IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD

IN THE MATTER OF: TOM SLOCKETT, Johnson County Auditor, Appellant	Case No. 2012 IECDB 05 Appeal from Reprimand

Appellant's Brief in support of
Summary Judgment

I. Statement of the Case

A. For purposes of this appeal, the following facts and record as recited by the Order of Reprimand in this case are assumed to be true:

> On this 31st day of May, 2012, a complaint filed against Johnson County Auditor Tom Slockett came before the Iowa Ethics and Campaign Disclosure Board. The Board elects to handle this matter by administrative resolution rather than through a contested case proceeding process. See Iowa Admin. Code r. 9.4(2). For the reasons that follow, the Board hereby reprimands Tom Slockett for using government resources for political purposes in violation of Iowa Code section 68A.505.
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> 4. Telephone calls
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> Mr. Slockett acknowledged working on his campaign while in the office during week of April 16. He said he made telephone calls using his private cell phone to ask people to publicly support his candidacy. Mr. Slockett said he does not believe he initiated any of these calls using the Auditor's phone line but acknowledged that some of his friends and supporters may have returned his call by calling his work number rather than his cell number.
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> Mr. Slockett said he was relying on the advice of both the current and former Johnson County Attorneys when he was making these telephone calls while in the office. Both Attorneys acknowledged they have advised county officials that it is permissible to use government resources for political purposes as long as there is no additional cost to the county.
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> **The Board finds 68A.505 prohibits the use of government resources, including office facilities and equipment, for political purposes regardless of whether or not the use of these resources incurs an additional cost to the government body.** Mr. Slockett expressly advocated for his candidacy when he telephoned people and asked them to publicly support his re-election bid. Mr. Slockett used government

resources-his office-when he made those telephone calls, even though most of them were on his private cell phone.

Nevertheless, the Board finds it is a mitigating factor that Mr. Slockett relied on the advice of counsel when making these telephone calls. Based on past Board precedent, the Board believes a reprimand, the least severe civil sanction, is the appropriate sanction for violating the law in reliance on the advice of counsel. See 2001 IECDB 12.

SUMMARY

Mr. Slockett is reprimanded for using government resources for political purposes in violation of Iowa Code section 68A.505.

"*Reprimand*", Case No. 2012 IECDB05, Iowa Ethics and Campaign Disclosure Board (May 31st, 2012) {*Emphasis Supplied*}

B. The reprimand was issued on May 31st, 2012, just 5 days before the primary election. The Appellant, Mr. Slockett had served as Johson county audtitor since 1977. In the three previous primary elections in which he had an opponent, he more than doubled the votes of his competitors each time. The Board's ethics reprimand has been cited as a likely factor contributing to Slockett's defeat. http://www.kcrg.com/news/local/Weipert-Defeats-Slockett-in-Democratic-Primary-for-Johnson-Co-Auditor-157384535.html.

II. Argument

A. Iowa Code Section 68A.505 cannot be applied to the Appellant's Conduct.

1. The Board's regulations exceed its statutory authority.

Iowa Code § 68A.505 provides:

> 68A.505 Use of public moneys for political purposes.
> 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.
> {*emphasis supplied*}

However, the Ethics Board broadly expanded the scope this statutory prohibition by adopting regulations that extend its coverage to any public official and any use of public property, *viz.*:

> CHAPTER 5
> USE OF PUBLIC RESOURCES FOR A POLITICAL PURPOSE
> **351—5.1(68A) Scope of chapter.**
> 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.
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> This rule is **intended to implement Iowa Code section 68A.505**.[1]

[1] Iowa Administrative Code, Ethics and Campaign Disclosure [351], 351—5.1(68A) Scope of Chapter.

Immediately, it can be seen from these regulations that the Ethics Board claims it is only implementing Section 68A.505, yet it has openly expanded the statutory focus on "expenditures" to include any "use of public resources;" and it has altogether ignored and not even mentioned, the statute's limitation purely to the actions of "governing bodies." Moreover, there is no mention or implementation of the statute's second paragraph instructing against interpretations that "limit the freedom of speech of officials...."[2]

The Board's decision to "construe" the statute so broadly and without limitation was nothing short of a power grab giving it supposed jurisdiction over many more citizens and offenses than had been intended by the legislature.

In this case, the statute simply means no more than what it says: "governing bodies" shall not spend "public moneys" for "political purposes." "In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Ia R. App. Pro. 6.904(3)(m)

> "'In determining what the legislature intended ... we are constrained to follow the express terms of the statute.' State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990). 'When a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms.' State v. Chang, 587 N.W.2d 459, 461 (Iowa 1998). In determining plain meaning, '[s]tatutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them.' State v. Royer, 632 N.W.2d 905, 908 (Iowa 2001)."

Kolzow v. State, 813 N.W.2d 731, 736 (Iowa 2012).

[2] 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. . .."

In this case, the Appellant is clearly not a "governing body;" he is the County Auditor and has no power to appropriate county funds funds. The Oxford Dictionary lists the American English definition of "governing body" as: "a group of people who formulate the policy and direct the affairs of an institution in partnership with the managers, especially on a voluntary or part-time basis:"[3]

In Polk County Bd. Spvs'rs v. Polk Commonwealth Charter Comm'n, 552 N.W.2d 783 (Iowa 1994) a dispute arose over whether even a super council of city mayors (who typically sit on city councils) could be considered a "governing body." The dissent in that case noted that the majority had gone too far in designating a proposed council of mayors as a "governing body:"

> The most common definition for the "governing body" of a municipal corporation is that body which performs legislative functions. Humthlett v. Reeves, 212 Ga. 8, 12, 90 S.E.2d 14, 18 (1955); Borough of Rutherford v. Hudson River Traction Co., 73 N.J.L. 227, 238, 63 A. 84, 88 (1906); Burch v. City of San Antonio, 518 S.W.2d 540, 542 (Tex.1974). Clearly, the mayor of a city does not fall within this definition.

Id., 552 N.W.2d at 796. The dividing line between the fine and hotly contested distinction in *Polk County* lies far away from that separating a county auditor from a board of supervisors. It follows *a fortiori*, that as single elected official, Tom Slockett cannot be a "governing body" when caselaw places the dividing line close to a "council of mayors."

[3] http://oxforddictionaries.com/definition/american_english/governing%2Bbody?region=us&q=governing+body

Further support against the inclusion of a county auditor within the definition of a "governing body" can be drawn from how our legislature has used that term in other sections of the Iowa Code. In our open meetings statute for instance, a "governmental body" is defined as: "a board, council [*or*] commission", a "multimembered body formally and directly created by one or more boards, councils, commissions, or other governing bodies," an "advisory board," "commission" or "task force" created by the governor or the legislature, a publicly supported non-profit corporation, a non-profit gambling corporation, or and advisory board, commission or committee created by executive order to make "recommendations on public policy issues." In all of these examples there is not even a hint that a single official holding elected office should be treated as a "governing body."

2. Section 68A.505 proscribes the "expenditure" of "public moneys" for "political purposes" and not the incidental "use" of public facilities.

The Ethics Board regulations define "public moneys" as "public resources generally" and they re-define "expenditure" to mean "use." Here also, the Board has vastly increased its subject matter jurisdiction and regulatory power by "re-drafting" the statute to cover a broad range of actors and activities not contemplated by the legislature.

In *Droste v. Kerner* the Illinois Supreme court was asked to construe a statute that prohibited the "disbursement" of "public funds" and "public moneys" so as to include the

"sale" of "public property." Employing the "plain language" rule of statutory construction, Illinois' high court rejected such a tortured interpretation of "disbursement" and "public moneys:"

> . . .it is manifest that the 'liberal construction' for which plaintiff contends cannot prevail. Webster's New International Dictionary, 2d ed. p. 2005, defines 'public funds' as being: 'Moneys belonging to a government, or any department of it, in the hands of a public official.' (See also: Cases collected in Words & Phrases, Perm.ed. vol. 35, pp. 164—172.) Approximately the same definition is given in Black's Law Dictionary, 4th ed., p. 802, and this court has on two occasions stated that the word 'funds', in its common usage, 'ordinarily means money or negotiable instruments readily convertible into cash, and has been defined as property of every kind when such property is contemplated as something to be used for payment of debts.' . . . In the face of these accepted meanings, 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.

Droste v. Kerner, 34 Ill. 2d 495,*503-4, 217 N.E.2d 73,*78-9 (1966) {*later overruled on an unrelated point*} Cases in disagreement with *Droste's* "plain language" distinction between public "funds" or "moneys" and the diposition of public property have not been found.

3. The Appellant's expressive and political organizing activities are insulated from censure under Section 68A.505 by its exception for free speech.

The second unnumbered paragraph of Iowa Code Section 68A.505 provides in relevant part:

> 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.

The precise boundaries of this exception are not entirely clear since the statute's general proscription on "political purposes, including expressly advocating the passage or defeat of a ballot issue," would include lawful political expression. The most reasonable and straightforward interpretation of this exception is that, since it singles out public workers for protection, it was intended to prevent the unfair muzzling of public officials in their private speech simply because they are forced to deal so closely with allocations of state moneys.

In other words, state officials, acting in their personal capacities, should have the right to do what everyone else can do when it comes to personal expression—political or otherwise. If the president of the United States can make a political call without having to step outside of the White House grounds, so should Tom Slockett. If a campaign worker or an opposing candidate, can take a few moments at his or her work place to call a supporter on his or her own private cell phone, why shouldn't Tom Slockett be able to do precisely that? Such activities are surely within the ambit of protected speech and not

within the focus of the statute. Indeed, the focus of the statute is upon the diversion of public money into political campaigns. The exception for speech rights of public servants is a directive by the legislature to construe the statute narrowly when an overly zealous interpretation would impede the private speech activities of a public official.

In this case, both a current and a former county attorney had each advised the Appellant that there was no violation of the statute for uses of county resources that do not incur any "additional cost to the government body." [*Order*, "4. Telephone Calls"] Indeed, there appears to be no comparable published decision in the country where a public official has been lawfully punished for making private campaign calls from his or her office. To the exact contrary, our own Eighth Circuit Court of Appeals has held, as a constitutional proposition, that a county administrator had an a right to use his private office quarters to display personal religious objects and messages where the impact on the county's interests was inconsequential: Brown v. Polk Cnty., Iowa, 61 F.3d 650 (8th Cir. 1995). If the supervisor in *Brown* could hang a poster or offer up a spontaneous prayer in his office, Tom Slockett surely had the leeway to make a private cell phone call from his own office quarters.

Although *Brown* was decided under the "Free Exercise of Religion Clause" of the First Amendment, the Eighth Circuit drew first upon the "Free Speech Clause" by making

a strong and principled analogy with a famous U.S. Supreme Court case dealing with freedom of speech in a government work place.

> "*Pickering* recognizes a public employee's right to speak on matters that lie at the core of the first amendment, that is, matters of public concern, so long as 'the effective functioning of the public employer's enterprise' is not interfered with. *Rankin v. McPherson,* 483 U.S. 378, 388, 107 S.Ct. 2891, 2899,...(1987)."

Brown at 658. In this case, the alleged harm to "the effective functioning" of public enterprise was the diversion of public funds for private political purposes—an event that simply did not occur given that there was no incremental cost to the County for Mr. Slockett's political calls. Under *Pickering's* rule, the state has no legitimate grievance against the Appellant's attempts to balance political campaigning with attention to his office duties. The Appellant's political organizing calls were constitutionally protected.

B. Iowa Administrative Code 351—5.1(68A) is unconstitutional as a matter of First Amendment law both facially and as applied in this case.

When the Ethics Board expanded the meaning and scope of Iowa Code Section 68A.505 through adoption of its own regulation and its subsequent application of that regulation to the actions of the Appellant in making campaign calls on his private cell phone from within his public office, it not only frustrated the legislative intent, it also crossed a forbidden constitutional threshold. Few would argue with the original statutory proscription against spending public funds in support of a particular ballot issue or candidate. But 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; the Board ventured far into forbidden First Amendment territory.

In this region of law the state must tread carefully and with great precision.

> '(I)t can hardly be doubted that the constitutional guarantee (of the First Amendment) has its fullest and most urgent application precisely to the conduct of campaigns for political office.' *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971)'

Buckley v. Valeo, 424 U.S. 1, 256 (1976) *C.J. Burger concurring & dissenting op.*

1. Presumptive invalidity

The Ethics board in this case does not object to private activities of government officials while occupying a government office even though these activities may waste public resources in the pursuit of private resources. The Board's regulatory enforcement is directed at such ills **only** when they involve political activity such as campaign speech and organizing. Further the Ethics Board has not uniformly targeted all speech that conceivably "uses" public resources. Private telephone calls from private government office quarters are apparently tolerated. Nor are all political calls even treated alike. Private calls in which government officials express political opinons are seemingly

tolerated, but what is prohibited are private calls that are made in support of a political campaign. Even then, it can be seriously questioned whether the Ethics Board would reprimand a private citizen who makes a private campaign call while occupying ("using") an interior space in a public building, so there is discrimination among speakers as well as subject matter.

In sum, the Board's policy as enforced here, discriminates solely against public officials who make private calls from within their office quarters in aid of a political campaign. That discrimination is "content-based" because it relates only to campaign calls; and it is "viewpoint-based" because, at least as a practical matter, it only operates against calls made by political incumbents, thus taking sides in an election.

> Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns. *Minneapolis Star,* for example, considered a use tax imposed on the paper and ink used in the production of newspapers. We subjected the tax to strict scrutiny for two reasons: first, because it applied only to the press; and, second, because **in practical application** it fell upon only a small number of newspapers.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 659 (1994). {*emphasis added*}

The focus on private campaign speech is also of concern. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991). *Simon & Schuster* dealt with

the imposition of an content-based tax on publications, but the principle quoted would extend to other speech burdens as well.

> "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984). Discrimination against speech because of its message is presumed to be unconstitutional. See *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 641–643, 114 S.Ct. 2445, 2458–2460, 129 L.Ed.2d 497 (1994)."

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

When a general statute prohibiting constitutionally protected speech lacks neutrality toward speech or certain speakers or subjects it is not necessary to engage in protracted analysis for such discrimination is precisely what the First Amendment forbids. *See*, Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd., 502 U.S. 105, 117,*126-7, 112 S.Ct. 501, 509, 116 L. Ed. 2d 476, (1991) (J.Kennedy concurring). A statute that discriminates against speech on the basis of viewpoints or content is *presumptively invalid*, and the Plaintiff's *prima facie* burden ends with this showing.

Because the regulatory enforcement in this case is "presumptively unconstitutional," there is no need, at this point, for full strict scrutiny analysis. *Id.* It is certain however, that any extended analysis, if undertaken, would need to satisfy the strictures of strict scrutiny:

> [*S*]ubstantial burdens on the right ... to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless **essential to serve a compelling state interest**."

Storer v. Brown, 415 U.S. 724,*729 (1974). {*emphasis supplied*}

> If a **less restrictive alternative** would serve the Government's purpose, the legislature must use that alternative. To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.

U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803,*813, 120 S.Ct. 1878,*1886, 46 L.Ed.2d 865 (2000) {*emphasis supplied*}

The requirements of strict scrutiny in this context are strenuous:

> "Once a state interest is found to be sufficiently compelling, the regulation addressing that interest must be narrowly tailored to serve that interest. ... 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**). ... In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as *precisely* tailored as possible."

Republican Party of Minn. v. White, 416 F.3d 738,*751 (8th Cir. 2005) (*en banc*) {*boldface supplied, citations omitted*}.

Applying these principles, it is not evident, that Iowa Administrative Code Section 351—5.1(68A) pursues a truly "compelling" state interest in prohibiting private cell phone calls, in aid of a campaign, from within a public space. Violation of the underlying statute is only a serious misdemeanor even though it requires the actual misappropriation of public funds. This begs the question of how important the legislature would judge less serious, even inconsequential, conduct under the Board's derivative regulation to be. *Compare*, In re Primus, 436 U.S. 412, 424–25, 98 S.Ct. 1893, 1901 (1978)[4] Here, the Board seeks to prohibit **solicitation** of campaign supporters from a public office. In *Primus,* the U.S. Supreme Court found that the state's interest in preventing lawyers from **soliciting** clients was insufficiently established by the mere promulgation of "broad prophylactic rules." IAC 351—5.1(68A) is a "broad prophylactic rule"

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[4] "South Carolina's action in punishing appellant for soliciting a prospective litigant... on behalf of the ACLU, must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights....' *Buckley v. Valeo,* .... South Carolina must **demonstrate** 'a subordinating interest which is **compelling**,' *Bates v. City of Little Rock,* ..., and that the means employed in furtherance of that interest are 'closely drawn to avoid unnecessary abridgment of associational freedoms."

Primus, 436 U.S. 412, 424–25, 98 S.Ct. 1893, 1901 (1978){*citations omitted, emphasis added*}

"...the Disciplinary Rules in question permit punishment for mere solicitation unaccompanied by proof of any of the substantive evils that appellee maintains were present in this case. In sum, the Rules in their present form have a distinct potential for dampening the kind of 'cooperative activity that would make advocacy of litigation meaningful,' *Button, supra*, at 438, 83 S.Ct., at 340, as well as for permitting discretionary enforcement against unpopular causes."

Id. at 433

> '[b]road prophylactic rules in the area of free expression are suspect,' and ... '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' 371 U.S., at 438, ...; see *Mine Workers v. Illinois Bar Assn.*, 389 U.S., at 222-223, ...

Primus at 1904-5

Assuming arguendo, that the state does have a compelling interest at stake, the Ethics Board's regulation and enforcement decisions in this case are not "**narrowly tailored**" given that the broad net cast by the Board catches even instances such as this, where there is no actual impact on the public treasury (*i.e.,* "**over-inclusive**"). Nor can it be shown that such a wide net is "**necessary**" to achieve the state's goal, since any actual misappropriations of public funds would presumably be addressable through existing criminal statutes such as theft and embezzlement, and other statutes relating to the removal of officials from office for demonstrable misconduct or malfeasance (*i.e.,* not "**essential,**" not the "**least restrictive alternative**"). Nor can it be said that the regulatory enforcement under challenge actually "**advances**" the asserted goal, given that it does not reach a vastly greater population of people outside the Board's jurisdiction who may also usurp public resources for political purposes (*i.e.,*"**under-inclusive**"). The Board's regulation and enforcement posture do not satisfy strict scrutiny in any of its particular requirements.

2. Overbreadth & Vagueness

The Appellant, Tom Slockett, sought the advice of legal counsel before engaging in the conduct that lead to his reprimand by the Ethics Board. These weren't just any lawyers; they were, in fact, current and former county prosecutors who had primary responsibility for interpreting and enforcing the strictures of Iowa Code Section 68A.505. How clear can the Board's regulatory implementation of that statute be, when even reasonable, seasoned prosecutors were unable to anticipate the violation later claimed by the Board in sanctioning the Appellant?

A principal[5] flaw in the Board's regulation, and perhaps the crux of this case, lies in its use of the verb "use" which is one of the most generalized and non-specific verbs in the English language. When used with an object, the word use has many different connotations and substantive meanings:

> **use** [v. yooz or, for past tense form of 9, yoost; n. yoos] verb, used, us·ing, noun
>
> verb (used with object)
>
> 1. to **employ** for some purpose; put into service; make use of: to use a knife.
> 2. to **avail** oneself of; apply to one's own purposes: to use the facilities.
> 3. to **expend or consume** in use: We have used the money provided.

[5] The Appellant reserves the issue of the vagueness of the terminology "political purposes" as used in the underlying statute should it become necessary to raise at a later point in this proceeding.

4. to **treat or behave toward**: He did not use his employees with much consideration.
5. to **take unfair advantage of**; exploit: to use people to gain one's own ends. 6. to drink, smoke, or ingest habitually: to use drugs.
7. to **habituate or accustom**.
8. Archaic . to practice habitually or customarily; **make a practice of**. ...

Dictionary.com, http://dictionary.reference.com/browse/use?s=t {*emphasis added*)

It can be seen that to "use" public resources, could variously mean to "expend or consume" them, or to "take unfair advantage of" them, or to customarily involve them in an activity, or to "avail" oneself of them on a single occasion. Whereas the underlying statute concentrates on dissipation or diminution of public moneys the Board's regulation, as set forth and as applied in this case, has no focus on expenditure, loss or consumption. How much association there needs to be between a government facility and a political activity before "public resources" are "used" cannot be determined by reference to the Board's regulation or by comparison to the statute.

A narrowly tailored construction of the Board's regulation is not possible, nor logical, since Board employs such language as "construe ...broadly" and "the use ... generally." Even if the regulation could be interpreted in narrow terms, the Ethics Board chose not to do so in this case. The Appellant could not have been reprimanded but for the Board's broad application of its own already overly broad regulation.

The Ethics Board has no where to move in defense of its regulation and actions. The Board has worded and enforced its legal requirements to reach protected speech and political activity. Ordinary citizens and lawyers are understandably confused about what is proscribed.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values.
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> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.
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> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.
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> Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked.'

Grayned v. City of Rockford. 408 U.S. 104,*108-9, 92 S.Ct. 2294,*2298-9, 33 L.Ed.2d 222 (1972) {*text reformatted for clarity*}

"Vague laws in any area suffer a constitutional infirmity." but when "First Amendment rights are involved,...[*the United States Supreme Court looks*] 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, 86 S.Ct. 1407,*1410, 16 L. Ed. 2d 469 (1966). Under these standards, the Board's regulation and enforcement stance are unconstitutionally "vague" under the "Due Process" clause of the Fourteenth Amendment and the protections for freedom of speech and political activity under the First Amendment to the U.S. Constitution and corresponding provisions of the Constitution of the State of Iowa (Art. I, §§1, 2, 7 & 9).

Nor is such fatal vagueness and over-breadth confined to the Board's regulation "as applied" only to the Appellant's conduct. As a person charged civilly with violating Iowa Code Section 68A.505, the Appellant has over-breadth standing to challenge the Board's regulation on its face.

> "the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v. Pfister, 380 U.S., at 486, 85 S.Ct., at 1121. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

The U.S. Supreme Court has indicated that 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. ""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, 123 S.Ct. 2191,*2197 (2003) {*emphasis added*}. "...[*T*]he First Amendment does not require 'case-by-case determinations' if 'archetypical' First Amendment rights 'would be chilled in the meantime.'" John Doe No. 1 v. Reed, ___U.S.___,130 S. Ct. 2811,*2846 (2010) J. Scalia concurring.

Thus, because a broad range of protected speech is conceivably punishable under the Board's regulation, it must be stricken as facially overly broad. 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.

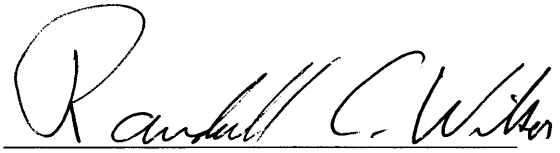
> "Applying ...[*the government's suggested standard*] would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime. ' 'First Amendment freedoms need breathing space to survive.' ' *WRTL, supra,* ... (quoting *NAACP v. Button,* .... We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned..."

Citizens United v. Fed. Election Com'n, 558 U.S. 310, 892 (2010).

Conclusion

The constitutional duty of this tribunal is not simply to remove the Board's reprimand. In order to preserve necessary breathing space for First Amendment freedoms it must also declare Iowa Administrative code 351—5.1(68A) to be contrary to statute and to the Iowa and federal constitutional provisions that protect free speech and core political activity. The reprimand must be overturned and the board's regulation should be declared null and void for the reasons stated above.

Respectfully Submitted:



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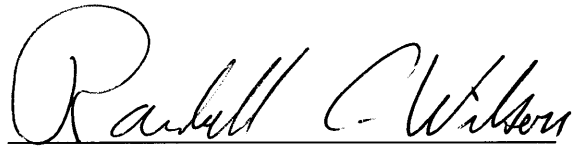
CERTIFICATE OF SERVICE:
I certify by my signature on this document that on November 9th, 2012, I served each of the parties to this action in compliance with Fed. R. Civ. Pro. 1.442 :

Service by: _√__Mail ____E-mail ____Fax



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