IN THE SUPREME COURT OF IOWA

NO. 16-1534

THERESA SEEBERGER,

Petitioner-Appellee/Cross-Appellant,
v.

DAVENPORT CIVIL RIGHTS COMMISSION,

Respondent-Appellant Cross-Appellee

MICHELLE SCHREURS,

Intervenor-Appellant/Cross-Appellee

On Appeal from the District Court for Polk County
The Honorable Michael D. Huppert

FINAL BRIEF OF THERESA SEEBERGER

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This is a case about discriminatory speech, housing, and the First Amendment. Theresa Seeberger lawfully terminated Michelle Schreurs's residential lease after hearing that Schreurs's teenage daughter was pregnant. Seeberger believed that the Schreurs was an irresponsible parent, and she told Schreurs as much. The Davenport Civil Rights Commission found Seeberger's statements to be discriminatory in violation of the Davenport Civil Rights Ordinance, and it awarded damages and attorney fees. The questions presented are:

1. Was the district court correct to apply the commercial-speech doctrine to statements that were inextricably intertwined with fully protected noncommercial speech?

2. The Davenport Civil Rights Ordinance allows landlords to discriminate, for any reason, if they own less than four single-family houses, but it punishes *any* landlord who makes a discriminatory statement. Is that ban on discriminatory speech constitutional when applied to a landlord who owns less than four single-family houses?

3. Did the district court correctly rule that the Commission did not have authority to award attorney fees?

Routing Statement

This case involves significant free-speech issues; it should remain with the Supreme Court.

The U.S. Supreme Court applies a lower standard of scrutiny to "commercial speech" (the *Central Hudson* test), but the Court has also made clear that not every statement motivated by money or related to a financial transaction is "commercial." Sometimes nominally "commercial" speech is fully protected.

This case draws out the distinctions between commercial speech and fully protected speech. Theresa Seeberger told her tenant Michelle Schreurs, in the context of terminating her tenancy, that Schreurs was irresponsible for allowing her teenage daughter to become pregnant and for bringing a baby into a family that was financially strapped. Seeberger argued that those statements are subject to full constitutional protection; the district court disagreed and instead applied *Central Hudson*. This is an important constitutional issue for this Court to decide.

If the Court disagrees with Seeberger (if it believes that the speech is truly "commercial") then this case presents another First

Amendment issue. The Davenport Civil Rights Ordinance allows landlords who own less than four houses to refuse to rent to anyone for any reason, but (*at the same time*) still prohibits those landlords from making discriminatory statements. In other words, the act of discriminating is legal; talking about it is illegal. Whether that statutory scheme is constitutional under the U.S. Supreme Court's commercial-speech cases is a significant and important question.

Statement of the Case

This is an as-applied challenge to the City of Davenport's content-based ban on speech that relates to legal conduct.

The appellee/cross-appellant, Theresa Seeberger, rented rooms in her house to appellant/cross-appellee, Michelle Schreurs and her teenage daughter. During the tenancy, Seeberger (who maintained full access to the house, other than the rented rooms) learned that Schreurs's daughter was pregnant. Seeberger believed that Schreurs, who had been behind on her rent, was irresponsible for allowing her daughter to become pregnant and that they needed to vacate the house. *App.* 346.

Schreurs filed a complaint with the Davenport Civil Rights Commission, alleging that Seeberger had violated the Davenport Civil Rights Ordinance (Davenport Municipal Code Chapter 2.58) by making discriminatory statements based upon familial status.[1] The complaint did not allege that the *act* of terminating the tenancy amounted to unlawful discrimination, because both the Davenport Civil Rights Ordinance (and the Fair Housing Act after which it's modeled) contain an exception for landlords who own less than four single-family houses. So discriminating based upon familial status is legal; it's just illegal to talk about it.

The Davenport Civil Rights Commission, through its attorney, investigated the complaint and issued a probable cause finding against Seeberger. The case was then heard by Administrative Law Judge Heather Palmer, who issued a

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[1] Section 2.58.305 of the Davenport Civil Rights Ordinance makes it unlawful "to make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, or sexual orientation." The Fair Housing Act contains a nearly identical provision. *See* 42 U.S.C. § 3604(c).

proposed order finding that Seeberger had violated the Ordinance by making a discriminatory statement. ALJ Palmer recommended that Seeberger pay a $10,000 civil penalty and she awarded $35,000 in emotional distress damages to Schreurs. *App.* 146. Seeberger had raised constitutional defenses based on the First Amendment, the Home Rule Clause, and the Due Process Clause, but ALJ Palmer concluded that neither she nor the Commission had jurisdiction to consider those arguments. *App.* 144.

The Davenport Civil Rights Commission adopted the proposed order, except that it reduced the emotional distress damage award to $17,500. *App.* 152. The Commission also awarded Schreurs $23,200 in attorney's fees and $681.80 in costs. *App.* 153.

On judicial review, the district court affirmed in part and reversed in part.

The court rejected Seeberger's First Amendment challenge. "It is well-settled that discriminatory statements made in the context of housing are illegal," the district court wrote. *App.* 351. And because statements were made in connection with a

commercial transaction (the termination of the rental agreement), the district court ruled that that they were not protected. *Id.* (citing *Campbell v. Robb*, 162 Fed. App'x 460, 470 (6th Cir. 2006) for the proposition that discriminatory statements made to prospective tenant is "akin to a want ad proposing a sale of narcotics or soliciting prostitutes").

The district court also rejected Seeberger's other constitutional arguments regarding home rule and due process. Those rulings are not being challenged on appeal.

Although the district court upheld the Commission's finding on liability, it reversed the Commission's ruling on remedies. The ALJ and the Commission awarded Schreurs damages based solely upon the "stress she experienced when Seeberger terminated her tenancy" and she "had to move in with her parents." *App.* 355. That was error because Seeberger's liability was based upon her speech rather than the actual termination of the tenancy (that was legal). The district court therefore reversed the emotional distress award and the civil penalty. *App.* 355.

The district court also reversed the attorney fee award because the Davenport Civil Rights Ordinance does not provide authority for it. The housing-discrimination section limits relief "to an award of actual damages, equitable or injunctive relief and the assessment of a civil penalty." *App.* 355-356 (citing Davenport Mun. Code § 2.58.340(F)(3)). Schreurs argued that the Commission could have awarded attorney's fees under the Fair Housing Act, but the district court disagreed. *App.* 363.

Seeberger raised two other arguments, but the district court concluded that they had not been preserved. First, Seeberger argued that Schreurs, as the prospective grandmother, was not covered by the ban on discriminatory statements related to family status. That argument wasn't raised in the Commission proceeding, and the district court ruled that it was waived because it related to the merits rather than to the Commission's subject-matter jurisdiction. *App.* 348.

Seeberger also argued that ALJ Palmer should have recused herself because she submitted an ethical complaint against Seeberger (who is an attorney and part-time magistrate) during

the pendency of the case. *App.* 344-345. ALJ Palmer did not disclose that fact to Seeberger before the administrative hearing, believing that she "was not required to make such a disclosure," so Seeberger did not file a recusal request. *App.* 362-367. The district court nevertheless ruled that Seeberger waived the issue because she did not raise it with the Commission before its final order. *App.* 364-365.

All parties—Seeberger, Schreurs, and the Commission—have appealed, but there are only two issues before the Court: (1) Does the Commission's ruling violate the First Amendment and article I, section 7 of the Iowa Constitution (Iowa's free-speech clause), and, if not, (2) is Schreurs entitled to attorney's fees?

Statement of the Facts

In 2012, Theresa Seeberger got married and moved in with her wife, Stacey. *App.* 137*; App.* 14. Moving in, though, didn't exactly mean moving out. Stacey was allergic to cats, so Seeberger left her four pets at her house. *App.* 137*; App.* 14. She also left all her furniture, her kitchen wares, her filing cabinets, and even her clothes. *App.* 14*; App.* 14, 15, 17. In some ways,

Seeberger had two houses: the house where she kept her things and the house where she slept. *App.* 14, 15, 17, 20.

Towards the end of 2012, Seeberger began renting some of the rooms in her house to tenants—some of whom were friends of hers, some of whom were friends of Stacey's, and some of whom heard about the house through word of mouth. *App.* 14-15. About seven months later, Michelle Schreurs and her daughter Trinity moved in. *App.* 138. At the time, Seeberger was also renting rooms to two others: Roberta Hodges and Peter King, Schreurs's boyfriend. *App.* 137-138.

Shortly after Schreurs moved in, Seeberger separated from her wife and moved to an apartment a few blocks from her (Seeberger's) house. *App.* 138. Even with the house filled with tenants, Seeberger kept her belongings in the house and would go there most days.[2] *App.* 137-138. As Seeberger explained it: "I probably never slept there [at that time], but I was there every

[2] Because Seeberger kept her belongings in the house and maintained access to it, Seeberger, King, and Hodges were not "tenants" within the definition of the Landlord Tenant Act. *See* Iowa Code section 562A.6(14) (defining a tenant that occupies a dwelling "to the exclusion" of the landlord).

day . . . . Playing with my cats, maybe doing laundry, cleaning, just whatever people do, hanging out, just watching TV, reading. I've got a porch, a nice front porch that we would just hang out on, just read." *App.* 20. *See also App.* 137 (noting that Seeberger went to the house "every day").

In September 2014, Seeberger was in the house and noticed a bottle of prenatal vitamins on the kitchen counter. At that time, both Hodges and King had moved out; Schreurs and Trinity were the only tenants left. Seeberger took a picture of the vitamins with her cellphone and sent it to Schreurs, asking: "Something I should know about?" *App.* 138. Schreurs did not respond. *App.* 138.

The next day, Seeberger went to the house and asked about the vitamins. Schreurs, who had not seen the text, became excited and started to giggle. *App.* 138. She told Seeberger that it was her teenage daughter, Trinity, who was pregnant. *App.* 138. Seeberger had assumed that it was Schreurs who was having the baby. *App.* 26. Upon hearing that it was Trinity, Seeberger told Schreurs "You're going to have to leave." *App. 138.* "You don't even pay rent on time the way it is, and . . . Now you're going to bring another

person into the mix," she said. *App.* 138. Seeberger also remarked that "she [Trinity] is taking prenatal vitamins," so "obviously you're going to keep the baby." *App.* 138.

Schreurs moved out three weeks after the confrontation. This case ensued. As Seeberger testified, she "believes people should be responsible" and that she "was disappointed with Schreurs and believes Schreurs took advantage of her because she was paying less rent than she would anywhere else." *App.* 140. In concluding that Seeberger had made discriminatory statements to Schreurs based upon familial status, ALJ Palmer made the following findings:

> Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant. During the hearing Seeberger testified adding a third person to the family was no different than if Schreurs had purchased a new Cadillac. Seeberger testified she would not take a vacation she could not pay for in advance. An ordinary listener listening to Seebergers' statements would find her statements discriminatory on the basis of familial status.

App. 138-139.

Argument

The Commission's ruling against Seeberger violates the First Amendment and article I, section 7 of the Iowa Constitution. Seeberger expressed her opinion that Schreurs was irresponsible for allowing her teenage daughter to become pregnant and for bringing a child into the family when they could not afford it. Whatever one thinks of that opinion, it is subject to full constitutional protection. It's true that Seeberger's speech related to a commercial transaction (renting a room in the house) but because that speech was "inextricably intertwined" with Seeberger's philosophical or ideological message, it is classified as noncommercial, fully protected speech under the First Amendment. *See Riley v. Nat'l Federation of the Blind of N. C., Inc.,* 487 U.S. 781, 795–96 (1988).

Even so, Seeberger's comments are constitutionally protected under the less onerous commercial-speech standard. Although *some* landlords are prohibited from discriminating based upon familial status, Seeberger wasn't. She owned less than four single-family houses, so she could refuse to rent to anyone, for any

reason, without violating the Davenport law. Davenport Mun. Code § 2.58.310(A)(1)(a). As a result—i.e, because Seeberger's conduct was legal—the Commission was required to prove that the application of the speech ban against Seeberger advances a substantial government interest and is narrowly tailored to achieve that end. The Commission has not done that—indeed, it *cannot* do that—so the Commissioner's ruling must be reversed regardless of whether Seeberger's speech fits into the commercial bucket.

Because Seeberger's speech is constitutionally protected, Schreurs's request for attorney's fees is moot. But even if Seeberger could be held liable for her speech, the Davenport Civil Rights Ordinance is clear that attorney's fees are not available in housing-discrimination matters and this Court has already correctly ruled that local civil rights Commissions do not have the authority to issue remedies under a federal statute. *Van Meter Industrial v. Mason City Human Rights Commission*, 675 N.W.2d 503, 515–16 (Iowa 2004). The district court's ruling on that issue should be affirmed. And because the district court did not abuse

its discretion in denying fees for the judicial-review proceeding, that ruling should be affirmed as well.

I. Seeberger's statements to Schreurs are protected under the First Amendment and article I, section 7 of the Iowa Constitution.

Standard of Review: The Court reviews constitutional issues de novo. *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 6 (Iowa 2012).

Error Preservation: Seeberger raised the free-speech challenge before the Commission and again in the district court. The district court ruled on her arguments; they are preserved.

A. The commercial-speech doctrine does not apply because any commercial aspect of Seeberger's speech was inextricably intertwined with fully protected speech.

When analyzing a First Amendment claim, the U.S. Supreme Court makes a distinction between commercial speech—"expression related solely to the economic interests of the speaker and its audience"—and "other varieties" of speech that express political, religious, philosophical, or ideological opinions and ideas. *Cent. Hudson Cps & Elec. Corp. v. Pub Serv. Comm'n of N.Y.,* 447 U.S. 557, 561-62 (1980). The "other varieties" of speech are

subject to almost full constitutional protection, while commercial speech has traditionally been analyzed under a lesser, though still stringent standard. *Id* at 563.

That distinction is narrowing somewhat, with the Supreme Court becoming more and more skeptical of restrictions on so-called commercial speech.[3] But that is not something this Court needs to get into, because Seeberger's speech does not fall within the "commercial" category.

When the Supreme Court laid out its commercial-speech test in *Central Hudson*, Justice Stevens wrote a concurring opinion (joined by Justice Brennan) to express his belief that "it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Central Hudson*, 447 U.S. at 579. It is often the case, Justice Stevens wrote, that expression motivated by economic interests also "encompasses speech that is

[3] *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (applying "heightened scrutiny" to law that restricts commercial speech "because of the disagreement with the message it conveys" (internal quotation omitted)).

entitled to the maximum protection afforded by the First Amendment." *Id.*

Eight years later, the Supreme Court confronted Justice Stevens's concern, and it sided with him. Writing for the Court in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), Justice Brennan stated that even if "speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* at 796. Where the "component parts of a single speech are inextricably intertwined," Justice Brennan explained, courts cannot "parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* "Such an endeavor would be both artificial and impractical," and therefore the entire expression is fully protected. *Id.*

In this case, the district court concluded that Seeberger's speech was commercial—and therefore subject to the *Central Hudson* test—because it "pertained directly to the commercial transaction between landlord and tenant." Slip. Op. 13. That is

the kind of oversimplification that Justice Stevens warned about in *Central Hudson* and that the Supreme Court guarded against in *Riley*.

The ALJ and the Commission found Seeberger liable under the Davenport Civil Rights Ordinance because "Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant," and because Seeberger thought Schreurs was irresponsible for "adding a third person to the family" when they could not afford it. *App.* 145. To Seeberger, it was "no different than if Schreurs had purchased a new Cadillac" or took "a vacation she could not pay for in advance." *App.* 145. That sentiment—which expresses notions of parental responsibly and family planning—is the type of political or philosophical expression that is fully protected under the First Amendment. It doesn't matter that Seeberger expressed her opinion in the context of a landlord/tenant issue, because the commercial aspect of the speech (your tenancy is terminated) was inextricably intertwined with the fully protected speech (you're an irresponsible parent for allowing your daughter to become

pregnant and to bring a child into this home when you can't afford it).

The Commission's decision is therefore subject to strict scrutiny, which means that its decision must be reversed.[4] The Commission hasn't tried to justify its censorship under that standard—nor could it. In some ways, it's remarkable that this case has gotten this far. It seems obvious that the government cannot—or at least should not—punish Seeberger for expressing the kinds of opinions she expressed here. But this is a "discrimination" case, so the Commission (and the district court) seem to believe that the First Amendment doesn't apply. That's wrong.

Remember: Seeberger isn't being punished for terminating the tenancy *or* for her reason for doing so; she's being punished only because she spoke that reason aloud. That should be the

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[4] *See Perry v. L.A. Police Dep't*, 121 F.3d 1365, 1368 (9th Cir. 1997) (applying strict scrutiny to prohibition on speech that inextricably intertwined commercial and noncommercial expression); *Gaudiya Vaishnava Soc'y v. City & Cty. of S.F.*, 952 F.2d 1059, 1064–65 (9th Cir. 1990) (same).

beginning and the end of the matter. Seeberger's statements and opinions are given the fullest protection under the First Amendment and article I, section 7 of the Iowa Constitution. The Commission's decision should be reversed and the case against Seeberger thrown out.

B. Even if the commercial-speed doctrine applied, Seeberger's speech would be constitutionally protected because it related to a legal transaction.

Seeberger's speech is constitutionally protected, even if it were purely commercial.

Under *Central Hudson*, a content-based restriction on commercial speech is subject to heightened scrutiny if the speech concerns lawful activity and is not misleading. *Central Hudson*, 447 U.S. at 566. Both are true here. Seeberger truthfully expressed her opinion that Schreurs was irresponsible, and the activity—terminating the tenancy based on family status—was lawful. Under the Davenport Civil Rights Ordinance, a landlord who owns no more than three single-family houses can discriminate against anyone for any reason. *See* Davenport Municipal Code 2.58.310(A)(1)(a).

The district court nevertheless ruled that Seebergers speech wasn't protected by the First Amendment, because "discriminatory statements made in the context of housing are illegal." *App.* 351. That is not the right inquiry. Every First Amendment case deals with illegal speech; that's the point.

What the district court probably meant is that because *housing discrimination* is illegal, it's okay to make discriminatory statements illegal too. That is true in most cases, but not this one: Seeberger owns less than four houses, so she is exempt from Davenport's housing discrimination provisions and thus free to terminate Schreurs' tenancy for any reason, including familial status. *See Central Hudson*, 447 U.S. at 566. Although courts have upheld First Amendment challenges to the Fair Housing Act's speech ban (which is virtually identical to Davenport's), all of those cases involved *illegal* discrimination. *See App.* 351 (citing cases). This one doesn't.

The Seventh Circuit is the only court that seems to have commented on the situation we have here—where the landlord is not prohibited from discriminating but is prohibited from talking

about it. In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008), a public-interest group sued Craigslist for posting rental advertisements that expressed race, sex, religion, and family status preferences (e.g., "No children"). Some of those ads were published by people who had less than four single-family houses, which means that (like Seeberger) they were legally entitled to discriminate under the Fair Housing Act but (also like Seeberger) forbidden from making any advertisements or statements to that effect. *Id.* The Seventh Circuit, Judge Easterbrook writing, warned that applying the discriminatory-speech ban to those Craigslist posts (the posts of those who could legally discriminate) would "encounter[] serious problems under the first amendment." *Id.* (citing the body of Supreme Court's precedent on the issue).

The court ultimately did not address that issue because some of the discriminatory ads were posted by people who could *not* legally discriminate (apartment building owners, for instance), and so the court moved on to the next issue: whether Craigslist was immune from liability under a federal statute dealing with

online publishing (it was). But had the Seventh Circuit fully addressed the issue, it seems clear what the court would have done: It would have ruled, consistent with the four Supreme Court cases Judge Easterbrook cited, that the advertising ban could not be enforced where the homeowner could *legally* discriminate.

In one of those cases, *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 182 (1999), the Supreme Court held that an FCC regulation banning gambling advertisements was unconstitutional when applied to casinos that were lawfully taking bets. It didn't matter that the government could have banned the activity altogether, because "the power to restrict speech about certain socially harmful activities" is not "as broad as the power to prohibit such conduct." *Id.*

That rule—that the government cannot ban speech merely because it *could have* banned the activity—came from the Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). There, the Court struck down a Rhode Island law that banned price advertising for alcohol products. *Id.* at 516. The state argued that its advertising prohibition survived *Central*

Hudson's heightened-scrutiny test because the state "could, if it chose, ban the sale of alcoholic beverages outright." *Id.* at 508. The Supreme Court disagreed because that argument could not "be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available." *Id.* at 509. In other words, the government cannot regulate conduct by banning speech alone. If it wants to regulate *conduct*, then it must do so directly; it cannot merely regulate the speech concerning that conduct.

That is precisely why the Commission's case against Seeberger is unconstitutional. The City of Davenport may have an interest in prohibiting discrimination based upon familial status, but it cannot rely on that interest here because the Davenport Civil Rights Ordinance expressly *allows* landlords like Seeberger to refuse to rent to anyone, for any reason—familial status included. If Davenport wants to regulate a small landlord's ability to discriminate based upon familial status (or any other class),

then it needs to do so directly.[5] Under *44 Liquormart* and *Greater New Orleans Broadcast Association*, it cannot do so by regulating speech alone.

Because the City allows landlords to discriminate if they own less than four houses, the only interest it has in suppressing those landlords' speech is to protect tenants from *hearing* that they are being discriminated against. That interest is not a substantial one that justifies the deprivation of the right to free speech. Imagine if it were; the government could ban every statement that it deems insensitive. As the Supreme Court stated in its most recent commercial-speech case: "Many are those who

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[5] It's worth noting, though, that *if* the Ordinance had prevented Seeberger from discriminating based upon familial status, that prohibition would violate Seeberger's fundamental right to freedom of association. Seeberger did not sleep in the house (at least according to the ALJ's findings) but it is undisputed that she kept almost all of her belongings there (clothes, furniture, kitchen wares, etc.), that she kept her cats there, and that she kept full access to the house—meaning that she could come and go as she pleased. Indeed, Seeberger visited the house almost every day. Given the intimate nature of that situation, Seeberger had a fundamental right to choose who she wanted to share her house with. *See Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012) (Kozinski, J.). So not only was it legal for Seeberger to terminate the tenancy under the Davenport Civil Rights Ordinance; it was her right under the Constitution.

must endure speech they do not like, but that is a necessary cost of freedom." *Sorrell*, 564 U.S. at 575.

As explained above, Seeberger's statements to Schreurs—which amounted to much more than "tenants with kids cannot live here"—is not subject to the Supreme Court's commercial-speech doctrine; it is fully protected. But even if it were analyzed under *Central Hudson*, the First Amendment would still bar this proceeding. So would article I, section 7 of the Iowa Constitution.

II. Even if it were constitutional to punish Seeberger for her speech, Schreurs would not be entitled to attorney fees.

Standard of review: The district court's ruling regarding attorney fees—i.e., that the Commission does not have the statutory authority to award them—is reviewed for correction of errors at law. The district court's denial of Schreurs's request for attorney fees in defending the judicial review petition is reviewed for abuse of discretion. *See Scheurs Br.* 13.

Error preservation: The Commission and Schreurs have not preserved each of their attorney-fee arguments for appeal. In the district court, the Commission's *sole* argument was that it

properly awarded fees under Davenport Civil Rights Ordinance section 2.58.175(8). Schreurs made the same argument and also stated that the Commission could have also awarded fees under the Fair Housing Act. Both parties make those same arguments on appeal, but they also make another argument: that the Commission could have awarded fees under *another* section of the Davenport Municipal Code, 2.58.350, which is in the section titled "Fair housing – Judicial review." Neither party raised this issue in the district court as a justification for the fee award, even *after* Seeberger stated in her opening brief that this section does *not* allow for an award of fees in this circumstance. That prompted the district court to conclude that the Commission and Schreurs agreed on that point. *See App.* 355 ("[I]t appears from the briefing that all parties concede that this section has no applicability to the issue of attorney fees in the present context."). The Commission belatedly raised the issue in its Rule 1.904(2) motion, but the district court properly ruled that it was waived.

Neither Schreurs nor the Commission challenge *that* ruling in their opening brief. As a result, the district court's ruling can

no longer be challenged and this Court need not consider it. *See Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) ("[A]n issue cannot be asserted for the first time in a reply brief.")

A. The Commission did not have authority to award attorney fees under the Davenport Municipal Code.

This Court has been here before. In *Botsko v. Davenport Civil Rights Commission*, 774 N.W.2d 841, 845 (Iowa 2009), the Davenport Civil Rights Commission argued that it had the authority, under the Davenport Municipal Code, to award attorney fees in an employment discrimination case. This Court disagreed. "[B]ecause attorneys' fee awards are a derogation of the common law," this Court held that they "are generally not recoverable as damages in the absence of a statute or a provision in a written contract." *Id.* And since the Davenport Municipal Code did not contain such a clear authorization for attorney's fees, the Commission's award was improper.

Since that case, and actually during the pendency of it, the City of Davenport amended its municipal code to allow for reasonable attorney fees for cases involving a discriminatory

practice, which is every kind of discriminatory practice *other* than a "discriminatory *housing* practice," which has its own definition and its own section of the Davenport Municipal Code. For whatever reason—be it intentional or not—Davenport did *not* add attorney's fees to the list of potential remedies for a discriminatory *housing* practice. *See* Davenport Mun. Code § 2.58.340(F)(3).

The housing discrimination section does allow for an award of attorney fees upon judicial review (*see* 2.58.350(G)), but that was not the basis for the Commission's award—nor could it be, because the Commission awarded Schreurs fees *before* Seeberger requested judicial review.

In any event, neither the Commission nor Schreurs relied on section 2.58.350(G) in the district court; they relied solely on section 2.58.175(8). As a result, and as noted above, any claim that the Commission properly awarded fees under section 2.58.350(G) has been waived.

B. The Commission did not, and cannot, award attorney fees under the Fair Housing Act.

The Commission and Schreurs also argue that the Commission *could have* awarded attorney fees under the Fair Housing Act. There are two problems with that argument.

First, the Commission did *not* make the award on that basis. In the district court it stated, clearly and definitively, that it awarded fees under Davenport Municipal Code section 2.58.175. (*DCRC Judicial Review Br.* 26-27).

Second, and more important: The Davenport Civil Rights Commission does not have the authority to issue remedies under a federal statute. The Commission is a creature of state law, which means that its jurisdiction is limited to state law. Indeed, the Commission and Schreurs are making the same argument that this Court rejected in *Van Meter Industrial v. Mason City Human Rights Commission*, 675 N.W.2d 503, 515–16 (Iowa 2004). In that case, the local Commission was arguing that it could award punitive damages under the Title VII, because the complaint was cross filed with the EEOC. This Court disagreed, ruling that regardless of whether a complaint is cross-filed with a federal

agency, a local Iowa Commission does not have access to *federal* remedies. *Id.*; *see also Van Meter Indus. v. Mason City Human Rights Comm'n*, 665 N.W.2d 441 (Iowa Ct. App. 2003) ("[The complainant] cites no authority supporting her proposition that cross-filing her complaint with the [EEOC] grants the Commission the authority to award her punitive damages and we find none.").

The district court was right to reverse the attorney fee award.

C. The district court did not abuse its discretion in denying Schreurs's request for attorney fees for the judicial review proceeding.

The district court completely reversed the Commission's ruling regarding damages, and neither Schreurs nor the Commission is challenging that ruling on appeal. As a result, Seeberger cannot be said to have prevailed before the district court.

But even if getting an affirmance on one issue was enough, the district court was well within its discretion to deny Schreurs's request for attorney fees. If anything, the district court should have awarded Seeberger *her* fees, since all changes to the

Commission's order were in Seeberger's favor. The district court nevertheless rejected both parties' requests for attorney fees. If Seeberger's request was properly denied, there is certainly no abuse of discretion in denying Schreurs's request. The ruling denying Schreurs's fees for the judicial-review proceeding should be affirmed.

Conclusion

Seeberger's statements to Schreurs about parental responsibility and family planning are fully protected, meaning that they are subject to strict scrutiny. It doesn't matter that they occurred in relation to housing, because there is no housing exception to the First Amendment.

But even so, the Commission's action against Seeberger also fails the *Central Hudson* test, so the case must be reversed and judgment entered in favor of Seeberger.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 5,314 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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I hereby certify that on March 10, 2017, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel of record.

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