IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TOM SLOCKETT, Petitioner, vs. **IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD**, Respondent.	Case No. CVCV049899 PETITIONER'S BRIEF IN SUPPORT OF JUDICIAL REVIEW

CONTENTS

INTRODUCTION

Petitioner Tom Slockett had served as the Johnson County Auditor for over thirty years, since 1977. On April 25, 2012, a disgruntled employee of Petitioner and active supporter of Petitioner's political challenger in an upcoming election for County Auditor filed a complaint with Respondent Iowa Ethics and Campaign Disclosure Board ("Board") alleging that Petitioner had engaged in various behaviors in violation of ethics and campaign regulations. On May 31, Respondent, based on one of the grounds alleged in the complaint, reprimanded Petitioner for answering campaign-related phone calls on his private cell phone while physically present in his government office. By making these phone calls, Petitioner did not engage in acts which constitute violations of the plain text of Iowa Administrative Code Rule 351—5.4(2)(b) (68A) nor Iowa Code section 68A.505.

To the extent this Court disagrees, Petitioner asserts that Respondent's action in this case threatens the very bedrock of our democratic system: the ability for elected officials to engage with the governed, hear their concerns, and be the voice through which we, as citizens, effect change in our society. Punishing Petitioner for engaging in protected political speech, absent any sufficient justification, not only curtails his ability to be an effective representative of the people, but chills the free interchange and debate of

ideas statewide. Consequently, Respondent's reprimand was thus unconstitutional in violation of Petitioner's fundamental right to engage in core political speech protected by the First Amendment to the United States Constitution and article 1, section 7 of the Iowa Constitution.

STATEMENT OF THE CASE & PROCEDURAL HISTORY

In early 2012, Petitioner Tom Slockett was serving as Johnson County Auditor, an elected position he had held since 1977. *See* Stipulation of Facts at ¶ 1, R. Ex. 21. On April 3, 2012, Petitioner sought the advice of Johnson County Attorney Janet Lyness about whether he could engage in campaign-related activity on his personal cell phone while physically present in the Auditor's office, which he was told was permissible under Iowa law. *Id.* at ¶ 2. Former Johnson County Attorney J. Patrick White had previously advised all Johnson county officials, including Petitioner, that they would not be in violation of Iowa Code section 68A.505 so long as they did not expend county resources in furthering their political or campaign work. *Id.* at ¶ 6.

Relying on the advice of those two county attorneys, Petitioner used his personal cell phone to answer calls related to his campaign for County Auditor during regular business hours during the week of April 16, 2012 while he was physically present in the County Auditor's office. *Id.* at ¶ 8. Importantly, Petitioner paid for his cell phone entirely with his personal

funds, which was not reimbursed or paid for by Johnson County. *Id.* at ¶ 7. Additionally, as County Auditor, Petitioner was an elected, salaried employee with no set work hours, and was working fifty to sixty-hour work weeks at that time. *Id.* at ¶ 9, 11.

On April 25, 2012, Nathan Reckman, who worked in the County Auditor's Office at the time under Petitioner's supervision, filed a complaint with the Board alleging that Petitioner "repeatedly violated Iowa Code section 68A.505 by using public moneys to support his political campaign." *See* Complaint at 1–2, R. Ex. 1. Reckman made various allegations of conduct that he believed violated section 68A.505. *See generally id.* One specific allegation made by Reckman was that Petitioner made various campaign-related phone calls while physically present in his office during normal business hours. *Id.* at 3.

The next day on April 26, 2012, Petitioner e-mailed Johnson County Attorney Lyness to confirm the details of their April 3, 2012 conversation; he specifically asked, among other things, whether he was permitted to use his private cell phone for campaign purposes while in the office. Stipulation of Facts at ¶ 4, R. Ex. 21. County Attorney Lyness responded that Petitioner "may use [his] private cell phone to do whatever [he wants], including campaign functions." *Id.* at ¶ 5.

On May 31, 2012, just five days prior to the primary election for Johnson County Auditor, Respondent issued a Reprimand of Petitioner based on its conclusion that Petitioner violated Iowa Code section 68A.505. Reprimand at 4, R. Ex. 2. The sole ground for Respondent's reprimand was its determination, contested by Petitioner, that Petitioner improperly expended government resources simply by making campaign-related phone calls in his office, "even though most of them were on his private cell phone." *Id.* at 4.

Petitioner does not contest that he made campaign-related phone calls on his private cell phone during normal business hours during the week of April 16, 2012. Stipulation of Facts at ¶¶ 8, 11–21, R. Ex. 21. Further, Petitioner acknowledged that some campaign-related calls he made were returned to him on his county phone. *Id.* at ¶ 21. However, Petitioner insists he did not initiate any such calls on his county phone. *Id.* At no time in the course of these proceedings has the State been able to produce any type of bill or record that Petitioner made such calls from his county phone or that any County assets or resources were diminished as a result of the calls. *Id.* at ¶ 22.

Petitioner eventually lost his primary bid for Johnson County Auditor. Respondent's reprimand was cited by local news outlets as the likely reason

Petitioner lost reelection after his thirty-five-year incumbency as Johnson County Auditor. *See, e.g.*, *Johnson auditor loses, Linn's wins in primary,* The Gazette (Mar. 31, 2014), www.thegazette.com/2012/06/05/weipert-defeats-slockett-in-democratic-primary-for-johnson-county-auditor ("Slockett, of Iowa City, fell to challenger Travis Weipert . . . following reports this spring of questionable practices at work and a reprimand last week from the Iowa Ethics Campaign and Disclosure Board.").

Petitioner appealed the Respondent's decision, and on November 9, 2013, filed a motion for summary judgment. Mot. for Summ. J., R. Ex. 3. Respondent transferred the case for hearing before an administrative law judge. *See* Ruling on Mot. for Summ. J. at 1, R. Ex. 9. On April 1, 2013, following oral arguments on Petitioner's motion for summary judgment, then-administrative law judge Jeffrey Farrell ruled in favor of Petitioner. *See generally id.* Specifically, Judge Farrell found both that Petitioner was not a "governing body" within the meaning of section 68A.505, and therefore was not subject to that provision, and that Respondent failed to demonstrate that Petitioner, by simply being present in his office, "expended" any county resources in furtherance of a ballot initiative. *Id.* at 6–9.

On May 31, 2014, counsel for Respondent filed a Statement of Exceptions to Judge Farrell's ruling. Statement of Exceptions, R. Ex. 10. On

June 4, 2014, Respondent rejected Judge Farrell's decision and directed its attorney to schedule rehearing before the entire Board. Minutes Open Session, Regular Meeting, R. Ex. at 14.

On June 26, 2014, Petitioner moved to stay any remaining proceedings before the Board to seek judicial review of the Respondent's rejection of Judge Farrell's decision. Mot. to Stay Further Administrative Proceedings, R. Ex. 16. Counsel for Respondent waited until September 29, 2014 to respond, asking that the motion be denied. Resp.'s to Mot. to Stay, R. Ex. 17. While Respondent apparently considered Petitioner's "matter" on October 2, 2014, *see* Mins., Telephonic Meeting, R. Ex. 19, it took no further action with respect to Petitioner's request, and no hearing date was set to further consider Petitioner's case.

After waiting for months with no further action by Respondent, Petitioner filed for judicial review of the reprimand on May 21, 2015. Pet. for Judicial Review, CVCV049899 (May 21, 2015). On December 8, 2015, the Court found that Respondent failed to render final agency action with respect to section 68A.505, and remanded this case back to the Board for Final agency action. Ruling and Order on Pet. for Judicial Review, CVCV049899 (Dec. 8, 2015).

On May 2, 2016, Respondent entered final order and reprimand finding that Petitioner violated Iowa Code section 68A.505 and Iowa Administrative Code Rule 251—5.4(2)(b). Order at 5, R. Ex. 22. Petitioner subsequently filed the present amended Petition for Judicial Review challenging Respondent's final order reprimanding Petitioner.

This years-long case ultimately presents a simple question for this Court: Whether Petitioner, by making campaign-related phone calls on his private cell phone while in his government office during normal business hours, violated Iowa Code section 68A.505. Under any reasonable interpretation of the law, he did not; and to the extent this Court disagrees, then Respondent's reprimand punishes Petitioner for engaging in protected core political speech in violation of the First Amendment to the United States Constitution and article 1, section 7 of the Iowa Constitution.

SCOPE OF REVIEW

On judicial review of agency action, the district court functions in an appellate capacity. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). Petitioner alleges six grounds for reversal and other relief requested under Iowa Code section 17A.19(10). Iowa Code §17A.19(10)(a)–(c), (k), (l) & (n).

ARGUMENT

I. RESPONDENT LACKS THE AUTHORITY TO REPRIMAND PETITIONER IN THIS CASE, AND IN THE ALTERNATIVE, PETITIONER'S CONDUCT DID NOT VIOLATE IOWA CODE SECTION 68A.505.

Respondent Iowa Ethics and Campaign Disclosure Board is an independent executive agency established by Iowa Code section 68B.32. Among its duties, Respondent must "[e]stablish and impose penalties, and recommendations for punishment of persons who are subject to penalties of or punishment by the board or by other bodies, for the failure to comply with the requirements of . . . chapter 68A." Iowa Code § 68B.32A(9). Respondent has not been "clearly vested" with interpreting Iowa Code section 68A.505, and thus its interpretation via administrative rules are accorded no deference by this Court. *See NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 36–37 (Iowa 2012). Consequently, Respondent's interpretation of Iowa Code section 68A.505 is erroneous because Petitioner, as Johnson County Auditor, was not a "governing body," nor did his conduct amount to the "expenditure of public moneys."

A. Standards of Review

Two main subsections of section 17A.19(10) govern agency interpretation of law: subsection (l) and subsection (c). The threshold question for reviewing courts when assessing a challenge to an agency's

interpretation of a statute is whether the agency was "clearly vested with the authority to interpret the statute at issue." *NextEra*, 815 N.W.2d at 36–37. If the agency is clearly vested with this authority, then the more deferential standard of section 17A.19(10)(l) applies, and appellate review is for abuse of discretion. *Id.* If, however, the agency is not vested with this authority, then the agency's action is entitled to no deference; section 17A.19(10)(c) applies, and review is for correction of errors at law. *Id.*

Iowa Code section 17A.19(10)(k) provides that relief may be granted if the agency's action is "[n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy." "An agency's action may be reversed under section 17A.19(10)(k) only if the action is not required by law." *Zieckler v. Ampride*, 743 N.W.2d 530, 533 (Iowa 2007).

Further, section 17A.19(10)(b) provides that relief may be granted if the agency's action is "[b]eyond the authority delegated [to it] by any provision of law or in violation of any provision of law." Importantly, where an agency's interpretation results in an effect that is "beyond the scope of any delegated authority," then the "interpretation is not enforceable." *See Iowa Civil Rights Comm'n v. Deere & Co.*, 482 N.W.2d 386, 388 (Iowa

1992). "The interpretation would be beyond the scope of the delegated authority if it is at variance with the enabling act or if it amends or nullifies legislative intent." *Id.*

The court determines whether an agency possesses legislative interpretive authority on a case-by-case, phrase-by-phrase basis, and does not make "broad articulations of an agency's authority." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010)). Moreover, on judicial review, a court "[s]hall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11)(a). In making this determination, the court

> [does] not focus our inquiry on whether the agency does or does not have the broad authority *to interpret the act as a whole*. Instead, when determining whether the legislature has clearly vested the agency with authority to interpret, each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes.

Burton, 813 N.W.2d at 257 (emphasis added) (internal quotation marks omitted). The grant of authority must be "clearly vested" with the agency, whether impliedly or expressly. *See id.*

Under principles of statutory interpretation, "[t]he intent of the legislature is the polestar of statutory construction and is primarily to be ascertained based on the language employed in the statute." *Univ. of Iowa v. Dunbar*, 590 N.W.2 510, 511 (Iowa 1999). "Precise, unambiguous language will be given its plain and rational meaning in light of the subject matter." *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996). Only where the language of a statute is so ambiguous that its plain meaning cannot be determined will courts endeavor into statutory interpretation to evince legislative intent:

> Rules of statutory construction are to be applied only when the explicit terms of a statute are ambiguous. . . . A statute is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. Ambiguity may arise in two ways: (1) from the meaning of particular words; or (2) from the general scope and meaning of a statute when all its provisions are examined.

Id. (internal citations omitted).

B. The legislature did not clearly vest Respondent with interpretive authority over section 68A.505

Iowa Code section 68A.505 provides in part: "The state and the governing body of a county, city, or other political subdivision of the state shall not expend or permit the expenditure of public moneys for political purposes, including expressly advocating the passage or defeat of a ballot

issue." Respondent has adopted Iowa Administrative Code Rule 351—5.1 (68A) to implement Chapter 68A, which provides:

> Iowa Code section 68A.505 prohibits the expenditure of public moneys for political purposes, including expressly advocating the passage or defeat of a ballot issue. For the purposes of this chapter, the board will construe the phrase "expenditure of public moneys for political purposes" broadly to include the use of public resources generally. This chapter outlines the permissible and impermissible uses of public resources for a political purpose pursuant to Iowa Code section 68A.505 and board interpretations of the statute.

For the stated purpose of "clarifying the general prohibition on the use of public resources for a political purpose," Respondent also adopted Rule 351.5.4(2)(b) (68A), which specifically prohibits "[u]sing public resources to solicit votes, engage in campaign work, or poll voters on their preferences for candidates or ballot issues."

Respondent has not been vested, let alone clearly vested, with any authority to specifically interpret Iowa Code section 68A.505. An express grant of interpretive authority is just that—explicit language requiring an agency to engage in the interpretation of law. *See Iowa Ass'n of Sch. Bds. v. Iowa Dep't of Educ.*, 739 N.W.2d 303, 307 (Iowa 2007) (finding that the Department of Education had express interpretive authority where its implementing statute directs that the agency "shall . . . [i]nterpret the school laws and rules relating to school laws."). Respondent's only express grant of

authority to regulate this area is found in section 68B.32A, which permits Respondent to adopt rules to implement Chapter 68A broadly. *See generally* Iowa Code § 68B.32A. Nowhere in the Iowa Code is Respondent given any interpretive authority over section 68A.505 specifically.

Section 68B.32A addresses Respondent's ministerial duties with respect to administration of Chapter 68A's regulation of campaign finance and reporting, such as prescribing forms, reporting procedures, maintaining records and accounts. *See generally* Iowa Code § 68B.32A. While subsection (9) clearly permits Respondent to establish and impose penalties for violating Chapter 68A, nowhere has the legislature suggested that interpreting section 68A.505 is within the purview of the Board. Section 68A.505's focus on limiting the appropriation of funds for political purposes plainly falls outside of Respondent's interpretive authority.

Nor has the Iowa legislature vested Respondent with any implied authority to interpret section 68A.505. In the absence of express interpretive authority, the court must examine "the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency." *Renda*, 784 N.W.2d at 11–12. A mere grant of rulemaking authority is not dispositive. *Id.* at 13. Courts must

consider the substance of the terms to be interpreted; where the effectuating a substantive term in the law requires the special expertise of an agency, courts are more likely to find that the legislature intended the agency to interpret those terms. *Id.* at 14. As Professor Arthur Bonfield has articulated, courts should only defer to an agency's interpretation "where the General Assembly clearly delegates *discretionary* authority to an agency to interpret or elaborate a statutory term *based on the agency's own special expertness*." *Renda*, 784 N.W.2d at 11 (quoting Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 62 (1998)) (second emphasis added).

Respondent possesses no such special expertise in defining words like "expend" and "moneys." Unlike professional licensing boards, such as the Board of Pharmacy and the Board of Medicine, the Board has no special expertise relative to legislatively imposed limits on public spending. There are no special requirements for members of the Board in terms of qualification or expertise. Iowa Code section 68B.32. Board members are simply appointed by the Governor and must comport with political balancing requirements of section 69.16. *Cf.* Iowa Code § 147.14(b) (requiring the Board of Medicine consist of at least seven health

professionals licensed to practice medicine in Iowa) *and* § 147.14(e) (requiring the Board of Pharmacy consist of at least give health professionals licensed to practice pharmacy in Iowa) *with* § 68B.32(1) ("The [Ethics] board shall consist of six members and shall be balanced as to political affiliation as provided in section 69.16. The members shall be appointed by the governor, subject to confirmation by the senate.").

Additionally, terms that are ubiquitous throughout the code are far less likely to be within the ambit of a state agency's interpretive authority. *See Renda*, 784 N.W.2d at 14 ("When the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing, we have generally concluded interpretive power was not vested in the agency."). "Expenditure" and "public moneys" are hardly terms unique to Chapter 68A. *See, e.g.*, Iowa Code §§ 279.45 ("Administrative expenditures"); 8.54 ("General fund expenditure limitation"); 540A.104 ("Appropriation for expenditure or accumulation of endowment fund . . ."); 331.437 ("Expenditures exceeding appropriations"); *see also* §§ 8F.1 ("This chapter is intended to create mechanisms to most effectively and efficiently monitor the utilization of public moneys by providing the greatest possible accountability for the expenditure of public moneys."); 384.20(2) ("Public moneys may not be expended or encumbered except under an annual or

continuing appropriation."); 97B.7(1) ("There is hereby created as a special fund, separate and apart from all other public moneys or funds of this state"). Neither, for that matter, is the phrase "governing body." *See, e.g.*, Iowa Code §§ 28I.1 ("Authority of governing bodies—joint commission"); 331.251(1) ("The governing body of a participating city or county in office . . . ."); 404B.1 ("The governing body of a county . . . ."). None of these terms are "uniquely within the subject matter expertise" of the Board. *See Renda*, 784 N.W.2d at 14.

Given the language and context of section 68A.505 and the lack of express or implied interpretive delegation to Respondent, the legislature did not "clearly vest" Respondent with interpreting Iowa Code section 68A.505. Lacking this clear authority to interpret section 68A.505, any interpretations by Respondent must be reviewed by the Court for correction of errors at law, a non-deferential standard of review, under Iowa Code section 17A.19(10)(c).

Alternatively, if the Court disagrees and finds that Respondent was "clearly vested" with the authority to interpret section 68A.505, Respondent's interpretation must still pass muster under the more deferential abuse-of-discretion standard. An abuse of discretion occurs when an agency "exercised its discretion on untenable grounds or its exercise of discretion

was clearly erroneous." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000).

> To constitute an abuse of discretion, the action must be unreasonable or lack rationality under the attendant circumstances. An abuse of discretion is synonymous with unreasonableness. A decision is unreasonable where it is not based on substantial evidence . . . or is based on an erroneous application of the law. Evidence is substantial when a neutral, detached, and reasonable person would find it sufficient to establish the fact at issue when the consequences from the establishment of that fact are understood to be serious and of great importance.

Sioux City Community School Dist. v. Iowa Dept. of Educ., 659 N.W.2d 563, 566 (Iowa 2003) (internal citations and quotation marks omitted).

C. Respondent has no authority to reprimand Petitioner under Iowa Code Section 68A.505 because he was not a "governing body."

Iowa Code section 68A.505, by its very terms, only applies to "the governing body of a county, city, or other political subdivision." *See* Iowa Code §68A.505. Because Petitioner is not a "governing body" within the meaning of section 68A.505, the statute necessarily does not apply to Petitioner. Accordingly, any application of administrative rules used to sanction Petitioner under this section is erroneous.

The phrase "governing body" is not ambiguous, and unambiguously excludes county auditors. In *Polk County Board of Supervisors v. Polk County Charter Commission*, the Iowa Supreme Court interpreted the phrase

"governing body" to include both the mayor of a city and the city council. 522 N.W.2d 783, 792–93 (Iowa 1994). In reaching this conclusion, the Court determined that a city mayor, as the "chief executive officer of the city and presiding officer of the council," possesses sufficient "governing powers and functions" to warrant inclusion in the definition of "governing body," including: the authority to oversee "all city offices and departments;" the emergency authority to command control of the police and other police powers; and the authority to "sign, veto, or take no action on an ordinance, amendment, or resolution passed by the council." *Id.* at 792. In his dissent, Justice Carter states the majority went too far in even including the mayor, instead urging that a governing body of a city is that which performs its legislative functions: the city council. *See id.* at 796 (Carter, J., dissenting).

Iowa courts recognize that a "governing body" possesses "broad discretion of a legislative nature" to make decisions on behalf of an entire political subdivision, such as possessed by county supervisors over a county, or a city council over a municipality. *See, e.g., Oakes Const. Co. v. City of Iowa City*, 304 N.W.2d 797, 808 (Iowa 1981) ("The general principle is that governing bodies such as city councils and county supervisors have broad discretion of a legislative nature . . . ."); *Mahaska State Bank v. Kelly*, 520 N.W.2d 329, 332 (Iowa Ct. App. 1994). Judge Farrell, in his ruling on

Petitioner's motion for summary judgment in his capacity as the administrative law judge in this case, agreed. *See* Ruling on Mot. for Summ. J. at 5–8, R. Ex. 9 ("Unlike the position of mayor . . . there is no question that the board of supervisors acts as the governing body of a county, and the county auditor performs other duties as set forth by statute.").

Iowa Code section 331.301 vests the "power of a county" with the board of county supervisors, giving it the plenary ability to "exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents." Iowa Code § 331.301(1)–(2). The Iowa Code further subjects the position of county auditor to the supervision of the board of county supervisors. *See, e.g.*, Iowa Code §§ 331.323(2)(g) (entrusting discretion in establishing number of deputy auditors to the board); 331.903(1) (conditioning auditor's appointment of deputies on the board's approval);

Indeed, among the states, the law generally distinguishes carefully between the rights and duties of "governing bodies" and those of "elected officials." *See, e.g., Traino v. McCoy*, 455 A.2d 602, 605 (Ch. Div. 1982) ("This statute, while authorizing a municipal governing body to prescribe the

duties of its officers and employees, says nothing specific about the regulation of ethical conduct. Moreover, it has been interpreted as not giving a municipal governing body any authority to affect the duties and terms of office of elected officials."); *Cogswell v. Whatcom Cnty.*, No. 47518–5–1, 2001 WL 828499, at *2 (Wash. Ct. App. Div. 1 July 23, 2001) (finding that "the [county] auditor is not an agent of the 'governing body'" of the county); La. Rev. Stat. 40:537 (2016) ("A commissioner . . . may be removed on any such grounds by the chief elected official . . . or if no chief elected official exists, then by the governing body thereof."); La. Atty. Gen. Op. No. 00-259A, 2001 WL 233841 (Feb. 2, 2001) ("The prohibition forbidding the use of public funds for car decals on private vehicles belonging to elected officials does not effect governing bodies . . . .").

Importantly, although elected, county auditors possess no authority over the board of county supervisors; to the contrary, decisions of the auditor not prescribed by statute are in many cases subject to control or override by the county board of supervisors. *See Miller v. Bd. of Supervisors of Linn Cnty.*, No. 13–0278, 2013 WL 6116851, at *7 (Iowa Ct. App. Nov. 20, 2013) (finding that the Linn County Board of Supervisors had the authority to reduce the number of deputy auditors over the objection of the county

auditor, and that, absent authorization of the Board, the county auditor lacked the authority to audit county departments).

The elected position of county auditor does not entail any of the emblematic duties of a "governing body." As county auditor, Petitioner, a single elected official, lacked any power to levy taxes, appropriate funds, or legislate. Accordingly, Petitioner is not a "governing body" within the meaning of Iowa Code section 68A.505 and did not so violate that section by making private, campaign-related cell phone calls in his office during normal business hours.

D. Alternatively, even if Petitioner was a "governing body," Petitioner's conduct did not amount to an "expenditure of public moneys" in violation of Iowa Code section 68A.505.

In the alternative, if the Court finds that the phrase "governing body" is properly interpreted to include the elected position of County Auditor, then Petitioner's conduct did not violate section 68A.505. Section 68A.505 only prohibits "the expenditure of public moneys for political purposes, including expressly advocating the passage or defeat of a ballot issue." The sole ground upon which Respondent reprimanded Petitioner was due to the use of his private cell phone to make campaign-related calls in his government office during normal business hours. *See generally* Order, R. Ex. 22. Respondent has failed to demonstrate that, by simply being present

in a government facility, he caused the "expenditure of public moneys" in violation of section 68A.505. Respondent's application of its administrative rules to reach Petitioner's conduct is further antithetical to the legislative intent of section 68A.505.

Iowa Administrative Code Rules 351—5.1 (68A) define "public moneys" as "public resources generally" and they re-define "expenditure" to mean "use." This expansive interpretation vastly engorges Respondent's authority beyond that delegated to it by the legislature. Black's Law Dictionary defines "expenditure" as "[t]he act or process of spending or using money, time, energy, etc.; esp., the disbursement of funds. . . . A sum paid out." Black's Law Dictionary (10th ed. 2014). Black's Law Dictionary defines "money" as "[t]he medium of exchange authorized or adopted by a government as part of its currency," "[a]ssets that can be easily converted to cash," and "[c]apital that is invested or traded as a commodity." *Id.* Neither buildings nor the depreciation of public property comport with these plain definitions of commonly understood terms.

While Iowa appellate courts have not had the opportunity to define what constitutes an "expenditure of public moneys," the Illinois Supreme Court has interpreted near identical language, and narrowed it its meaning much further than Petitioner argues here. In *Droste v. kerner*, the Illinois

Supreme Court was tasked with deciding whether a conveyance of land constituted a "disbursement" of "public funds." *See* 217 N.E.2d 73, 75–76 (Ill. 1966), *overruled in part on other grounds by Paepcke v. Pub. Bldg. Comm'n of Chicago*, 263 N.E.2d 11 (Ill. 1970). The Illinois Supreme Court rejected the plaintiff's proposed "liberal construction" of that language, concluding that "the legislature could not have contemplated real estate when it referred to 'public funds', nor may this court torture the meaning of the words employed to arrive at that result." *Id.* at 78–79.

As an elected official, Petitioner had no set hours of employment and could switch his attention freely and often between private matters and the responsibilities of office. Iowa Code § 331.502. Petitioner's salary was set by statute, and not determined by units of labor. Iowa Code §331.907. Petitioner's private cell phone calls were not billed to the county. Respondent has not at any point submitted evidence that Johnson County incurred any additional phone charges or increased utility costs as a result of Petitioner's actions. In reprimanding Petitioner, Respondent essentially reasoned that, because the physical office in which Petitioner was present while making the calls on his personal cell phone was a "public resource," the facility depreciated in value which constituted the expenditure of funds. *See* Order at 4, Rec. Exhibit 22.

This logic is untenable when applied to the expenditure of public money. The mere use of something does not necessarily deplete it. Respondent further fails to cite any authority for the novel proposition that simply "using" something constitutes an expenditure. And, even if a public property's "depreciation" in value could reasonably be construed as the "expenditure of public moneys," the State has not actually proven that the building "depreciated" value in any way, shape, or form merely by Petitioner's presence therein.

Contemplating the vast array of conduct that falls within Respondent's jurisdiction to regulate under this interpretation is bewildering. Iowans, by engaging in activities related to a campaign while being present in or on *any* public property, could be sanctioned under Rules 351.5.1 and 351.5.4(2)(b) (68A). No longer could any candidates for public office host campaign debates in public buildings, including schools and public universities; and no longer could candidates for office answer any campaign related questions by their soon-to-be constituents on publicly owned streets, sidewalks, or parks. Indeed the mere exercise of political speech on even traditional public fora such as the grounds outside the Capitol building, outside a public library, the town square, or public sidewalk, when exercised

by a public office holder, would by this theory cause depreciation to public property and be subject to sanction.

No judge in any courthouse in Iowa would be permitted to comment, even *privately* in chambers, on their judicial record worthy of consideration in judicial retention votes. Any Iowa legislator would be prohibited from mentioning their views on campaign issues relating to upcoming elections anywhere on Capitol grounds in and out of session. All candidates for any public office would be resigned to discussing their candidacy only in places entirely owned by private entities, assuming they could get permission to do so. This clearly absurd result requires reversing Respondent's action in this case.

Importantly, as Judge Farrell noted in his administrative ruling,

> The legislature has long-prohibited the type of conduct that the board claims is covered by section 68A.505 in other statutory provisions[in Chapter 721]. . . . The difference between the chapter 721 provisions and section 68A.505 is notable, because the chapter 721 prohibitions are directly related to personal campaigns, whereas section 68A.505 focuses on public ballot campaign.

Ruling on Mot. for Summ. J. at 5–8, R. Ex. 9. Indeed, Chapter 721 criminalizes, for example, improperly using government property for political purposes, Iowa Code section 721.2(8), and misusing publicly owned vehicles for political purposes, Iowa Code section 721.4.

While Respondent may wish it was the duly elected county attorney of Johnson County—the only authority permitted to enforce Iowa's criminal statutes in that county—it is not. This makes Respondent's conduct especially alarming, given that the *actual* Johnson County attorney at the time not only refused to prosecute Petitioner, but explicitly affirmed that his conduct was in fact legal. Sustaining this reprimand against Petitioner essentially promotes Respondent to the role statewide political prosecutor, which it is decidedly not.

E. Respondent's interpretation contravenes the clear statutory intent of the legislature to balance the misappropriation of public funds with the free speech rights of elected officials.

As discussed below, Petitioner has a clear and vested right to engage in core political speech without interference by the State. Iowa Code section 68A.505 expressly includes a provision recognizing these important, constitutionally protected rights, and warns against encroaching on the First Amendment right to free speech: "This section *shall not* be construed to limit the freedom of speech of officials or employees of the state or of officials or employees of a governing body of a county, city, or other political subdivision of the state." (emphasis added). The reprimand of Petitioner in this case flies in the face of this express, manifest legislative intent.

While 68A.505 does generally permit restriction on some aspects of political speech, this exception was intended to prevent the unfair muzzling of public officials in their personal speech in light of the fact they are forced to deal so closely with allocations of state moneys and with public issues of political importance. This conclusion follows rather closely and logically from the fact that the statute is meant to restrain "governing bodies" and not state or local officials or employees. In other words, Respondent went exactly where it was not authorized to go—"limit[ing] the freedom of speech of officials or employees" rather than preventing the misappropriation of public funds. In so doing, Respondent's unnecessary action greatly exceeded the authority the legislature delegated to it, and is therefore unenforceable. Iowa Code § 17A.19(10)(b), (k).

* * *

For these reasons, Petitioner's conduct squarely does not constitute the "expenditure of public moneys" as interpreted by Respondent. Petitioner respectfully requests that the Court reverse Respondent's reprimand of Petitioner and remand this matter to the Board for dismissal.

II. IN THE ALTERNATIVE, IF RESPONDENT PROPERLY REPRIMANDED PETITIONER IN VIOLATION OF SECTION 68A.505, THEN SECTION 68A.505 VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 7 OF THE IOWA CONSTITUTION BOTH FACIALLY AND AS-APPLIED.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. Similarly, article 1, section 7 of the Iowa Constitution provides that "[n]o law shall be passed to restrain or abridge the liberty of speech." Iowa Const. art. 1, § 7. "Political speech, of course, is at the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (internal quotation marks omitted). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

While Petitioner does not challenge the constitutionality of Iowa Code section 68A.505 when properly applied, Petitioner does assert that Iowa Administrative Code Rule 351–5.1(68A) violates the First and Fourteenth Amendments to the U.S. Constitution and article 1, section 7 of the Iowa Constitution both facially and as applied in this case. By barring the mere

"use" of public resources for political expression, Respondent's direct proscription of political advocacy is neither evenhanded nor narrowly tailored, and cannot survive scrutiny at any level.

Further, Rule 351–5.1(68A) is overbroad and vague under First and Fourteenth Amendment standards. By abandoning the statutory concept of illegal "expenditures" of "public monies" and replacing it with a focus on "use of public resources"—and then by further interpreting "use" of public resources to include presence within a public office while making a private political call—Respondent has errantly ventured far into territory forbidden by the First Amendment to the U.S. Constitution and article 1, section 7 of the Iowa Constitution.

A. Standard of Review

With respect to constitutional challenges, Iowa Code section 17A.19(10)(a) provides that relief may be granted if the agency's action is "[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied." Despite the fact that petitioners must raise constitutional issues at the agency level to preserve error for judicial review, agencies "lack the authority to decide constitutional questions." *Soo Line R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). Thus, this Court reviews constitutional issues presented in

judicial review actions de novo. *Id.*; *see also Brummer v. Iowa Dep't of Corrections*, 661 N.W.2d 167, 171 (Iowa 2003).

B. Iowa Administrative Code Rule 351—5.1(68A) is facially unconstitutional

Iowa Administrative Code Rule 351–5.1(68A), and its counterpart Rule 351—5.4(68A), are direct regulations of political expression. These regulations broadly prohibit the "use of public resources generally" "for political purposes, including expressly advocating the passage or defeat of a ballot issue." Speech for "political purposes" necessarily includes political expression and participation in the democratic process.

Respondent acknowledges its sweeping interpretation of section 68A.505: "For the purposes of this chapter, the board will construe the phrase "expenditure of public moneys for political purposes" broadly to include the use of public resources generally." Iowa Admin. Code R. 351—5.1(68A). This broad interpretation includes the non-depleting "use" of public facilities by elected officials. Thus, it prohibits core protected political speech in a broad range of contexts. Speaking about a campaign while on public property is sufficient to violate the rule. Even *de minimus* "uses" for certain expressive purposes are prohibited.

"[T]he First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes

desired by the people . . . .” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971) (internal quotation marks omitted). “At its core, the First Amendment guarantee ‘has its fullest and most urgent application precisely to the conduct of campaigns for political office.’” *Bertrand v. Mullin*, 846 N.W.2d 884, 893 (Iowa 2014) (quoting *Monitor Patriot Co.*, 401 U.S. at 272).

> While debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution, an election campaign is a means of disseminating ideas as well as attaining political office. Consequently, constitutional protection for political speech in the context of a campaign extends to anything which might touch on an official's fitness for office.

Bertrand, 846 N.W.2d at 893–94 (internal citations and quotation marks omitted). As Justice Harlan eloquently noted in *Cohen v. California*:

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests

403 U.S. 15, 24 (1971).

Respondent’s reprimand of Petitioner is wildly inconsistent with these ideals that underpin our representative democracy, and requires reversal by this Court.

1. Iowa Administrative Code Rule 351–5.1(68A) is a content-based regulations of speech, and cannot survive strict scrutiny

Petitioner does not contest that the State has a compelling interest in preventing public, taxpayer money from being improperly used for partisan political purposes. However, that is not what happened in this case. Respondent's regulations interpreting Iowa Code section 68A.505, which prohibit the non-diminutive "use" of public resources, including public buildings and property, for "political purposes" is a content-based restriction on speech. Accordingly, Respondent has failed to use the least-restrictive, most narrowly tailored means of protecting its asserted interest. This broad rule is both over- and under-inclusive and chills core political speech in violation of the U.S. and Iowa Constitutions.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Importantly, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign

motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228 (internal quotation marks omitted). Laws that limit political speech and expression on their face are content-based. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 196–97 (1992) (analyzing law prohibiting electioneering as content-based)

Importantly, "the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Id.* at 197. Thus, a regulation need not specifically target a certain idea or political belief to be unconstitutional; it is sufficient that a law regulate an entire topic of discussion. *See id.* However, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). The viewpoint discrimination need not be explicit; a regulation whose "practical application" affects only one group of speakers or viewpoints is similarly presumed unconstitutional. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994).

Iowa Administrative Code Rule 351–5.1(68A) is not narrowly tailored to achieve the State's interest in protecting taxpayer funds from being spent on partisan elections.

> As with the compelling interest determination, whether or not a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest. A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

Republican Party of Minn. v. White, 416 F.3d 738, 751 (8th Cir. 2005) (en banc). Rule 351—5.1(68A) is unnecessary, overinclusive, underinclusive, and is not the least-restrictive means of regulating the misuse of taxpayer funds by government employees for partisan politics.

Rule 351—5.1(68A)'s broad sweep of prohibiting *all* "use" of county resources, regardless of whether any actual resources are wasted, is unnecessary to protect the misappropriation of taxpayer funds. Respondent has not, at any point in this case, demonstrated that Petitioner's conduct cost Johnson County anything. It is impossible to find that merely standing in a building diminishes its value in any way. Whether Petitioner was on his cell phone or has not actually cost Johnson County anything. Further, as recognized by Judge Farrell in his ruling, there exists an entire section of the

code criminalizing conduct by government officials who embezzle or misuse government property, preempting Respondent's interpretation of Rule 351—5.1(68A). *See* Ruling on Mot. for Summ. J. at 5–8, R. Ex. 9.

As evident in this case, Rule 351—5.1(68A) also sweeps far too broadly by prohibiting conduct that does not advance the state's interest of prohibiting the misappropriation of county funds. As discussed in Part I.D of this brief, every elected official in Iowa is now on warning that use of their personal cell phones in or on any public grounds whatsoever is illegal if it relates at all to their campaign for office, as interpreted by Respondent.

Rule 351—5.1(68A) is also necessarily *underinclusive*. Respondent cannot articulate any argument that an elected official's individual office "depreciates" or loses value more quickly than, say, the general county office he or she controls; or the public entryway; or any other part of a government building; or a public roadway or sidewalk; or a public park. All of these examples of public properties would lose just as much value as a county auditor's individual office if Petitioner had discussed his campaign on or in any of them—that is to say, they would all lose precisely no value.

Finally, Rule 351—5.1(68A) is not the least restrictive means of protecting Respondent's asserted interest in this case. A simple amendment to the rule would arguably salvage it. Rather than "use," Respondent could

prohibit the "depletion" of public funds (or, as the statute actually intends, "expenditure") to ensure that public officials running for office only violate of section 68A.505 when they *actually* cause the county to suffer some financial loss. Given the State's interesting in protecting against the misuse of taxpayer money, this would be the most narrowly tailored approach to do so.

Importantly, Rule 351—5.1(68A) is not viewpoint neutral in its practical application in this case because it is only enforceable against "governing bodies" already in office. It therefore improperly prohibits incumbents from engaging in speech related to their campaigns on government property, while permitting challengers to do so (despite the fact that both would cause the same theoretical harm to the property's value).

2. Iowa Administrative Code Rule 351–5.1(68A) is unconstitutionally overbroad and vague

Additionally, Rule 351—5.1(68A) is unconstitutionally overbroad and vague, and has a chilling effect on the free speech of every political candidate in Iowa. As the U.S. Supreme Court has staunchly recognized, "[a]s additional rules are created for regulating political speech, any speech arguably within their reach is chilled." *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 334 (2010). Enforcement of Rule 351—5.1(68A)

threatens to curtail the constitutionally protected political speech of political candidates and elected officials throughout Iowa.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law is vague if it: 1) fails to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly;" 2) fails to "provide explicit standards for those who apply them" to avoid "arbitrary and discriminatory enforcement;" and 3) where a law reaches the "sensitive areas of basic First Amendment freedoms," contains "[u]ncertain meanings [that] inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 108–09 (internal quotation marks and footnotes omitted). As in this third category, where free speech is threatened, a court must scrutinize the prohibition "even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer. . . . [S]uch a law must be narrowly drawn to prevent the supposed evil." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

Similarly, unconstitutionally overbroad laws threaten the free exercise of speech by chilling the public's exercise of its otherwise lawful speech due

to the nature of the prohibition and the threat of enforcement. *Broadrick v. Oklahoma*, 413 U.S. 601, 611–15 (1973). As the Iowa Supreme Court has recognized:

> [T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep. . . . [E]ven a clear and precisely worded statute may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct. However, for a statute to be invalidated it must reach a substantial amount of constitutionally protected conduct. A single impermissible application of a statute will not be sufficient to invalidate the statute on its face.

State v. Bower, 725 N.W.2d 435, 442 (Iowa 2006) (internal citations and quotation marks omitted).

A case-by-case approach to vindicating core rights of political expression or activity is inappropriate where the existence of an overly broad statute would simply continue to chill protected speech. Requiring "case-by-case determinations [would chill] archetypical political speech . . . . First Amendment freedoms need breathing space to survive." *Citizens United*, 558 U.S. at 329 (internal quotation marks omitted).

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an

> overinclusive law, reduces these social costs caused by the withholding of protected speech.

Virginia v. Hicks, 539 U.S. 113, 119 (2003). This risk is too great in light of the exceedingly important role that core political speech plays in our society.

Thus, because a broad range of protected speech under various scenarios is punishable under Rule 351—5.1(68A) due to its incredibly expansive scope and use of unclear terms like "use," which are being interpreted nonsensically, it must be stricken as facially overbroad. No amount of case-by-case litigation can provide timely relief for those who will be chilled by the broad and vaguely worded regulation and the way it was applied in this case. In curing a defective regulation affecting core political speech, a rule of interpretation that requires case-by-case determinations is to be avoided. *See Citizens United*, 558 U.S. at 892. This Court should invalidate Rule 351–5.1(68A) in its entirety as being inconsistent with and unsupported by its implementing statute, Iowa Code section 68A.505, and constitutional protections for freedom of expression and political activity. Iowans should not be subject to sanction over such vague, overbroad, and arbitrary laws as Rule 351–5.1(68A).

For these reasons, Iowa Administrative Code Rule 351–5.1(68A) is facially unconstitutional in violation of First Amendment to the U.S. Constitution and article 1, section 7 of the Iowa Constitution. The protection

of political speech is of paramount importance when the State attempts to regulate core political speech. Here, we witness the effects of government regulation gone to its extreme without justification, to the extent of punishing Petitioner for engaging in core protected political speech.

C. Iowa Administrative Code Rule 351—5.1(68A) is unconstitutional as applied to Petitioner

Rule 351—5.1(68A) is also unconstitutional as applied to Petitioner in this case for the same reasons discussed above. Even if Rule 351–5.1(68A) could theoretically be enforced constitutionally in some cases, as applied to Petitioner, it was enforced in violation of his right to engage in political speech. Petitioner also reasserts his vagueness claim as applied to his conduct in this case. *See Bower*, 725 N.W.2d at 442 (considering a vagueness claim against Iowa Code section 718.4 as applied to the defendant).

Importantly, the courts have recognized that public employees enjoy less First Amendment protections than non-public employees. In *Pickering v. Bd. of Educ.*, the Supreme Court held that when a government employee is speaking on a matter of public concern the government's restriction of that speech must be subjected to a balancing test; specifically, the courts must weigh the employee's right to speak against the government's interest in promoting efficiency of the services it provides through those employees.

391 U.S. 563, 568 (1968). In *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), the Court included one caveat to the analysis—that employees speaking pursuant to their official duties received no First Amendment protection.

1. As an elected official, Petitioner was not a "government employee" for purposes of the *Pickering* analysis

While the free-speech rights of government employees may be more circumscribed than non-public citizens', there is no clear precedent establishing that elected officials are "public employees" for purposes of *Pickering*. Indeed, courts have distinguished elected officials' speech from that of the un-elected employee, recognizing the important democratic interests at stake in constraining the ability of elected officials to speak, vote, and otherwise represent their constituents freely. The Fifth Circuit Court of Appeals has refused to apply the *Pickering* test to an elected official, opting instead for strict scrutiny. *See Jenevein v. Willing*, 492 F.3d 551, 558 (5th Cir. 2007) ("We are persuaded that the preferable course ought not draw directly upon the *Pickering-Garcetti* line of cases for sorting the free speech rights of employees elected to state office.").

More recently in *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009), *vacated by* 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009), a panel of Fifth Circuit Court of Appeals judges again held that *Pickering* did not apply to

elected officials. The court cited various Supreme Court decisions highlighting the importance of insulating the speech of elected officials from government restriction, and concluded that speech restrictions on elected officials warrant a strict scrutiny analysis, declining to apply Pickering:

> None of the Supreme Court's public employee speech decisions qualifies or limits the First Amendment's protection of elected government officials' speech. Contrary to the district court's reasoning, there is a meaningful distinction between the First Amendment's protection of public employees' speech and other speech, including that of elected government officials. Indeed, the Supreme Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general.

Rangra, 566 F.3d at 523 (footnotes omitted*), vacated by* 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009).[1]

The Supreme Court of Nevada similarly distinguished between elected officials and non-elected government employees, concluding that strict scrutiny, and not the *Pickering* balancing test applied to restrictions on elected officials' speech. *Carrigan v. Comm'n on Ethics*, 236 P.3d 616, 622

[1] *Rangra* was later revisited by the entire Fifth Circuit, which vacated the prior decision and dismissed the appeal on the grounds that the issue was moot. *Rangra v. Brown*, 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009). One Judge dissented from the order dismissing the appeal, however, insisting that the court address the issue en banc. *Rangra*, 584 F.3d at 206.

(Nev. 2010), *rev'd on other grounds by Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011). The Nevada Supreme Court reasoned than an elected official's

> relationship with the state differs from that of most public employees, however, because he is an elected officer about whom the public is obliged to inform itself, and the 'employer' is the public itself, at least in the practical sense, with the power to hire and fire. While Carrigan is employed by the government, he is an elected public officer, and his relationship with his "employer," the people, differs from that of other state employees.

Carrigan, 236 P.3d at 622 (internal citation and quotation marks omitted). While the U.S. Supreme court ultimately reversed *Carrigan*, it made no comment on the Nevada Supreme Court's *Pickering* analysis, resting its decision instead on the type of speech at issue in that case. *See Nevada Comm'n on Ethics*, 564 U.S. at 121. This is consistent with past Supreme Court precedent discussing the free speech rights of elected officials prior to *Pickering*. *See, e.g.*, *Wood v. Georgia*, 370 U.S. 375, 395 n. 21 (1962) ("Petitioner was not a civil servant, but an elected official, and hence this is not a case like *United Public Workers v. Mitchell*, 330 U.S. 75 . . . in which this Court held that congress has the power to circumscribe the political activities of federal employees in the career public service.");

Candidates for political office and elected officials possess a unique and critical interest in the already-heightened protections of free speech;

they, as representatives of the people, use their voice to advocate for the betterment of society and the country. The free speech rights of public office holders are important not only to the personal constitutional rights of the speaker, but as important, the core democratic rights of her constituents, who she represents. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (internal quotation marks omitted). Thus, the Court must "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270.

Indeed, our historic national commitment to the bedrock principle of free and open political debate requires ensuring that politicians can speak freely. "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy" so that their constituents "may be represented in governmental debates by the person they have elected to represent them." *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966). As one

scholar comments, it is *necessary* that "we allow the elected officials . . . some breathing room" when considering restrictions on their speech given the pivotal role they play in communicating the voice of the people:

> The citizenry cannot afford to constantly hover behind their elected officials, peering eagerly over their shoulders at every turn. . . . [T]he people cannot expect to instruct their elected representatives as if they were ordinary "employees," serving at the beck-and-call of their "employer." As such, a degree of separation is not only appropriate, but necessary to the maintenance of our form of republican government.

Christopher J. Diehl, Note, *Open Meetings and Closed Mouths: Elected Officials' Free Speech Rights After Garcetti v. Ceballos*, 61 Case W. Res. L. Rev. 551, 570 (2010).

In 2002, Erwin Chemerinsky vocally criticized the scholarship of his peer, who defended the Model Code of Judicial Conduct's restrictions on elected judicial candidates' speech. *See* Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 Ind. L. Rev. 735 (2002). Chemerinsky urged that "[g]overnment-imposed, content-based restrictions on the speech of political candidates, in virtually any circumstance, are unconstitutional," citing the harm suffered by the constituency in having less access to and information about their candidates. *Id.* at 735, 739.

Other scholars similarly highlight the necessary connection between

an elected official's right to free speech and that of his or her constituent: that the free flow of ideas and debate *mandates* the "free flow of information that will inform [voters] not only about the candidates but also about the day-to-day issues of government." Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 596 (1982).

> "[G]overnments ... derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers." Because government officials in a democracy are merely agents of the electorate, the electorate needs as much information as possible to aid it in performing its governing function in the voting booth. Therefore, "[t]he principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."

Id. (quoting A. Meiklejohn, *Political Freedom*, 9, 11, 27 (1960) (expanded version of Meiklejohn's *Free Speech* (1948)). "Political actions," Redish writes, "have as an essential part of their purpose a communicative aspect," *id.* at 600—communicating the will of the people.

The constitutional issue presented here is not merely a generic question as to the fairness of a certain campaign finance regulation. This case instead touches upon the most pure and central tenet of the First Amendment right to free speech—protecting the ability of both our elected officials and the citizens they represent to fully participate in the democratic process. Petitioner's ability to communicate with the electorate on issues of

broad public importance as well as his fitness to address those concerns as a representative of the people of Johnson County is essential to maintaining the integrity of our representative democracy.

Thus, Petitioner, as an elected official, was not a public employee, and therefore *Pickering* does not apply. Accordingly, this Court should subject Rule 351—5.1(68A) to strict scrutiny for purposes of Petitioner's as-applied claim. As explained above, Rule 351—5.1(68A) does not pass constitutional muster when subjected to strict scrutiny. *See infra* part I.B.

2. Alternatively, even if *Pickering* applies to Petitioner as an elected official, Petitioner's interest in exercising core political speech supersedes any interest proffered by Respondent in this case

Even if this Court were to find that Petitioner, as an elected official, was a "public employee," Respondent's enforcement of Rule 351—5.1(68A) fails to pass muster under the *Pickering* balancing test. It is uncontested that Petitioner was not acting pursuant to his official duties as Johnson County Auditor when making the phone calls (*Garcetti*), and further, Petitioner was speaking on a matter of public concern (*Pickering*). Thus, Petitioner's speech is still entitled to protection; the final step in the *Pickering* analysis is to balance whether the State's interest as an employer in promoting efficiency of the public services it performs through its employees outweighs Petitioner's interest in engaging in the particular speech. *See*

Pickering, 391 U.S. at 568.

Petitioner's interest in engaging in campaign-related speech during normal work hours in his government office greatly outweighs Respondent's asserted (and proven) interest in this case: the loss of absolutely nothing. Respondent may not like the fact that Petitioner, while working fifty-to-sixty-hour work weeks prior to the election, answered a few phone calls at work related to his campaign. This, however, is not an interest strong enough to justify curtailing core political speech in the absence of proof that anything, whatsoever, was "expended" within the meaning of Iowa Code section 68A.505.

In *Brown v. Polk County, Iowa*, the U.S. Court of Appeals for the Eighth Circuit considered the case of a director-level public employee who was reprimanded and later discharged for engaging in express proselytization at work, including making occasional religious statements and displaying religiously themed objects in his office. 61 F.3d 650, 652–53 (8th Cir. 1995). The court held that the defendants violated the employee's First Amendment rights. *Id.* at 654. In so doing, the court found "that the record [revealed] no diminution whatever in the effectiveness of governmental functions fairly attributable to" the plaintiff's conduct, and focused exclusively on the effect on the plaintiff's employees. *See id.* at 658.

The court, engaging in a *Pickering* analysis, found that the State lacked a sufficient justification for retaliating against the employee, even though the State asserted its concerns that members of the public may be uncomfortable or offended by the employee's conduct. *Id.* at 658–59.

Here too, Respondent has failed to demonstrate any diminution of county resources nor any workplace disruption by the use of Petitioner's cell phone alone that could justify Respondent's conduct against Petitioner in light of the exceptionally steadfast protections for core political speech enshrined in the Constitutions of this state and country. Having failed to make any showing that Petitioner conduct affected the county financially or administratively in any way, Respondent's lack any justification for reprimanding Petitioner in violation of his constitutional rights.

* * *

For these reasons, Iowa Administrative Code Rule 351–5.1(68A) as applied to Petitioner's conduct in this case is unconstitutional in violation of First Amendment to the U.S. Constitution and article 1, section 7 of the Iowa Constitution.

CONCLUSION

Respondent is not the Johnson County Attorney—who explicitly informed Petitioner that his conduct was legal. They utterly lack the

authority to sanction Petitioner whatsoever in this case absent any showing that public resources were diminished in any way as a result of Petitioner's conduct, as contemplated by Iowa Code section 68A.505. Assuming Respondent's rules would even apply to Petitioner, Petitioner's fundamental constitutional right to engage in core political speech outweighs, on the record before this Court, any showing of harm to the public as a result of his speech.

The relief sought by the Petitioner in this matter should be granted in accordance with Iowa Code section 17A.19(10)(a)–(c), (k), (l) and (n). Petitioner respectfully requests that the Court render a declaratory judgment finding that:

1. Iowa Code section 68A.505 did not prohibit the Petitioner's conduct in participating in political campaign calls on his private cell phone from within his office;
2. Iowa Administrative Code Rule 351—5.1(68A) is an unconstitutionally overbroad construction of Iowa Code section 68A.505;
3. Respondent's interpretation of Iowa Code section 68A.505 on the face of the regulations and as applied in the course of reprimanding Petitioner is contrary to statute and inconsistent therewith; and

4. Iowans have a constitutional right to freedom of expression and unfettered political activity that prohibits such conduct from being regulated under Iowa Code section 68A.505 when no public monies are being misappropriated.

Petitioner respectfully requests the Court order injunctive relief invalidating Iowa Admin. r. 351—5.1(68A) and directing Respondent to repeal the regulation or amend it to conform to the Court's decision; issue equitable relief reversing the decision of Respondent and lifting the reprimand placed on Petitioner, and additionally, enjoining any further administrative proceedings against Petitioner with reference to this contested case; and order such additional equitable relief as appears necessary and justified in the premises of this case, including attorneys' fees.

Respectfully submitted,

/s/ Joseph Fraioli
Joseph A. Fraioli, AT0011851
ACLU OF IOWA FOUNDATION, INC.
505 Fifth Ave., Ste. 901
Des Moines, IA 50309–2316
Telephone: 515.259.7047
Fax: 515.243.8506
Email: Joseph.Fraioli@aclu-ia.org

/s/ Rita Bettis
Rita Bettis, AT0011558

ACLU OF IOWA FOUNDATION, INC.
505 Fifth Ave., Ste. 901
Des Moines, IA 50309–2316
Telephone: 515.243.3988
Fax: 515.243.8506
Email: Rita.Bettis@aclu-ia.org

Date: October 27, 2016