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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, a nonprofit corporation, and FOOD & WATER WATCH, a nonprofit corporation, Plaintiffs, 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 FRANCISCO, LAURA HOMMEL, TOM PRICKETT, PHYLLIS REIMER, DENNIS SCHEMMEL, and MARGO UNDERWOOD, in their official capacities as Commissioners of the Natural Resource Commission; DEPARTMENT OF AGRICULTURAL AND LAND STEWARDSHIP; and MICHAEL NAIG, in his official capacity as Secretary of Agriculture. Defendants.	No. EQCE084330

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RESISTANCE TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

INTRODUCTION 4

STATEMENT OF FACTS 5

LEGAL BACKGROUND 5

STANDARD OF REVIEW 8

ARGUMENT 8

I. IOWA CITIZENS HAVE STANDING. 8

A. Iowa Citizens have Standing Pursuant to Iowa Law. 8

B. Iowa Citizens have Federal Article III Standing. 11

II. THE INJUNCTIVE RELIEF CLAIMS ARE JUSTICIABLE. 14

A. The Political Question Doctrine Should not Apply in Iowa State Court and Should not Preclude Iowa Citizens' Claims for Injunctive Relief. 14

B. The Climate Change Cases do not Support Dismissal. 19

III. THE DECLARATORY RELEIF CLAIMS ARE JUSTICIABLE. 21

IV. IOWA CITIZENS APPROPRIATELY PLEADED SUBSTANTIVE DUE PROCESS AND COMMON LAW EQUITABLE CLAIMS. 22

A. Iowa Citizens' Claims are not Governed by the Iowa Administrative Procedure Act. 23

1. The Iowa Legislature's Actions and Inactions to Abdicate Control and Allow Substantial Impairment of the Raccoon River are not Subject to Review under the Iowa Administrative Procedure Act. 23

2. Defendant Agencies have no Authority to Limit Nitrogen and Phosphorus from Agricultural Nonpoint Sources. 25

3. The Department of Natural Resources Authority over Manure Land Application and Concentrated Animal Feeding Operation discharges is not an Adequate Remedy. 27

B. Iowa Citizens Appropriately Pleaded Claims under the Substantive Due Process Clause and the Common Law. 30

C. Limiting Iowa Citizens' Constitutional Claims to Review under the Iowa Administrative Procedure Act would Violate their Right to Procedural Due Process. 34

E-FILED 2019 MAY 10 6:28 PM POLK - CLERK OF DISTRICT COURT

CONCLUSION..........35

INTRODUCTION

Nitrogen and phosphorus from agricultural sources have polluted the Raccoon River, a recreational treasure and drinking water source for 500,000 Iowans. The legislature, through long-standing inaction, did not limit agricultural nonpoint source water pollution. The legislature recently and affirmatively made the voluntary Iowa Nutrient Reduction Strategy the official policy of the state for nitrogen and phosphorus pollution from agricultural nonpoint sources. The most recent Strategy progress report admits that "early efforts only scratch the surface of what is needed across the state" to reduce this pollution.[1]

Plaintiffs Iowa Citizens for Community Improvement and Food & Water Watch (collectively "Iowa Citizens") filed this Petition to protect their right to clean water in the Raccoon River. As beneficiaries under the public trust doctrine, Iowa Citizens seek to hold the State of Iowa accountable for abdicating control of the river to private parties and allowing agricultural sources to substantially impair the river with nitrogen and phosphorus. The Defendants State of Iowa, *et al.* (collectively "State of Iowa" or "State") ask this Court to dismiss the Petition, arguing that (1) Iowa Citizens have no standing because they did not allege that the State has caused, or that the Court can redress, the injuries Iowa Citizens' members suffer; (2) the public trust issue is a nonjusticiable political question beyond the reach of the Court; and (3) even if Iowa Citizens have standing and the Court can adjudicate the public trust issue, the Iowa Administrative Procedure Act ("IAPA") does not allow the Court to review the Petition.

This Court should deny the motion. First, Iowa Citizens have standing because the Petition alleges that the State of Iowa – specifically the Iowa legislature – has caused its members' injuries by allowing agricultural nonpoint source water pollution without restriction,

[1] Petition ¶ 62.

and injunctive and declaratory relief will redress these injuries.

Second, the federal political question doctrine should not apply in state court, and if it does, then this Court has jurisdiction because the Iowa Constitution does not textually commit the public trust issue to the legislative or executive branches of government.

Third, Iowa Citizens have a self-executing right of action under the substantive due process clause and a right of action in equity because there is no adequate remedy when, as here, the IAPA excludes review of the actions and inactions of the legislature, Iowa agencies have no authority to require nutrient limitations from agricultural nonpoint sources and very limited authority with respect to Animal Feeding Operations, and the scope of the IAPA does not extend to the programmatic, systemic claims pleaded in Count I and Count II.

STATEMENT OF FACTS

Iowa Citizens incorporate by reference the facts alleged and set forth in paragraphs 4 through 63 of the Petition for Injunctive and Declaratory Relief.

LEGAL BACKGROUND

The public trust doctrine protects Iowans' long-standing right to use navigable waters held in trust by the State of Iowa. This right of use predates the Iowa Constitution and the founding of our Republic. *See Arnold v. Mundy*, 6 N.J.L 1, 76-78 (1821) (discussing the colonial and pre-colonial history of the public trust doctrine, and holding that a riparian owner did not hold title to oyster beds in the Raritan River); *State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989) (Iowa's admission to the Union conditioned on preserving public use of navigable waters and the "public trust doctrine is said to be traceable to the work of Emperor Justinian" of Rome). Once severed from England "when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common

use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842).

The public trust doctrine tracks private trust law: in a private trust, a trustee holds property in trust for the beneficiary, to whom the trustee owes certain fiduciary duties; comparably, the public trust places certain natural resources in trust with the sovereign for the benefit of the public. *See, e.g., Sorensen*, 436 N.W.2d at 361; *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987); *In re Water Use Permit Applications*, 9 P.3d 409, 440 (Hawaii 2000); *National Audubon Society v. Superior Court*, 658 P.2d 709, 718 (Cal. 1983); *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 166 (Ariz. 1991). In Iowa, the public trust doctrine protects the public's use of navigable waters. The Iowa Supreme Court recently described the public trust doctrine as "the 'paramount' right of Iowans to use state waterways for navigational and recreational purposes" when it held that the threat of the loss of this right weighed against concluding that a warrantless search was voluntary. *State v. Pettijohn,* 899 N.W.2d 1, 35 (Iowa 2017) (citing *Witke v. State Conservation Commission*, 56 N.W.2d 582, 586 (Iowa 1953)). The *Pettijohn* court traced the public trust "right" to the "very act of Congress that granted Iowa statehood" and noted that the public trust reflects "the notion that the public possesses inviolable rights to certain natural resources." *Id.* (citing *Sorensen*, 436 N.W.2d at 361).

> The river Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free as well to the inhabitants of said State, as to all other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said State of Iowa.

Sorensen, 436 N.W.2d at 361 (quoting An Act for the Admission of the States of Iowa and Florida into the Union, March 3, 1845, III Iowa Code at 1190).

In *Sorensen*, the Supreme Court held that land adjacent to the Missouri River formed by accretion was part of the public trust and that the doctrine "applies broadly to the public's *use* of

property, such as waterways, without ironclad parameters on the types of uses to be protected." *Id.* at 363 (emphasis original). *Sorensen* specifically relied on recreational use as a basis for holding the land in question was part of the public trust. *Sorensen*, 436 N.W.2d at 363; *see also Board of Park Commissioners v. Diamond Ice Co.*, 105 N.W. 203, 205 (Iowa 1905) (statute giving the Board authority to facilitate swimming, boating, and ice skating on the Des Moines River was not unconstitutional, did not infringe on vested rights, and did not take private property because the public trust doctrine applies so the "state may enact such laws as will best preserve its use for all persons, and for all purposes").

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

STANDARD OF REVIEW

A motion to dismiss may be granted only when the allegations of the non-moving party, taken as true, fail to state any claim upon which any relief may be granted. *Mueller v. Wellmark, Inc.,* 818 N.W. 2d 244, 253 (Iowa 2012) (citing *Geisler v. City Council of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009)); Iowa R. Civ. P. 1.421(1)(f) (2018). For the purposes of considering a motion to dismiss, all facts alleged in the petition are taken as true, and the non-moving party is entitled to all favorable inferences raised by those facts. *Hornby v. State*, 559 N.W.2d 23, 24 (Iowa 1997); *Wilson v. Nepstad*, 282 N.W.2d 664, 666 (Iowa 1979). In evaluating the motion to dismiss, the factual background must be taken as true as a matter of law. *Id.* Under Iowa's liberal notice pleading standards, a court may grant a motion to dismiss only if the movant shows no state of facts in the petition which may conceivably show a right of recovery for the plaintiff. *Below v. Skarr*, 569 N.W.2d 510, 511 (Iowa 1997) (citing *Ries v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004).

ARGUMENT

I. IOWA CITIZENS HAVE STANDING.

The State of Iowa challenges Iowa Citizens' standing to sue even though the State admits that members of Iowa Citizens have suffered a cognizable injury to their legal interests. State Br. at 13. The State proceeds to argue elements – causation and redressability – applicable to federal Article III standing that are not required under Iowa law or under the Iowa Supreme Court's environmental standing analysis. While the Court should decline to raise the standing bar here, Iowa Citizens have standing under both Iowa law and federal Article III requirements.

A. Iowa Citizens have Standing Pursuant to Iowa Law.

In an environmental case involving a public trust doctrine claim, the Iowa Supreme Court analyzed standing under Iowa law and required the plaintiffs "to show (1) a specific, personal,

and legal interest in the litigation, and (2) injury." *Bushby v. Wash. County Conservation Bd.*, 654 N.W.2d 494, 496 (Iowa 2002) (quoting *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001)). When deciding standing in the environmental and public trust context, the *Bushby* court maintained this framework and adopted the Article III standing analysis for an environmental injury. *Id*. at 496-497. The Court held that the plaintiffs had demonstrated standing under the *Laidlaw* injury analysis because "they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Bushby*, 654 N.W.2d at 497 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) (internal citations omitted)).

Iowa Citizens have standing under *Bushby* because the Petition alleges Iowa Citizens' members suffer aesthetic and recreational injury. Petition ¶¶ 6, 85, 97. In addition, the Petition alleges the members suffer injury and fear of injury from treated Raccoon River water provided by Des Moines Water Works and injury from paying additional costs necessary to treat that water. *Id*. Applying *Bushby* to the allegations in the Petition, Iowa Citizens establish standing because of injury to their members.[2] And the State concedes this point. State Br. at 13.

Undeterred, the State of Iowa inappropriately argues that Iowa Citizens must establish standing under the remaining elements of the federal Article III standing analysis. The State asserts that the Iowa Supreme Court has "cited with approval," the federal constitutional framework for standing. State Br. at 12 (citing *Alons v. Iowa Dist. Court,* 698 N.W.2d 858, 867-

[2] *See Ames Rental Property Assn v. City of Ames*, 736 N.W.2d 255, 259 n.3 (Iowa 2007) (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) for the associational standing principle that "an organization whose members are injured may represent those members in a lawsuit"). *See also Laidlaw*, 528 U.S. at 169 (injury in fact established when "members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit"); *Bushby*, 654 N.W.2d at 497 (adopting *Laidlaw* and *Sierra Club* environmental injury standards).

68 (Iowa 2005) and *Sanchez v. State*, 692 N.W.2d 812, 821 (Iowa 2005)). Federal Article III standing requires a plaintiff to establish: (1) "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Alons v. Iowa Dist. Court,* 698 N.W.2d 858, 867-68 (Iowa 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

But the Iowa Supreme Court has only adopted the federal Article III analysis for *injury in fact*, and has not adopted the causation and redressability elements. In *Alons*, though the Court quotes the U.S. Supreme Court's three-part test for federal standing, it discusses only the injury in fact prong and then reaffirms Iowa's test of a legal interest and injury. *Alons*, 698 N.W.2d at 864 ("As far as Iowa law is concerned . . . a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected" (internal quotations omitted)). *Alons* proceeds to discuss only how the federal test for injury in fact informs Iowa's standing requirements of a legal interest and injury. *Id.* at 869-74 (discussing various plaintiffs' claims and finding that each lacked standing because they "failed to show [they had] a legally recognized interest or personal stake in the underlying case" and "failed to show the required injury sufficient to confer standing." *Id.* at 872. *Alons*, like *Bushby*, did not discuss or decide standing based on the federal Article III causation or redressability prongs. Similarly, in *Sanchez v. State*, the Iowa Supreme Court sets out the two-part standing test of a legally recognized interest and injury, then cites but does not discuss the three-part federal test set out in *Lujan*.[3]

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[3] The *Sanchez* court *did* definitively adopt the federal principle that standing for one plaintiff suffices to establish standing for all plaintiffs, stating "we need not decide whether the Doe class also has standing. The Supreme Court has repeatedly held that if one party has standing in an action, a court need not reach the issue of standing of other parties when it makes no difference

Sanchez, 692 N.W.2d at 821. The State confuses the Iowa Supreme Court's reference to the federal Article III analysis of injury in fact as a wholesale adoption of the entire federal constitutional standing framework. Thus, *Bushby* remains the relevant basis for evaluating standing here.

B. Iowa Citizens have Federal Article III Standing.

Even though *Bushby* controls the standing analysis under Iowa law here, Iowa Citizens will briefly demonstrate why Iowa Citizens establish causation and redressability. To establish causation in federal court, an injury must be "fairly traceable to the challenged action of the defendant." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180 (2000). In this case, causation requires that Iowa Citizens' recreational, aesthetic, and drinking water injuries must be fairly traceable to the State's voluntary nutrient control policies – exemptions for agricultural sources – and *de facto* under-regulation of animal feeding operations. Petition ¶¶ 82, 94. The State incorrectly argues that Iowa Citizens "do not allege that Defendants are "directly responsible for nitrogen and phosphorus pollution in the Raccoon River." State Br. at 13. But the Petition does allege the causal connection between the state's voluntary policies exempting agricultural nonpoint sources and the under-regulation of animal feeding operations with injuries resulting from the nitrogen and phosphorus entering the Raccoon River from fields on which fertilizer and manure is applied without mandatory controls. Petition ¶¶ 16-25 (application of fertilizer and manure on crop fields releases nitrogen and phosphorus into surface waters through storm water runoff and storm water tile drain discharges); Petition 30-39 (nitrogen and phosphorus-related pollution in the Raccoon River, including nitrates and cyanotoxins); Petition ¶¶ 40-48 (failure to regulate Animal Feeding Operations); Petition ¶¶ 59-63 (voluntary Iowa Nutrient Reduction

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to the merits of the case." *Sanchez*, 692 N.W.2d at 821 (internal citations omitted).

Strategy and admitted efforts "only scratch the surface of what is needed"); Petition ¶¶ 82-88, 94-99 (allegations that voluntary nutrient policies and *de-facto* under regulation of Animal Feeding Operations abdicate control and substantially impair the Raccoon River and harm Iowa Citizens' members).

Iowa Citizens have amply demonstrated causation from the conduct of the State here through voluntary policies exempting agricultural sources from controls to limit nitrogen and phosphorus and under-regulating Animal Feeding Operations.[4] In an effort to stretch out the causal chain between the State's actions and Iowa Citizens' injuries, the State mischaracterizes Iowa Citizens' allegations of DNR's actions as "simply inadequate." State Br. at 13. But Iowa Citizens are not harmed by the indirect effects of inadequate, but valiant, "efforts by the State of Iowa to reduce nutrient pollution in its waterways." *Id.* Nor is the State doing everything it can to protect water quality. To the contrary, Iowa Citizens allege that the State has failed to regulate agricultural pollution and that failure causes injuries to Iowa Citizens' members.

To satisfy the redressability element of federal Article III standing, a plaintiff must allege "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 181. To make this showing, Plaintiffs do not need to allege that the requested relief will redress one hundred percent of their injuries. *See, e.g.*, *P.I.R.G. v. Powell Duffryn Terminals*, 913 F.2d 64, 73 (3d Cir. 1990) ("Plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III."). Moreover, repeal of an unlawful exemption redresses injury caused by that

[4] Federal courts routinely find standing for private plaintiffs suing government actors for failing to regulate polluting industries, or for enacting unlawful or arbitrary regulations, on the basis that the resulting pollution causes the injury. *See Association of Irritated Residents v. EPA*, 790 F.3d 934, 940 n.4 (9th Cir. 2015); *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1072 (9th Cir.2014); *NRDC v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014).

exemption. *See Sierra Club v. EPA*, 129 F.3d 137, 139 (D.C. Cir. 1997) (petitioners had standing to contest "grace period" exemption promulgated by EPA in Clean Air Act rules); *NRDC v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (repeal of an exemption "would prevent those emissions and help alleviate that harm").

Iowa Citizens request several forms of relief, including an order directing the State to adopt mandatory nitrogen and phosphorus limitations for agricultural nonpoint sources and Concentrated Animal Feeding Operations and a moratorium on new and expanding medium and large Animal Feeding Operations in the Raccoon River watershed. Petition Prayer for Relief ¶¶ (d)-(e). The relief sought will prevent and reduce the agricultural nitrogen and phosphorus pollution that is injuring Iowa Citizens recreational, aesthetic, and drinking water uses of the Raccoon River. Thus even if the requested mandatory pollution reduction requirements would not result in immediate or complete elimination of nutrient pollution, it is "likely, as opposed to merely speculative," that they will reduce pollution and thereby reduce Plaintiffs' injuries.

The State's argument to the contrary relies entirely on a mischaracterization of the U.S. Supreme Court's analysis in *Lujan*. In *Lujan*, the Court held plaintiffs lacked standing in a challenge to an agency regulation applicable to other federal government agencies when taking actions that may affect endangered species. *Lujan*, 504 U.S. at 558-89. The plaintiffs failed to show redressability, because it was not clear that the regulation at issue imposed binding requirements on the non-party agencies whose actions caused plaintiffs' injuries. *Lujan*, 504 U.S. at 568 ("Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation . . . But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question.").

No such considerations are present here. The Iowa agencies responsible for implementing programs and requirements related to agricultural pollution are parties in this action, so their compliance with a court order is not speculative. Moreover, Iowa Citizens here seek remedies that would impose unambiguously mandatory pollution reduction requirements on agricultural sources, and so the fact that those private third parties are not before the court has no relevance. The State incorrectly implies that *Lujan* addressed a challenge to a regulation over *polluters*, and stands for the proposition that the efficacy of mandatory regulations over polluters is dependent on the "unfettered choices made by independent actors," rendering it difficult or impossible to establish redressability. State Br. at 14 (quoting *Lujan*, 504 U.S. at 562). *Lujan* does not stand for that proposition.

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

II. THE INJUNCTIVE RELIEF CLAIMS ARE JUSTICIABLE.

A. The Political Question Doctrine Should not Apply in Iowa State Court and Should not Preclude Iowa Citizens' Claims for Injunctive Relief.

The political question doctrine should not preclude Iowa Citizens' claims for injunctive relief. As the Iowa Supreme Court recently acknowledged, the doctrine is inapplicable to state courts. Alternatively, the doctrine should not apply to Iowa Citizens' state constitutional claim in Count I, and should only apply in the rare instance – not present here – where the Iowa Constitution textually commits decision making power to another branch of government.

The State inaccurately claims that it "is well-established that courts will not intervene or attempt to adjudicate a challenge that involves a 'political question.'" State Br. at 16 (citing

King v. State, 818 N.W.2d 1, 16 (Iowa 2012)). The political question doctrine emerged as a matter of federal law and rests on separation of powers concerns. It asks whether a claim would require the judicial branch to perform a function that the U.S. Constitution entrusts to another branch of government. *See Baker v. Carr*, 369 U.S. 186, 210-211 (1962). The fact that water quality in Iowa has been the subject of significant controversy and involves the resolution of complex issues does not make the public trust doctrine issue a nonjusticiable political question. *Baker*, 369 U.S. at 217 ("The doctrine . . . is one of 'political questions,' not one of 'political cases.'"); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (a case does not present a political question "merely because [the] decision may have significant political overtones.")

In a case the Iowa Supreme Court decided after *King* and which the state omitted from its brief, the Court questioned the applicability of the federal political question doctrine in state courts. In *Freeman v. Grain Processing Corp.*, the Court discussed the controversy surrounding application of the federal doctrine and noted that "the United States Supreme Court has made clear that the federal political question doctrine does not apply to state courts." 848 N.W.2d 58, 91 (2014) (citing *Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J. concurring)). For the reasons stated in *Freeman*, this Court should decline to apply the doctrine here. *Id.* at 91-92.

Alternatively – to the extent it does apply in state court – the political question doctrine should not preclude this Court's consideration of Count I because it is a constitutional claim which challenges the constitutionality of section 20 of Senate File 512 (2018), codified at Iowa Code § 455B.177(3). *King*, the case on which the State relies to lead its argument, recognizes this limitation on the doctrine. The "exercise of the judiciary's power to interpret the

constitution and review the constitutionality of laws does not offend these principles." *King*, 818 N.W.2d at 17 (citing *Luse v. Wray*, 252 N.W.2d 324, 327-328 (Iowa 1977) and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803)).

If this Court applies a variant of the doctrine, it should limit nonjusticiable political questions to situations where the Iowa Constitution bears a textual commitment of decision-making authority to a specific branch of government. *Freeman*, 848 N.W.2d at 92 (citing *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491, 493 (Iowa 1996) and *State ex rel. Turner v. Scott*, 269 N.W.2d 828, 828 (Iowa 1978)). Here, the State does not, and cannot, demonstrate a constitutional textual commitment of the public trust doctrine. Instead, it argues in a conclusory manner that *Baker* factors one, two, three, and four[5] render this case nonjusticiable because the injunctive relief prayed for – an order directing the State to adopt a mandatory remedial plan – would require "a complex regulatory scheme, the assessment of numerous costs and benefits, the balancing of many important interests, and the resolution of difficult social, economic, and environmental issues." State Br. at 18.

This Court should reject the State's argument for two reasons. First, the requested relief does not ask the Court to adopt the mandatory remedial plan and make these determinations. Rather, it asks the Court to order the State to adopt the plan, and much of the work to identify the problem and feasible solutions has already been done. Petition ¶¶ 31-34, 59, 61.

Second, the application of the four *Baker* factors does not support dismissal here.

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[5] To determine "whether a political question is present," *Baker* factors one, two, three, and four ask whether "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" *Freeman*, 848 N.W.2d at 90 (citing *Baker*, 369 U.S. at 217).

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Applying *Baker* factor one, the State cites *only* to general grants of legislative and executive authority for a textual constitutional commitment of authority. State Br. at 18 (citing Ia. Const. art. III sec. 1, art. IV sec. 1). But these constitutional provisions do not speak to the public trust issue. Moreover, the State cites them without capturing the context of the Iowa Constitution's general grant of authority to the judicial branch. Ia. Const. art. V sec. 1. The State also fails to demonstrate a textual commitment of the public trust issue to another branch of government, because no such commitment exists. State Br. at 18. "The first and most important factor of the *Baker* formula is thus plainly not present and cuts markedly against any application of the political question doctrine here." *Freeman*, 848 N.W.2d at 93 (citing *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 49 (2d Cir. 1991)). For this reason alone the Court should reject application of the political question doctrine.

Even if *Baker* factors two, three, and four governed this Court's analysis – which they should not given *Freeman* – the factors do not warrant dismissal. Applying *Baker* factor two, a vast body of public trust doctrine law from Iowa and other states spanning hundreds of years provides judicially manageable standards. *See, e.g., Witke*, 56 N.W.2d at 586-587; *Sorensen*, 436 N.W.2d at 361-362; *Pettijohn*, 899 N.W.2d at 35; *Illinois Central*, 146 U.S. at 453; *National Audubon*, 658 P.2d at 724. The Petition does not demand that this Court resolve technical remedial questions that lack judicially manageable standards. Instead, it asks the Court to order the State to develop the mandatory remedial plan. Petition Prayer for Relief ¶ (d). Finally, scientific issues do not implicate the political question doctrine because "the mere fact that a case is complex does not satisfy this factor." *Freeman*, 848 N.W.2d at 94 (rejecting scientific complexity as a basis for nonjusticiability).

The remaining *Baker* factors do not justify dismissal either. Regarding *Baker* factor three, there is no need for an initial nonjudicial policy determination. The public trust doctrine applies in Iowa; the scope includes navigable waters such as the meandered section of the Raccoon River; and the public uses of navigable waters enjoy protection. *Witke*, 56 N.W.2d at 586; *Sorensen*, 436 N.W.2d at 361. Moreover, the State has already performed an accounting of nitrogen and phosphorus, determined sources, and identified effective best management practices in the 2008 Raccoon River Total Maximum Daily Load and the voluntary Iowa Nutrient Reduction Strategy. Petition ¶¶ 31-34, 59, 61. Without the applicability of *Baker* factors one, two, and three, the remaining *Baker* factors "fall out of the equation" because they "are not strong in any approach to the political question doctrine[.]" *Freeman*, 848 N.W.2d at 94.[6]

Finally, the State cites two inapposite cases which should have no bearing on justiciability here. The State cites *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) and *Rousso v. State*, 239 P.3d 1084, 1086-1087 (Wash. 2010) to support its argument that this Court should not question how the State "addressed water quality issues through legislative and regulatory efforts, including the Iowa Nutrient Reduction Strategy." State Br. at 18. *Ferguson* stands for the unremarkable principle that federal courts do not second guess the legislative reasons for state policy so long as the legislation does not run afoul of federal law. *Ferguson*, 372 U.S. at 730-731. *Ferguson* does not hold that the issue of whether a sovereign trustee has violated the public trust doctrine is nonjusticiable, or even apply the doctrine. *Rousso* similarly does not involve either the political question or the public trust doctrines and, like *Ferguson*, expresses judicial restraint in the application of federal law to Washington legislation banning internet gambling.

[6] The State argues for dismissal of the other requests for injunctive relief based on the interrelated nature of the claims. State Br. at 18. Because the political question doctrine does not apply, the Court should also decline to dismiss all three requests for injunctive relief.

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Rousso, 239 P.2d at 1086.

B. The Climate Change Cases do not Support Dismissal.

The State Brief cites five cases from other states dismissing claims that the public trust doctrine applies to the atmosphere and that states are violating the doctrine by not reducing greenhouse gas emissions. All of these cases are inapposite based on the fundamental doctrinal scope and remedial differences. Here, the Petition asks this Court to adjudicate claims concerning agricultural water pollution in a discrete, wholly intrastate watershed where the State of Iowa has already recognized that the Raccoon River is a public trust waterway, identified the problem, identified feasible solutions, and yet has failed to institute mandatory pollution controls to protect established public trust uses. Petition ¶¶ 17-25, 28-29, 31-34, 59, 61-62. In each of the five cases cited, the courts were asked to adjudicate statewide climate change claims and determine the greenhouse gas reductions necessary to reach global climate stabilization goals. As explained further below, these cases are fundamentally distinguishable, and the State cites no cases in which a court has dismissed a non-climate public trust doctrine claim as nonjusticiable under the political question doctrine.

Iowa first relies on *Kanuk ex rel. Kanuk v. State, Dept. of Natural Resources*, in which the Alaska Supreme Court applied *Baker* factor three (initial policy determination) to hold three claims nonjusticiable. The claims sought a declaration setting forth the best science-based emissions reductions required to stabilize the climate by 2050, an order for the state to achieve those reductions, and an order to provide an annual accounting of the state's total carbon dioxide emissions. 335 P.3d 1088, 1097 (Alaska 2014). *Kanuk*'s holding regarding *Baker* factor three is inapplicable here for the reasons stated above in Section II.A.[7]

[7] The second case cited by the State, an unpublished trial court decision from the Superior Court

The third case cited by the State – *Sanders-Reed v. Martinez* – stands in stark contrast to the posture of this case. *Sanders-Reed* involved an explicit constitutional duty to protect the environment and a delegation to the legislature to implement that specific duty, which abrogated the common law. 350 P.3d 1221, 1225-1226 (N.M. Ct. App. 2015). The court held that claims to reduce greenhouse gases and protect the atmosphere should be raised within the constitutional and statutory framework, not a common law public trust claim. *Sanders-Reed v. Martinez*, 350 P.3d at 1225-1227. This case is inapposite because the Iowa Constitution preserves the common law right as an unenumerated right, the Constitution contains no environmental protection clause and, as discussed below in Sections IV.A.2 and IV.A.3, *infra*, the statutory scheme does not give Iowa agencies authority to require nitrogen and phosphorus limitations from agricultural sources.

The State also cites *Svitak v. State*, 2013 WL 6632124 (Wash. Ct. App. 2013), an unpublished decision from the Washington Court of Appeals. *Svitak* dismissed claims on political question grounds because the plaintiffs did not challenge an affirmative state action or the state's failure to undertake a duty to act as unconstitutional. *Svitak*, 2013 WL 6632124 at *2. The claims here, by contrast, challenge the constitutionality of the State's conduct. Specifically, the Petition challenges the legislature's pursuit of a voluntary agricultural source policy explicitly in section 20 of Senate File 512 (2018), codified at Iowa Code § 455B.177(3), and its prior inactions to regulate agricultural pollution. Iowa Citizens allege that these actions and inactions amounted to an unconstitutional deprivation of an unenumerated right, a deprivation of property without due process of law, and a violation of the public trust doctrine. Petition ¶¶ 78-88, 91-99. *Svitak* should therefore have no relevance to the political question issue presented

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of Alaska, followed *Kanuk* and applied *Baker* factor three to hold constitutional claims seeking to establish a fundamental right to a stable climate were nonjusticiable. *Sinnok v. Alaska*, 2018 WL 7501030 at *4 (Alaska Super. Oct. 30, 2018). *Sinnok* is thus equally inapposite and does not support dismissal on political question grounds.

here.

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

This case certainly raises critically important and politically charged issues, but that does not mean that this Court should defer to the actions and inactions of the sovereign trustee. This court can and should hold the State accountable to the public and should not dismiss this petition. As demonstrated above, the political question doctrine should not apply in Iowa, and even if it did, it should not apply to the constitutional claims in Count I. Moreover, the Iowa Constitution lacks a textual commitment of the public trust issue to another branch of government.

III. THE DECLARATORY RELEIF CLAIMS ARE JUSTICIABLE.

The State contends that a declaratory judgment will provide no effective relief. State Br. at 20. To the contrary, this Petition raises justiciable declaratory relief claims by pleading sufficient facts to establish a live controversy concerning the rights and duties of the State of Iowa under the Iowa Constitution and the public trust doctrine, and asks the Court to declare Section 20 of Senate File 512 (2018) null and void. While Iowa Rule of Civil Procedure 1.1101 permits Iowa courts to adjudicate declaratory actions, "a justiciable controversy must exist" and Iowa courts "will not decide an abstract question simply because litigants desire a decision on a point of law or fact." *Bechtel v. City of Des Moines*, 225, N.W.2d 326, 330 (Iowa 1975). For a controversy to be justiciable, the parties must have "adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment." *Id.* (quoting *Katz*

Investment Co. v. Lynch, 47 N.W.2d 800, 805 (1951)). Additionally, plaintiffs must plead sufficient facts "to show that the issue is concrete and that particular legal rights and powers will be or are affected. Otherwise, the court would be justified in dismissing the petition as merely advisory in character." *Id.* at 331.

Here, the Petition pleads abundant facts concerning agricultural water pollution, the state's voluntary control strategy, the abdication of control and substantial impairment of the Raccoon River, and the harm to public trust uses suffered by Iowa Citizens' members. Petition ¶¶ 4-6, 16-39, 40-48, 59-62. Not only do Iowa Citizens seek a declaration of rights and duties, but their Petition also prays for an order declaring Section 20 of Senate File 512 (2018), codified at Iowa Code § 455B.177(3), null and void so as to provide specific relief by declaring the voluntary Iowa Nutrient Reduction Strategy inconsistent with the public trust doctrine. Should this Court dismisses Iowa Citizens' injunctive relief claims under the political question doctrine – which it should not – then declaratory relief would support further remedial relief "at the ballot box," State Br. at 19, by informing Iowans of the rights of the public, the duties the State of Iowa has violated, and the harm inflicted on the public interest resulting from the state's improper and imbalanced policy favoring agricultural sources through an illegal, voluntary control strategy. The paramount right of Iowans to use and enjoy the State's navigable waters – the right to clean water – is far too important to be declared nonjusticiable.

IV. IOWA CITIZENS APPROPRIATELY PLEADED SUBSTANTIVE DUE PROCESS AND COMMON LAW EQUITABLE CLAIMS.

The State inappropriately argues that the legislature can dictate the terms under which it can, if at all, be held accountable to the public for violating its right to clean water. Specifically, it contends the judiciary may review the voluntary agricultural nutrient policy only under the limits of the Iowa Administrative Procedure Act ("IAPA"), that Iowa Citizens must first exhaust remedies

before state agencies implementing the voluntary policy, and that any IAPA claims cannot challenge the programmatic, voluntary policy that has abdicated control over, and allowed substantial impairment of, the Raccoon River. State Br. at 20-27.

Under the public trust doctrine, the legislature must enact laws that preserve and protect navigable waters and cannot pass laws offensive to the public's right of use. The IAPA does not apply here, where Iowa Citizens seek review of the legislature's programmatic policy actions and inactions. Nor would raising these issues before any administrative agency provide a remedy, because the impotent agencies lack authority to require mandatory pollution controls for agricultural sources. Iowa Citizens may appropriately seek injunctive relief under the substantive due process clause of the Iowa Constitution and at common law under this Court's equitable authority because no adequate remedy exists. Absent a meaningful mechanism for vindication of their rights, Iowa Citizens' procedural due process rights will be denied. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Godfrey v. State*, 898 N.W.2d 844, 868 (Iowa 2017) (quoting *Marbury*, 5 U.S. at 163).

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

1. The Iowa Legislature's Actions and Inactions to Abdicate Control and Allow Substantial Impairment of the Raccoon River are not Subject to Review under the Iowa Administrative Procedure Act.

Iowa Citizens challenge the State's voluntary agricultural water pollution controls for nutrients – nitrogen and phosphorus – from agricultural sources. Petition ¶¶ 82, 94. These voluntary control policies exist because of the actions and inactions of the legislature. In 2018, after years of voluntary nutrient controls, the legislature made the voluntary Iowa Nutrient Reduction Strategy the state's official policy for nutrients. *Id.*; Iowa Code § 455B.177(3); Acts 2018 (87 G.A.) ch. 1001, S.F. 512, § 20. And as alleged, the *de minimis* progress from the Strategy to date "only scratches the

surface of what it needed" and "improvements affected by conservation practices will require a much greater degree of implementation than has occurred so far." Petition ¶ 62. Thus, instead of protecting the public use of the Raccoon River, the State of Iowa has abdicated control to private parties and allowed nitrogen and phosphorus pollution without restriction. Petition ¶¶ 82, 86, 94, 98.

As the Supreme Court stated in *Geer v. Connecticut*, "it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state." 161 U.S. 519, 534 (1896) *overruled on other grounds by Hughes v. Oklahoma,* 441 U.S. 322 (1979); *see also Arnold*, 6 N.J.L at 78 (explaining that the legislature is the "rightful representative" of the trust resources). Legislative action or inaction that violates the public trust should be overturned. *See, e.g., Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc*., 671 P.2d 1085, 1095 (Idaho 1983) (public trust doctrine "forms the outer boundaries of permissible government action").

The IAPA does not provide for judicial review of the actions of the Iowa legislature. "Any person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final *agency* action is entitled to judicial review thereof under this chapter." Iowa Code § 17A.19(1) (emphasis added). The IAPA defines "agency" specifically to exclude the legislature. Iowa Code § 17A.2(1). The IAPA thus does not govern judicial review of the Iowa legislature's voluntary agricultural pollution policy, as codified in Iowa Code § 455B.177(3). Accordingly, the IAPA does not dictate judicial review here.

2. Defendant Agencies have no Authority to Limit Nitrogen and Phosphorus from Agricultural Nonpoint Sources.

The State's argument that review should proceed only under the IAPA and that Iowa Citizens have failed to exhaust administrative remedies overlooks defendant agencies' lack of authority.[8] State Br. at 20-25. The IAPA does not provide an adequate remedy because the agencies themselves do not have authority to implement any policy for nitrogen and phosphorus from agricultural nonpoint sources other than the voluntary Iowa Nutrient Reduction Strategy. A reviewing court under the IAPA could not order an agency to perform an *ultra vires* action – adopt mandatory nitrogen and phosphorus limits at agricultural sources – if the agencies themselves lack the delegated authority to adopt such limits. It is disingenuous at best for the State to argue that Iowa Citizens must exhaust administrative remedies and proceed under the IAPA when, if Iowa Citizens had done so, the primary defense would have been that the agencies lack authority to institute such limits and the official policy of the state for nutrient pollution is the voluntary Iowa Nutrient Reduction Strategy.

The State's brief sets forth various water quality provisions under the Iowa Code and the Iowa Administrative Code, yet none of these provisions authorizes or directs the adoption of mandatory nutrient limits from agricultural nonpoint sources. *See* State Br. at 6-8. The legislature recently and expressly underscored this statutory reality when it declared that the voluntary Iowa Nutrient Reduction Strategy was the policy of the state in the same section of the Iowa Code where it declared that "it is in the interest of the people of Iowa to enact this part of this division in order to authorize the state to implement the federal Water Pollution Control Act, and federal regulations and guidelines issued pursuant to that Act." Iowa Code §§ 455B.177(1), (3). While the legislature has

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[8] The Iowa Department of Natural Resources does have authority to require manure management plans for land application of manure at animal feeding operations over a certain threshold size. *See* Iowa Code §§ 459.312(1), (7)(a) and (b), and (10)(a)-(h). The inadequacy of that remedy is set forth in Section IV.A.3, *infra.*

E-FILED 2019 MAY 10 6:28 PM POLK - CLERK OF DISTRICT COURT

directed the Department of Natural Resources ("DNR") to implement the federal Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit program for point sources, Iowa Code § 455B.197, the legislature specifically exempted "agricultural storm water discharge and return flows from irrigated agriculture[]" from the term "point source" and thus exempted agricultural nonpoint sources from any obligation to limit pollution under the NPDES permitting program. Iowa Code § 455B.171(21). This is consistent with the federal Clean Water Act, which prohibits discharges of pollutants from point sources without a permit, and also exempts agricultural storm water discharges and irrigation return flows from the definition of point source. *See* 33 U.S.C. §§ 1311(a), 1342, 1362(12), (14) (discharge of a pollutant from a point source without a permit unlawful). Also tracking federal regulations, Iowa's NPDES implementing regulations exempt "any introduction of pollutants from non-point source agricultural and silvicultural activities" from the obligation to obtain an NPDES permit. Iowa Admin. Code 567-64.4(1)(e).[9] Thus, agricultural nonpoint source runoff and discharges are not subject to regulation or

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[9] Agricultural operations have access to incentive-based voluntary programs to reduce their nitrogen and phosphorus pollution. Under these programs, an agricultural source accepts public money in exchange for committing to reducing pollution. For instance, soil and water conservation programs do not require "any new permanent or temporary soil and water conservation practice unless cost-share or other public moneys have been specifically approved for that land and made available to the owner or occupant pursuant to section 161A.74." Iowa Code § 161A.48(1). A similar voluntary program exists for water protection projects and watershed protection programs. *See* Iowa Code §§ 161C.2(2), 161C.7(1). The water quality initiative likewise extends incentive funds for nitrogen and phosphorus controls. Iowa Code §§ 466B.45, 466B.43, 16.154, 8.57B.

Even though these voluntary incentive funding programs exist, the most recent report on the Iowa Nutrient Reduction Strategy documented the lack of progress using voluntary methods. "While annual progress continues in the implementation of these practices, early NRS efforts only scratch the surface of what is needed across the state to meet the nonpoint source nutrient reduction. Progress has occurred, but not at the scale that would impact statewide water quality measures. Local water quality improvements may be realized in the short term where higher densities of conservation practices are in use, but the ability to detect early trends in measured water quality will vary from case to case. Statewide improvements affected by conservation practices will require a much greater degree of implementation than has occurred so far." Petition ¶ 62 (quoting Iowa Nutrient Reduction Strategy Progress Report dated March 7, 2019).

E-FILED 2019 MAY 10 6:28 PM POLK - CLERK OF DISTRICT COURT

limitation under the NPDES permitting program administered by the Iowa DNR.

This agricultural nonpoint source pollution thus would only be subject to mandatory limits if the Iowa legislature required limitations beyond the NPDES program. The federal Clean Water Act does not require states to implement mandatory nonpoint source controls. *See* 33 U.S.C. §§ 1313, 1319. And the Iowa legislature has not filled the gap left by Congress; it requires no pollution controls from agricultural nonpoint sources.

Because the agency Defendants lack authority to require nutrient limits for nitrogen and phosphorus from agricultural nonpoint sources, there is no adequate remedy. It hardly bears repeating that an agency may only adopt a rule if it falls within the scope of powers delegated to the agency by the legislature. *Litterer v. Judge*, 644 N.W.2d 357, 362 (Iowa 2002) (holding Secretary of Agriculture did not have authority to promulgate rules relating to the percentage of ethanol in motor fuel sold in Iowa absent specific legislative authorization). Because the agencies lack authority to limit agricultural nonpoint sources' nutrient pollution, Iowa Citizens have no duty to exhaust administrative remedies. *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 328-329 (Iowa 2015) (exhaustion required when action or inaction is related to the authority of the agency); *Rowen v. LeMars Mutual Ins. Co. of Iowa*, 230 N.W.2d 905 (Iowa 1975) (the exhaustion inquiry is whether the relief sought is within the jurisdiction of the agency).

3. The Department of Natural Resources Authority over Manure Land Application and Concentrated Animal Feeding Operation discharges is not an Adequate Remedy.

The Iowa DNR has very limited authority to restrict nitrogen and phosphorus from animal feeding operations' land application of manure on crop fields and to require NPDES permits of discharging Concentrated Animal Feeding Operations. Neither provides an adequate

remedy. The Petition alleges that fertilizer and manure are applied to crop fields, and nitrogen and phosphorus enters surface waters through precipitation events and storm water runoff, as well as through manure spills from Animal Feeding Operation production areas. Petition ¶¶ 17, 19, 23, 45, 74. Iowa statutes provide that Animal Feeding Operations shall not *directly* release manure into a water of the state and must retain manure between manure land applications, Iowa Code § 459.311(1), and certain Animal Feeding Operations must submit and comply with a manure management plan to limit indirect releases. *See* Iowa Code §§ 459.312(1), (7)(a) and (b), and (10)(a)-(h). However, this manure land application regulatory authority does not provide an adequate remedy for nitrogen and phosphorus entering surface waters from manure land application areas because (1) small Animal Feeding Operations, as defined under state law,[10] are exempt from developing and complying with manure management plans; and (2) the storm water discharge exemption applies to Concentrated Animal Feeding Operations' manure land application under state and federal law.

First, only the largest Animal Feeding Operations shall submit and comply with manure management plans to the DNR. Iowa Code § 459.312(1)(a). Small Animal Feeding Operations, which Iowa defines as all Animal Feeding Operations with 500 animal units or fewer, are exempt from this requirement. *Id.*; Iowa Code § 459.102(51). This translates to all confinement or feedlot operations with 1,250 or fewer finishing hogs or 500 beef cattle. Iowa Code § 459.102(6). Because this class of Animal Feeding Operations enjoys an exemption from manure management plan requirements, Iowa DNR has no authority to impose limits on the nitrogen and phosphorus applied by small Animal Feeding Operations as manure to crop fields. Thus, there is

[10] Iowa's definition of small Animal Feeding Operation includes some facilities defined as "medium" under federal regulations. *See* Petition ¶ 75 (referencing federal size categories); Iowa Code § 459.102(51); 40 C.F.R. §§ 122.23(6), (9).

no adequate administrative remedy for the manure nitrogen and phosphorus runoff from these small Animal Feeding Operations.

Larger Animal Feeding Operations, including CAFOs, are required to implement manure management plans. Iowa Code § 459.312. As explained herein, this is the sum total of DNR's regulatory authority over agricultural water pollution of the Raccoon River. But even as to this subset of agricultural operations, DNR's authority does not provide an adequate remedy. Iowa Citizens seek relief that far exceeds what DNR is authorized to require via manure management plans, even where they are required. Critical to water quality, DNR lacks the authority to prohibit manure spreading on frozen or snow-covered ground in manure management plans. Iowa Code § 459.313A; *see also* Petition ¶ 46 (In 2019, the Iowa DNR authorized more than 100 Animal Feeding Operations to apply manure to frozen [or] snow covered ground.")

DNR also lacks authority to limit nitrogen and phosphorus runoff from manure land application areas on which a permitted or unpermitted Concentrated Animal Feeding Operation applies manure as long as they meet manure management requirements. The State Brief recognizes Iowa DNR's authority to issue NPDES permits to Concentrated Animal Feeding Operations ("CAFOs") that discharge pollution. State Br. at 9. But this DNR authority is illusory. As the State acknowledges, state law also prohibits the DNR from imposing CAFO NPDES permit restrictions that are more stringent than federal regulations. *Id.* (citing Iowa Code § 459.311(2)). Federal law specifically classifies precipitation runoff from manure land application areas at both permitted and unpermitted CAFOs as a nonpoint source agricultural storm water discharge if "the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater." *See* 40 C.F.R. §

122.23(e), (e)(1). Because the legislature capped DNR authority with federal law, and because federal law exempts precipitation related releases of nitrogen and phosphorus from manure land application areas used by CAFOs with manure management plans, then the DNR has no authority to limit nitrogen and phosphorus storm water runoff.

The practical result of Iowa's law limiting CAFO NPDES permits and the agricultural storm water exemption has been complete non-regulation; Iowa DNR has not issued a single NPDES permit to a hog CAFO in Iowa. Petition ¶¶ 45, 74. Due to the severe statutory limitations on DNR's Animal Feeding Operation and CAFO oversight, DNR has no meaningful authority to restrict nutrient pollution from the vast majority of even these ostensibly regulated sources. Iowa Citizens thus have no duty to exhaust administrative remedies with respect to animal feeding operations.

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

The State does not dispute – other than the IAPA argument – that Iowa Citizens have stated a claim under the due process clause or at common law in equity. Review should therefore proceed under the substantive due process clause or in equity because the State admits that the IAPA provides review for only discrete agency actions and not for the programmatic, systemic violations pleaded here. At bottom, Iowa Citizens allege the Iowa legislature has affirmatively opted to pursue a voluntary nutrient reduction strategy (and that strategy "only scratches the surface of what is needed"),[11] so challenging a myriad of agency actions under the IAPA does not provide an adequate remedy for the overriding problem in the Raccoon River watershed.

The State acknowledges that "the overall thrust of the petition is a broad programmatic

[11] Petition ¶ 62.

attack" on water quality policies and that Count I and Count II do not challenge "*discrete* agency action[s]" which must be challenged under the IAPA. State Br. at 26 (emphasis original) (citing Petition ¶¶ 82, 94[12]; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). The State correctly frames Count I and Count II as programmatic and systemic challenges because the State of Iowa pursues a voluntary nutrient pollution control strategy and under-regulates animal feeding operations. Petition ¶¶ 82, 94. But this does not support the conclusion that Iowa Citizens' claims must be dismissed; it simply underscores that the claims are not IAPA claims. Iowa Citizens agree that the Iowa legislature does not authorize such review under the IAPA, and as such, the legislature has not provided an adequate remedy for Iowa Citizens to protect their "'paramount' right" of use of the Raccoon River. *Pettijohn*, 899 N.W.2d at 35 (quoting *Witke*, 56 N.W.2d at 586).

This Court may appropriately adjudicate Count I and Count II of this Petition. The due process clause of the Iowa Constitution provides a right of action against the state for a violation of a constitutionally protected right. *See Godfrey*, 898 N.W.2d at 871 (holding that a claim for damages under the due process clause was self-executing when the legislature did not provide a remedy). In so holding, the Iowa Supreme Court followed its own decisions allowing self-executing claims for injunctive relief. *Id.* (citing *Hensler v. City of Davenport*, 790 N.W.2d 569, 588–90 (Iowa 2010)). In *Varnum v. Brien*, the Court granted injunctive relief in an action under the Iowa equal protection and substantive due process clauses to remedy an act of the legislature banning same-sex marriage. 763 N.W.2d 862, 906-907 (Iowa 2009). Under both *Godfrey* and *Varnum*, Iowa Citizens may seek injunctive relief here for their constitutional claim. As the Iowa Supreme Court noted:

> It would be ironic indeed if the enforcement of individual rights and liberties in the Iowa Constitution, designed to ensure that basic rights and liberties were immune from majoritarian impulses, were dependent on legislative action for enforcement. It is the state judiciary that has the responsibility to protect the state constitutional rights

[12] The State's Brief cites paragraph 84 but the context suggests that this is a typographical error and that the State intended to cite paragraph 94 of the Petition. State Br. at 26.

E-FILED 2019 MAY 10 6:28 PM POLK - CLERK OF DISTRICT COURT

of the citizens.

Godfrey, 898 N.W.2d at 865 (citing *Corum v. University of North Carolina*, 413 S.E.2d 276, 290 (N.C. 1992)); *see also Varnum*, 763 N.W.2d at 876 ("When individuals invoke the Iowa Constitution's guarantees of freedom and equality, courts are bound to interpret those guarantees").[13]

In Iowa, the public's right of use under the public trust doctrine is both a constitutionally protected property right and an unenumerated right. In *Witke v. State Conservation Commission*, the Iowa Supreme Court considered the issue of whether the state may charge the public for the use of navigable waters. *Witke*, 56 N.W.2d at 585. The Court held that "all persons have a right to use the navigable waters of the state, so long as they do not interfere with their use by other citizens, subject to regulation by the state under its police powers[]" and the state – except to provide improvements for public use – "may not restrict or charge for the use of the waters of navigable streams or lakes, and any attempt on its part to do so is a deprivation of the citizen of his property without due process of law[.]" *Witke*, 56 N.W.2d at 588-589.

The Iowa Constitution's Unenumerated Rights Clause provides another constitutional basis for the public's rights under the public trust doctrine. The Clause states that "[t]his enumeration of rights shall not be construed to impair or deny others, retained by the people." Iowa Const. art. I, § 25. The Clause "bring[s] . . . unenumerated rights retained by the people, founded equally . . . upon natural justice and common reason . . . within the censorship of courts of justice . . . . when . . . [the rights are] assailed." *Atwood v. Vilsack*, 725 N.W.2d 641, 651 (Iowa 2006) (quoting *State ex rel. Burlington & Mo. River R.R. v. County of Wapello*, 13 Iowa 388, 412 (1862)). In *Atwood*, the Iowa

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

Supreme Court affirmed that the Unenumerated Rights Clause "secure[s] to the people of Iowa common law rights that pre-existed Iowa's Constitution." *Id.* at 651 (citing *County of Wapello*, 13 Iowa at 412). There can be no doubt that the public trust doctrine provides the public with common law rights of use, those rights of use are natural rights, and that those rights predate the Iowa Constitution. Indeed, the Iowa Supreme Court acknowledged the doctrine's common law roots and that Congress conditioned Iowa's admission to the Union upon the preservation of the right to use navigable waters. *Sorensen*, 436 N.W.2d at 361; *see also Arnold*, 6 N.J.L at 77-78 ("The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right").

This Court should adjudicate Iowa Citizens' claims because a public trust doctrine without accountability for the sovereign trustee eviscerates the long-standing natural rights provided by the common law and protected by the Iowa Constitution. Other courts invalidating legislative actions violating the public trust doctrine have emphasized the importance of the judiciary in enforcing the doctrine.

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

Arizona Center for Law, 837 P.2d at 367 (internal citations omitted). The State of Iowa has embraced the public trust doctrine and should be held to account for its actions and inactions as the trustee.[14]

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

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

The State contends that the IAPA forecloses judicial review of Iowa Citizens' constitutional and common law claims because of the limitations it places on judicial review. State Br. at 25-27. Because it insists upon case-by-case review of a multitude of discrete actions and inactions, and asserts that broad programmatic claims may not proceed under the IAPA, the State's argument necessarily implicates Iowa Citizens' right to procedural due process.

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

First, Iowa Citizens' right to use navigable waters is of the highest constitutional importance. The Iowa Supreme Court recently described it as a "'paramount' right," *Pettijohn*, 899 N.W.2d at 35 (quoting *Witke*, 56 N.W.2d at 586), for which any restriction or charge – except to improve use and access – amounts to a deprivation of property without due process of law. *Witke*, 56 N.W.2d at 588-589. Second, there is an absolute risk of deprivation if Iowa Citizens are forced to challenge a

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doctrine supported its claim to land). To the extent the State of Iowa argues that judicial review is exclusive to the IAPA and it thus enjoys sovereign immunity, its embrace of the public trust doctrine has constructively waived sovereign immunity. *See Lee v. State, Polk County Clerk of Court*, 815 N.W.2d 731, 741 (Iowa 2012) (affirming the doctrine of constructive waiver of sovereign immunity); *see also Godfrey*, 898 N.W.2d at 871 (right of action against the state for substantive due process constitutional violation without regard to sovereign immunity).

multitude of individual agency actions rather than the policy of the legislature and the programmatic nature of its voluntary nutrient strategy. Exhausting administrative remedies and litigating each permit (or failure to issue a permit), manure management plan, authorization to apply manure on frozen or snow covered ground, and petition for rulemaking would be astoundingly complex and, particularly considering the inadequacy of this remedy in light of Iowa DNR's very limited authority, raise an insurmountable bar for Iowa Citizens to protect their rights. These individual proceedings would render such deprivation inevitable. Third, the government's interest in administrative efficiency warrants review in a single action rather than a multitude of administrative appeals that would be immensely burdensome and costly for all parties, including the courts. For these reasons, the *Eldridge* factors favor proceeding with Iowa Citizens claims as pleaded in their Petition in order to avoid a procedural due process deprivation. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Godfrey*, 898 N.W.2d at 868 (quoting *Marbury*, 5 U.S. at 163).

CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss.

Respectfully Submitted,

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