), which was passed in order to respond to local regulation of minimum wage, does not create an exception to the Iowa Civil Rights Act ("ICRA"), and the two statutes must be read harmoniously so as to allow local regulation of civil rights through ordinances protecting a broader class of persons than under ICRA, consistent with long-established law under Iowa Code section 216.19. Pursuant to this authority, there are numerous historical and current examples of municipal enactment of local civil rights ordinances across Iowa.

Even if this Court finds that Iowa Code section 364.3(12) creates an exception to ICRA by preempting local civil rights laws that would exceed or conflict with state or federal civil rights law, the Fair Chance Ordinance is still not preempted. By limiting an employer's reliance on criminal history in the applicant recruitment and selection process, the Ordinance merely prohibits practices that "have been shown to have a disparate impact on minority groups, especially African Americans," which is consistent with the existing protections against race discrimination in employment enshrined in ICRA and Title VII of the Civil Rights Act of 1964. MSJ Order 7.

I. BACKGROUND ON FAIR CHANCE LEGISLATION

Nationally, African Americans make up twice the percentage of arrests as their share of the population. *Compare* Fed. Bureau of Investigation, *Crime in the United States, 2018: Table 43* (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43 (noting 27.4 percent of 2018 arrests were of Black or African American people), *with* U.S. Census Bureau, *Quickfacts: United States*, https://www.census.gov/quickfacts/fact/table/US/PST045219 (last visited Jul. 7, 2020)(approximately 13 percent of the U.S. population was Black or African American in 2019). Iowa disproportionately incarcerates African Americans at a higher rate than almost all other states in the nation. The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 5 tbl.1 (2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/. Iowa's population is less than 4 percent African American, and the state prison population is about 25 percent African American. *Id.* The stigma of criminal justice involvement is often lifelong, with lasting impacts on employment opportunities, even if the offense was minor or the person has merely been arrested but not convicted. Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record*, 54 Criminology 387, 36-40 (2016), https://www.sesp.northwestern.edu/docs/publications/279299815a1452bc75a

5b.pdf. Furthermore, surveys now indicate that nearly nine in ten employers perform background checks for some or all of their positions. *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, Soc'y for Human Res. Mgmt., 3 (2012), http://bit.ly/2mhlrzh. And when a job application conveys a candidate's criminal record, the candidate is much less likely to get a callback. One study found that disclosure of a criminal record halved the callback rate for white applicants from 34 percent to 17 percent, and Black candidates with records were penalized even more significantly than white candidates, with their callback rate reduced by almost two-thirds to 5 percent. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Soc. 937, 955-56 (2003), http://bit.ly/1vNQBJk.

It is against this background that fair chance legislation, also called ban-the-box legislation, has been enacted to protect workers from arbitrary treatment in the hiring process. Beth Avery, Nat'l Emp't Law Project, *Ban the Box: U.S. Cities, Counties and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions* 1 (2019), https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-July-2019.pdf (hereinafter NELP, *Ban the Box Guide*). Across the United States, 35 states and over 150 cities and counties have adopted a ban-the-box policy. *Id.* Fair chance laws prohibit employer inquiries into the criminal history of a job applicant until later in the hiring process, such as after a conditional job

offer. *Id.* They also often integrate arrest and conviction record guidelines from the 2012 Equal Employment Opportunity Commission ("EEOC"), which advise employers that, when considering an applicant's criminal history, they should (1) take into account at least the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question, and (2) give the applicant the opportunity to show why he should not be excluded from consideration for the position. EEOC, *What You Should Know: The EEOC and Arrest and Conviction Records*, (2012), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-and-arrest-and-conviction-records (hereinafter "EEOC, *What You Should Know*"). Additionally, if an employer considers criminal history, it must maintain strong standards of accuracy and transparency to ensure the integrity of its background check process. Research shows that even though fair-chance policies do not control an employer's hiring decisions, such policies are successful in increasing the hiring rates of individuals with criminal records because they allow employers to objectively evaluate a candidate's qualifications before becoming potentially biased by knowledge of the candidate's criminal history. *See* Terry-Ann Craigie, *Employment After Incarceration: Ban the Box and Racial Discrimination*, Brennan Cent. for Just. (2017), https://www.brennancenter.org/blog/employment-after-incarceration-ban-box-and-racial-discrimination.

II. WATERLOO ENACTED THE FAIR CHANCE ORDINANCE TO ADDRESS PRONOUNCED LOCAL RACIAL DISPARITIES

Waterloo passed its Fair Chance Ordinance to remedy well-documented and persistent local racial disparities in employment and economic opportunity. According to the latest report by the State Data Center of Iowa and the Iowa Commission on the Status of African Americans, nearly 16 percent of the total population of the city of Waterloo is African American, a higher percentage than any other city in Iowa. *African Americans in Iowa: 2020*, State Data Cent. of Iowa and Iowa Comm'n. on the Status of African-Americans (2020), https://www.iowadatacenter.org/Publications/aaprofile2020.pdf/view. In addition, Waterloo suffers from some of the starkest racial disparities in socioeconomic wellbeing in the state and in the nation. Using data from the U.S. Census Bureau, the Centers for Disease Control and Prevention, and the Bureau of Justice Statistics, a 2019 study listed Waterloo as the third-worst city in the country for Black Americans, based on factors such as racial disparities in income, education, health, incarceration, and white-Black achievement gaps in other socioeconomic outcomes. Evan Comen, *For Black Americans moving to a city, these are some of the worst places to settle*, 24/7 Wall Street (Nov. 8, 2019), https://www.usatoday.com/story/money/2019/11/08/moving-the-worst-us-cities-for-black-americans/40553101/. The data also showed that Black Waterloo residents earn only half of what their white counterparts make,

and 19.7 percent of Black Waterloo residents were unemployed, compared to only 4 percent of white residents. *Id.* One of the most alarming statistics revealed that in Waterloo Black residents make up nearly half of all arrests and were arrested at 5.5 times the rate of people of other races. *Database: Arrest rates for blacks in Iowa*, Des Moines Register Data Central, https://db.desmoinesregister.com/arrests-for-blacks-in-iowa (last visited July 2, 2020) (showing that 3,384 of Waterloo's 6,722 arrests in 2010 were of Black people, who comprise only 16 percent of Waterloo's population).

Waterloo became the first Iowa city to adopt a fair chance ordinance in response to these egregious racial disparities. The Waterloo Commission on Human Rights proposed the Fair Chance Ordinance after conducting an extensive review of data compiled by various organizations, including the Black Hawk County Sheriff's Department and the NAACP, all of which concluded that the consideration of criminal history during the hiring process has a disproportionate effect on African Americans. MSJ Order 2-3, 7; Def. App. 17-18. The Ordinance was adopted with the principal purpose of permitting people of color, particularly African Americans, a fairer chance in finding employment. *Id.* The Ordinance aims to reduce discriminatory hiring practices by delaying employer inquiries into criminal history and allowing the employer to consider criminal history only if relevant to the hiring decision, consistent with existing state and federal civil rights law. *Id; see* Part III. D, *below.*

III. STATE LAW DOES NOT PREEMPT WATERLOO'S FAIR CHANCE ORDINANCE

A. Iowa's Home Rule Law

Under the Iowa Constitution and Iowa Code, municipalities ordinarily have the power to determine local affairs as they see fit, unless the legislature has properly preempted local powers. *Madden v. City of Iowa City*, 848 N.W.2d 40, 49 (Iowa 2014). Iowa's home rule is both constitutional and statutory, providing regulatory latitude to cities and counties to enact any law governing their local affairs unless such law is inconsistent with state law. Iowa Const. art. III, §§ 38A, 39A; *see also* Iowa Code §§ 331.301(1)-(7), 364.1-364.3, 364.6 (2007). Iowa's statutory home rule provides that a city "may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." Iowa Code § 364.3(3)(a). An exercise of city power is not inconsistent with state law unless it is irreconcilable with state law and the conflict is unavoidable. Iowa Code § 331.301(3) ("inconsistent" is defined as "irreconcilable"); *City of Davenport v. Seymour*, 755 N.W.2d 533, 542 (Iowa 2008); *Goodell v. Humboldt County*, 575 N.W.2d 486, 500 (Iowa 1998); *Green v. City of Cascade*, 231 N.W.2d 882, 890 (Iowa 1975) (quoting *Webster's Third New International Dictionary* (1969) ("Irreconcilable means 'impossible to make consistent or harmonious' while inconsistent mean 'incongruous, incompatible, irreconcilable'")). This statutory standard allows for dual regulation under home

rule; a municipality may regulate an area the state also regulates, as long as the local ordinance neither imposes less stringent standards nor is irreconcilable with the state statute. *See Goodell*, 575 N.W.2d at 492.

B. The Fair Chance Ordinance is a Valid Exercise of Waterloo's Authority Under Iowa Home Rule and Section 216.19(1)(c)

Within this framework of Iowa's home rule, the legislature has specifically reserved the area of nondiscrimination policy to municipal regulation, allowing local governments to supplement, but not undercut, minimum statewide standards. Iowa Code § 216.19(1)(c). ICRA provides:

> Local laws implementing this chapter.
>
> 1. All cities shall, to the extent possible, protect the rights of the citizens of this state secured by the Iowa civil rights Act. Nothing in this chapter shall be construed as indicating any of the following:
> a. An intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter that deal with the same subject matter.
> b. An intent to prohibit an agency or commission of local government having as its purpose the investigation and resolution of violations of this chapter from developing procedures and remedies necessary to insure the protection of rights secured by this chapter.
> c. Limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices.

Iowa Code § 216.19(1) (2020).

This express reservation of authority for cities is consistent with the legislature's intent in enacting ICRA "to eliminate unfair and discriminatory

practices in . . . employment" and "correct a broad pattern of behavior rather than merely affording a procedure to settle a specific dispute." *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 462 (Iowa 2017) (quoting *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 19 (Iowa 2010)). The legislature has specifically mandated that ICRA "shall be construed broadly to effectuate its purposes." Iowa Code § 216.18(1); *see also Pippin v. State*, 854 N.W.2d 1, 28 (Iowa 2014).

In *Baker,* the Court held that a local ordinance prohibiting discrimination based on marital status, not found in ICRA, was within the city's section 216.19 authority to enact ordinances that prohibit broader or different categories of unfair or discriminatory practices. *Baker v. City of Iowa City*, 750 N.W.2d 93, 102 (Iowa 2008). The Court reasoned that there was no express indication that the legislature made a policy decision to the contrary. *Id.* ICRA expressly allows a city to enact a local civil rights ordinance that expands the protections granted its citizens under state statute, as long as the ordinance is not irreconcilable with either the procedural mechanism or substantive rights provided by ICRA. *Id.*; *see also* Iowa Code § 216.19(1)(c); 1983 Iowa Op. Atty. Gen. 88 (Iowa A.G.), 1983 WL 41812.

In addition to the law at issue in *Baker*, numerous Iowa municipalities have adopted civil rights ordinances prohibiting discrimination against broader classes of persons than expressly listed in ICRA. For example, before ICRA was

amended in 2007 to protect individuals based on sexual orientation and sexual identity,[1] Iowa City, Decorah, Cedar Rapids, Ames, Bettendorf, and Des Moines all passed ordinances protecting Iowans against discrimination on those bases.[2] More recently, Des Moines, Iowa City, and Marion have exercised this authority to adopt ordinances prohibiting source-of-income discrimination in housing, increasing protections for renters dependent on government assistance.[3]

Waterloo's Fair Chance Ordinance parallels the ordinance in *Baker* and various other local ordinances that have extended civil rights protection beyond

---

[1] S.F. 427, 88th Gen. Assembly (Iowa 2007).

[2] *See* Ames, Iowa, Ordinance No. 3128 (1991); Cedar Rapids, Iowa, Ordinance 2-99 (1999); Davenport, Iowa, Ordinance; Des Moines, Iowa, Ordinance Ch. 62 (2001); *see also Des Moines Adds Special Protection for Homosexuals*, Radio Iowa, June 5, 2001, https://www.radioiowa.com/2001/06/05/des-moines-adds-special-protection-for-homosexuals/; Tory Brecht, *Bettendorf makes it official, City adds sexual orientation to civil rights ordinance*, Quad City Times, Nov. 3, 2004, https://qctimes.com/news/local/bettendorf-makes-it-official-city-adds-sexual-orientation-to-civil/article_04042a4b-6cca-5c55-8598-f2095c68b3f3.html; Decorah, Iowa, Ordinance 1082 § 1 (2005); Iowa City, Iowa, Ordinance 95-3697 (1995); Des Moines, Iowa, Ordinance Ch. 62 (2001); Decorah, Iowa, Ordinance 1082 § 1 (part) (2005); Think Iowa City, *Iowa City: Ahead of the Curve for the LGBTQ Community*, https://www.thinkiowacity.com/plan-your-trip/lgbtq/(last visited June 8, 2020).

[3] Des Moines, Iowa, Ordinance Ch. 62 (2019); Marion, Iowa, Ordinance Ch. 31.18; Iowa City, Iowa, Ordinance 2-3-5 (2015); *see* Davis Brown Law Firm, *Certain Landlords Must Adapt Screening*, JDSUPRA, Dec. 4, 2019, https://www.jdsupra.com/legalnews/certain-landlords-must-adapt-screening-88878/.

that expressly afforded under state law.[4] Like those ordinances, it furthers the purpose of ICRA in addressing discrimination on the basis of a protected class. As the district court recognized, Waterloo passed the Fair Chance Ordinance to address the disparate racial impact of employer policies that screen out applicants with a criminal history too early in the hiring process and without regard to the requirements of a particular position or the applicant's qualifications. MSJ Order 2-3, 7; Def. App. 17. Like in *Baker*, the legislature has adopted no policy decision to the contrary—indeed, by protecting against policies and practices that have a disparate impact based on race in ICRA, the Fair Chance Ordinance is consistent with the policy of the state to eliminate discrimination based on race in employment.[5] Therefore, the Fair Chance Ordinance is consistent both with Iowa home rule generally and with the reservation of municipal authority under section 216.19(1) specifically to adopt civil rights protections at the local level that meet or exceed the state protections set forth in ICRA.

C. Iowa Code Section 364.3(12) Did Not Create an Exception to ICRA

Appellant, the Iowa Association of Business and Industry ("ABI") asserts that section 364.3(12)(a) expressly preempts Waterloo's Fair Chance Ordinance.

---

[4] However, the Waterloo Fair Chance Ordinance does not exceed or conflict with ICRA or Title VII protections. *See* Part III.D, *below.*

[5] *See* Part III.D, *below.*

This argument is unavailing because it ignores the language, legislative history, and intent of that section, as well as the plain language, legislative history, and intent behind section 216.19(1)(c), as set forth above. Such a construction contradicts basic principles of statutory interpretation because it would render the two statutes in conflict with one another. Iowa Code § 4.7; *Kelly v. State*, 525 N.W.2d 409, 411 (Iowa 1994) ("If two statutes conflict, courts must attempt to harmonize them in an effort to carry out meaning and purpose of both statutes."); *see also* Iowa Code § 4.6 (1) (providing, *inter alia*, that if a statute is ambiguous, the court may consider the object sought to be obtained and legislative history, as well as the consequences of a particular construction).

Iowa Code §364.3(12)(a) provides:

> A city shall not adopt, enforce, or otherwise administer an ordinance, motion, resolution, or amendment providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to a minimum or living wage rate, any form of employment leave, hiring practices, employment benefits, scheduling practices, or other terms or conditions of employment."
>
> *Id.*

Section 364.3(12)(a) was passed as House File 295, Iowa General Assembly (2017). Nothing in the legislation modified the express reservation of local authority to enact civil rights ordinances found in ICRA. If the legislature had intended such a dramatic end to the authority of cities to adopt local civil rights laws, it would have done so by striking 216.19(1) from the law. Instead,

the legislature considered taking that action, and specifically determined not to do so.

The legislative history of House File 295 shows that the legislature ultimately intended the law to respond to Iowa municipalities passing local minimum wage ordinances—not local civil rights ordinances. While the initial version of the legislation filed in the House included both minimum wage and civil rights preemption, the legislature deliberately removed the civil rights preemption language before voting on and passing the bill.

House Study Bill 92, the version of the legislation as it was first introduced, contained language which would have deleted subsections (a) and (c) of section 216.19(1), thereby removing cities' power to provide broader civil rights protections. H.S.B. 92, 2017 Leg., 87th Sess. (Iowa 2017), https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HSB%2092; Kevin Hardy, *Local smackdown: GOP bill would freeze Iowa minimum wages at $7.25, ban city, county increases,* Des Moines Register (Feb. 8, 2017), https://www.desmoinesregister.com/story/news/politics/2017/02/08/gop-bill-freezes-iowa-minium-wage-725-rescinds-local-increases/97625588/; *see also* Def. Summ. J. App. 43. This language was maintained until the bill was debated on the House floor, when the floor manager filed amendment H-1107 removing the language preempting local civil rights protections. H-1107 (line 2), 2017 Leg., 87th Sess. (Iowa 2017),

https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=H-1107. The ensuing debate around the amendment demonstrated that both majority and minority parties agreed it was appropriate to remove the language limiting cities' authority to protect civil rights. Iowa General Assembly, Session, *House File 259* video recording of debate on 2017-03-09, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H2017030909150416798&dt=2017-03-09&offset=708&bill=HF%20295&status=i at 3:34:42 (Rep. Landon) ("This is to take away any possibility of unintended consequences regarding cities ability to protect peoples' civil rights. This correction will allow cities to continue to enable local enforcement of state civil right laws, and it also keeps provision in place which allows cities to pass further protection for protected classes of people. It ensures that the wage and business component of this bill can complete its intended purpose."). The House approved this change. *Bill History for House File 295*, https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=HF%20295&ga=87#HSB92 (last visited Jul. 8, 2020) (showing adoption of H-1107). Thus, the final legislation enacting section 364.3(12) struck the local civil rights preemption provisions of the original bill, leaving sections 216.19(1)(a) and (c) intact. *Id.*

Because the legislature made the policy decision to adopt 216.19(1) and keep it intact when passing section 364.3(12) into law in 2017, the district court

reasonably and necessarily construed sections 364.3(12) and 216.19(1) so as not to conflict with one another. MSJ Order 7; *Kelly*, 525 N.W.2d at 411. This construction properly recognizes that the Ordinance does not conflict with state employment law and is consistent with authority given to cities by section 216.19(1). MSJ Order 7.

After manufacturing a conflict between section 364.3(12) and ICRA, ABI then seeks to distinguish between the effect of legislation not prohibiting an ordinance, and that of legislation specifically allowing an ordinance. Pet. Br. 20. It argues that that while the language in section 216.19(1)(c) does not itself limit the power of cities to go beyond state law, no state law actually authorizes cities to provide broader protections than under ICRA. *Id.* This argument fails for at least two reasons. First, it violates the basic tenet of home rule law requiring the limits on municipal action to be express, not implied. *Police Officers Ass'n v. Sioux City*, 495 N.W.2d 687, 694 (Iowa 1993) ("[L]imitations on a municipality's power over local affairs are not implied; they must be imposed by the legislature."). More fundamentally, adopting ABI's argument would erode the wide latitude granted to local governments by home rule law in Iowa's Constitution and legal history, because the ability to respond to unique local situations is an essential aspect of a strong home rule system. *See City of Des Moines v. Gruen,* 457 N.W.2d 340, 341 (Iowa 1990) (explaining that the Home Rule Amendment grants municipal corporations broad authority to

regulate matters of local concern). Because section 364.3(12) did not alter the express reservation of the authority granted to municipalities to enact local civil rights ordinances that has long been exercised by Iowa cities, which authority this Court affirmed in *Baker*, it does not preempt the Fair Chance Ordinance.[6]

---

[6] Section 364.3(12) illustrates a new trend in state legislative preemption of home rule powers, dubbed as the "New Preemption" by scholars and advocates. *See, e.g.*, Richard C. Schragger, *The Attack on American Cities*, 96 Tex. L. Rev. 1163 (2018); Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995 (2018); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 Fordham Urb. L. J. 133 (2017); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 Geo. L. J. 1469 (2018); National League of Cities, *Principles of Home Rule for the 21st Century* 16-19 (2020), https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf; Richard Briffault, Nestor M. Davidson & Laurie Reynolds, *The New Preemption Reader: Legislation, Cases, and Commentary on the Leading Challenge in Today's State and Local Government Law* (2019). The thrust of this wave of New Preemption is simple and narrow—state laws respond to home rule initiatives by targeting a single municipal power for removal, thus undercutting the essential premise of home rule that protects local governments' ability to respond to their own particular sociological, geographic, political, and demographic realities with their own local solutions. In some instances, state laws go so far as to impose punitive consequences on local failure to comply. Richard Briffault, *Punitive Preemption: An Unprecedented Attack on Local Democracy* (2018), https://www.abetterbalance.org/wp-content/uploads/2018/10/Punitive-Preemption-White-Paper-FINAL-8.6.18.pdf. This exercise of the preemption power does not follow the contours of well-established legislative preemption statutes, which typically preempt municipal power when the state seeks to impose uniform regulations or establish statewide minimum standards, which can be enhanced but not reduced. In contrast to that familiar use of the preemption power, this narrow and targeted prohibition does not reflect the state's desire to implement overriding and uniform statewide policies, but merely illustrates the legislature's hostility to the state constitution's protection of home rule authority. In that way, statutes like section 365.3(12) are inconsistent with home rule's constitutionally protected

When the Iowa Constitution was amended to create home rule for municipal governments, a profound alteration of the state-local relationship occurred. Prior to 1968, local governments in Iowa were subject to Dillon's Rule, a rule of strict judicial construction used to interpret grants of authority from the legislature to local governments.[7] That narrow and constraining

---

premise that local governments should be able to deal with local problems. This case provides the Iowa Supreme Court with its first, but surely not its last, opportunity to evaluate the breadth and legitimacy of a New Preemption statute. *See, e.g.*, Iowa Code Ann. § 364.3(3)(c) (preempting local standards or requirements regarding the sale or marketing of consumer merchandise); Iowa Code Ann. § 364.3(3)(d) (preempting certain local restrictions on owners of real property tied to an owner's compliance with other requirements); Iowa Code Ann. § 364.3(9) (preempting local rent control); Iowa Code Ann. § 388.10 (placing significant burdens on municipalities seeking to offer broadband services). Past cases involving judicial application of the principles of express preemption have occurred in the context of a state statute that denied municipal power because of a desire to impose uniform or minimum state regulatory schemes. *See, e.g.*, *Iowa Grocery Industry Assoc. v City of Des Moines*, 712 NW 2d 675 (Iowa 2006) (local ordinance imposing an administrative fee on liquor licenses was preempted by an extensive state statutory scheme, which denied local power unless expressly recognized in the statute); *Chelsea Theater Corp. v. City of Burlington*, 258 NW 2d 372 (Iowa 1977) (upholding stated statutory intent to provide uniform obscenity regulation statewide and invalidating local law). This Court should recognize that section 364.3(12) is not just a routine example of state preemption, but rather marks a remarkable transmogrification of that power in an attempt to erode Iowa municipalities' constitutionally protected home rule powers.

[7] Under the Dillon's Rule regime, grants of local government authority from the State would be construed strictly against the local government and would only be interpreted as transferring the following powers: "(1) those granted in express words; (2) those necessarily or fairly implied in ... the powers expressly granted; and (3) those essential to the accomplishment of the [purposes of the state

approach to local power was specifically rejected by the home rule amendment. The new constitutional provision envisioned broad municipal powers of initiative for cities to experiment with regulations deemed appropriate for their own particular social, demographic, economic, and geographic realities. Moreover, it signaled a reduction of the previously widespread legislative and judicial limitations on those local powers.

Iowa's home rule amendment reflects the drafters' judgment that when it comes to local problems, the state legislature may have neither the time nor the expertise to find solutions. In addition, it embodies the basic principles of federalism that a sufficient amount of legislative power should be reserved to the most local level of government possible so that the people most affected by government action are able to shape the contours of that action, and that our society is improved when local governments are free to experiment with innovative solutions to pervasive problems. Waterloo's ordinance reflects all of those important policies. It was adopted at the level of government closest to the people, in response to a specific local problem, and will apply without any extra-local impact. As the Court noted in *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008), "City authorities are no longer frightened by Dillon's

---

law.]" *See* Richard Briffault and Laurie Reynolds, *Cases and Materials on State and Local Government Law* 327 (8th ed. 2016).

ghost." This Court should reject ABI's crimped understanding of home rule, which would improperly resurrect Dillon's Rule.

D. The Waterloo Fair Chance Ordinance is Not Preempted Because It Does Not Exceed or Conflict with Existing Federal and State Civil Rights Laws Prohibiting Unfair Hiring Practices with a Discriminatory Racial Impact.

Even if this Court determines that the General Assembly intended for section 364.3(12) to limit the scope of section 216.19 as it applies to "unfair practices in employment," section 364.3(12) nevertheless does not preempt the Waterloo Fair Chance Ordinance. The ordinance does not "exceed or conflict with" existing federal or state civil rights laws that bar racially discriminatory hiring practices. For several decades, federal courts and the EEOC have interpreted Title VII of the Civil Rights Act of 1964 ("Title VII") as regulating employer consideration of workers' arrest and conviction records because of the discriminatory impact that record-related screens can have on workers of color.[8] And although nearly 200 fair chance hiring laws and policies exist across the nation, none has ever been found to impermissibly exceed or conflict with federal law.

---

[8] Appellant comes close to admitting this indisputable fact. Appellant's Proof Br. at 14 ("Both federal and state law regulate hiring practices, and to some extent[,] they even regulate the inquiry into and consideration of an applicant's criminal history.").

1. Federal courts and the EEOC have long recognized that Title VII bars employers from excluding job applicants with conviction records when such policies disproportionately impact workers of color and are not justified by business necessity.

Federal antidiscrimination law prohibits hiring practices that discriminate based on race—including those that are race neutral on their face yet disparately impact workers of color. Nearly 50 years ago, the U.S. Supreme Court in *Griggs v. Duke Power Co.* first recognized disparate impact claims challenging facially neutral employment policies under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Congress later codified disparate impact analysis via 1991 amendments to the 1964 law. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat 1071. Title VII now expressly prohibits seemingly neutral employment practices that have a racially disparate impact unless the employer can show that the practice "is job related for the position in question and consistent with business necessity" and the complainant cannot demonstrate the availability of a less discriminatory alternative employment practice. 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii) (2020).

Following the 1971 *Griggs* decision, federal courts began to recognize that an employer's race-neutral policy against hiring individuals with a conviction record may disproportionately impact workers of color because of race disparities in the criminal legal system and thus violate Title VII. Over 40 years ago, the Eighth Circuit in *Green v. Missouri Pacific Railroad Co.* held that Missouri

Pacific Railroad's policy against hiring any person convicted of any crime other than a minor traffic offense was racially discriminatory and violated Title VII. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975). In reaching that conclusion, the *Green* panel identified three commonsense factors that are relevant to determining whether an employer's conviction ban is consistent with business necessity: (i) the nature and gravity of the offense, (ii) the amount of time since the offense, and (iii) the nature of the specific job sought. *Id.* at 1297. More recently, the Third Circuit reiterated that hiring policies excluding people with criminal records violate Title VII if they have a disparate impact on people of color and are not job related and consistent with business necessity. *See El v. Se. Pa. Transp. Auth.*, 479 F.3d 233, 239 (3d Cir. 2007). The panel echoed the relevance of the age and nature of an applicant's prior offense and the nature of the job sought, among other things, to a proper business necessity analysis and the determination of whether an applicant poses an unacceptable level of risk. *Id.* at 243-45.[9]

Federal courts have thus long applied disparate impact analysis to cases in which employers rejected job applicants because of their conviction records. The Eighth and Third Circuits, as well as numerous district courts, have correctly

---

[9] The panel affirmed summary judgment for the employer after considering these factors but noted that summary judgment might have been properly denied if the plaintiff had introduced additional evidence undermining the defendant's business necessity defense. *Id.*

acknowledged that such policies violate Title VII when they have a disparate impact on people of color and are not job related and consistent with business necessity.

For decades, the EEOC has similarly applied Title VII requirements to criminal background check policies. The EEOC first found a criminal history screen to have a racially discriminatory effect in 1972, *see* EEOC Decision No. 72-1497, 4 Fair Empl. Prac. Cas. (BNA) 849 (March 29, 1972), and later issued several policy statements on the issue. In 2012, the EEOC thoroughly reviewed the relevant federal case law, social science research, and input from employer and employee advocates and issued an updated guidance on proper employer consideration of conviction and arrest records. EEOC, *What You Should Know* (summarizing the EEOC's process for drafting the guidance and explaining that similar policy statements from 1987 and 1990 predated it). The Iowa Civil Rights Commission ("ICRC") has also allowed discrimination complaints based on criminal background screening practices to proceed to investigation, rather dismissing them at the outset, applying Title VII's disparate impact analysis. *See* ICRC Decision No. 02-15-66913, *Robinson v. Des Moines Public Schools* (Sept. 16, 2015) (screening in for further investigation because "it does not appear Respondent can form a valid business necessity defense" regarding its criminal background check policy).

The 2012 EEOC guidance directly addresses the specific areas of law regulated by the Fair Chance Ordinance. Echoing the factors set out by the Eighth Circuit in *Green*, 523 F.2d at 1297, the guidance explains that a record-based exclusion must be job related for the position and consistent with business necessity, typically requiring an individualized assessment of a particular applicant's circumstances and the specific job sought, EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act* 17-20 (2012), https://www.eeoc.gov/sites/default/files/migrated_files/laws/guidance/arrest_conviction.pdf (hereinafter "EEOC, *Guidance*"). The Waterloo ordinance similarly prohibits an adverse hiring decision based on a conviction record unless there is "a legitimate business reason." Waterloo Ordinance 5522 § B.4. Just as the Fair Chance Ordinance bars adverse hiring decisions based on arrest records, *id.* § B.2, the EEOC guidance advises employers not to rely on arrest records when making employment decisions, explaining that "an exclusion based on an arrest, in itself, is not job related and consistent with business necessity" because "[a]rrests are not proof of criminal conduct," EEOC, *Guidance*, at 12. And with regard to "banning the box," *see* Waterloo Ordinance 5522 § B.1, the EEOC guidance further recommends "that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be

limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity," EEOC, *Guidance*, at 13-14.

Like the Waterloo City Council during deliberations over the fair chance ordinance, *see* Ruling on Mots. for Summ. J. at 1-2, the EEOC examined statistical information regarding race disparities in the criminal legal system when preparing the 2012 guidance, EEOC, *Guidance*, at 1, 9-10. The guidance sets forth specific statistics showing that Black and Latinx people are arrested, convicted, and incarcerated at disproportionately high rates, concluding that "[n]ational data support[] a finding that criminal record exclusions have a disparate impact based on race and national origin." *Id.* The EEOC thus made clear that national statistics showing disparities in the criminal legal system can be sufficient to establish a prima facie[10] case of disparate impact. *Id.* at 10 & n.76. Even so, Waterloo delved deeper than national statistics when adopting its fair chance

[10] Appellant's brief drastically overstates a plaintiff's burden to show disparate impact. Relying on an unpublished Fifth Circuit case, Appellant asserts that a plaintiff must *prove* disparate impact using data specific to the defendant's applicant pool and that broader statistical data is meaningless. Appellant's Proof Br. at 17. In reality, a plaintiff must establish merely a prima facie case of disparate impact before the burden shifts to the defendant, who may then attempt to disprove disparate impact through more specific applicant pool data. EEOC, *Guidance*, at 10. Furthermore, citing the U.S. Supreme Court, the guidance makes clear that not even evidence of a racially balanced workforce or favorable applicant pool data are necessarily sufficient to disprove disparate impact because, among other things, applicants of color may be deterred from applying. *Id.* at 10 & n.80 (citing *Conn. v. Teal*, 457 U.S. 440, 442 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); and *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977)).

ordinance. Both the Waterloo Commission on Human Rights and the Waterloo City Council "determined that employer[s'] consideration of criminal history during the hiring process has had a disparate impact upon minorities, including African Americans, and has caused employment discrimination in Waterloo," which is "the most racially/ethnically diverse community in Iowa." Ruling on Mots. for Summ. J. at 1-2.

2. Fair chance hiring laws clearly do not conflict with federal law given that nearly 200 such laws and policies have been adopted nationwide over the past two decades.

Waterloo's Fair Chance Ordinance was adopted after nearly 200 fair chance hiring laws and policies had already been enacted nationwide. The first such law was adopted in 1998 by the Hawai'i legislature, which required all employers to delay conviction inquiries until after extending the applicant a conditional job offer. NELP, *Ban the Box Guide*, at 10-11 (citing Haw. Rev. Stat. § 378-2.5). Since then, thirty-four additional states[11] and over 150 localities have adopted laws or policies delaying such employer inquiries. *Id.* at 1. Similar to the Waterloo Fair Chance Ordinance, thirty-one of those laws require private-sector

[11] The thirty-four additional states that adopted such laws or policies over the past two decades are Arizona, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah , Vermont, Virginia, Washington, and Wisconsin. NELP, *Ban the Box Guide*, at 7-25.

employers to delay their record-related inquires. *Id.* at 26-27. Despite the near ubiquity of fair chance laws and policies, Amici are not aware of any other cases seeking to preempt a local fair chance hiring law because it conflicts with or exceeds federal law.

CONCLUSION

For these reasons, and for those set forth by Defendants-Appellees, Iowa Code section 364.3(12) did not limit the reservation of authority to Iowa municipalities under section 216.19 as it applies to unfair practices in employment, but even if it did, section 364.3(12) nevertheless does not preempt the Waterloo Fair Chance Ordinance, because it does not "exceed or conflict with" existing federal or state civil rights laws that bar racially discriminatory hiring practices.

This Court should hold that Waterloo's Fair Chance Ordinance is a valid and constitutional exercise of authority reserved to municipalities to adopt local civil rights ordinances set forth in ICRA and affirm the district court's grant of summary judgment in favor of Defendants.

Respectfully submitted,

/s/ Shefali Aurora
Shefali Aurora, AT0012874
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 808
Des Moines, IA 50309-2317
Telephone: 515-243-3988
Facsimile: 515-243-8506
shefali.aurora@aclu-ia.org

/s/ Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 808
Des Moines, IA 50309-2317
Telephone: 515-243-3988
Facsimile: 515-243-8506
rita.bettis@aclu-ia.org

Counsel for amicus curiae ACLU of Iowa

/s/ Melissa C. Hasso
Melissa C. Hasso, AT0009833
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave., Suite 212
Des Moines, IA 50309
Telephone: (515) 224-2079
mhasso@sherinianlaw.com

/s/ Leonard Bates
Leonard Bates, AT0010869
NEWKIRK ZWAGERMAN
521 E. Locust St., Suite 300
Des Moines, IA 50309
Telephone: (515) 883-2000
lbates@newkirklaw.com

Counsel for amicus curiae Iowa NELA

/s/Elizabeth Avery*
Elizabeth Avery
NATIONAL EMPLOYMENT LAW PROJECT
2030 Addison Street, Suite 420
Berkeley, CA 94704
Telephone: (510) 663-5708
bavery@nelp.org

Counsel for amicus curiae NELP

* *Pro Hac Vice* Application filed

COST CERTIFICATE

I hereby certify that the cost of printing this application was $0.00 and that that amount has been paid in full by the ACLU of Iowa.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:
[x] this brief contains 6,997 words, excluding the parts of the brief exempted by the Iowa R. App. P. 6.903(1)(g)(1) or
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of the Iowa R. App. P. 6.903(1)(f) because:
[x] this brief has been prepared in a proportionally spaced typeface using Garamond in 14 point.

/s/ Shefali Aurora
Shefali Aurora, AT0012874
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 808
Des Moines, IA 50309-2317
Telephone: 515-243-3988
Facsimile: 515-243-8506
shefali.aurora@aclu-ia.org