IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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

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Petitioner submits the following reply brief in response to issues raised in Respondent's responsive brief.

I. Respondent's ad hoc rationalizations for its expansive interpretation of Iowa Code section 68A.505 conflicts with the plain language of the statute, legislative intent, and constitutional restraints.

The plain language of Iowa Code section 68A.505 constrains Respondent's ability to sanction Petitioner for calls made on his private cell phone while in the Auditor's Office in the manner it has in this case. Yet, throughout its response, Respondent refers to the administrative regulations themselves to justify its own exercise of power. The regulations, enacted subsequently to Iowa Code chapter 68A, cannot serve as ad hoc justifications for the actual legislative intent underpinning section 68A.505.

The Court has made clear that "[i]f the statutory language is plain and the meaning clear, we do not search for legislative intent beyond the express terms of the statute." *See Pub. Emp't Relations Bd.*, 744 N.W.2d 357, 360–61 (Iowa 2008) (finding the Public Employment Relations Board was afforded powers to implement and administer statute by the legislature, but was not delegated interpretive powers). As a longstanding and guiding principle of statutory interpretation, courts must read all parts of the statute to avoid rendering any part of it superfluous, while simultaneously seeking a

reasonable interpretation that best effectuates the statute's purpose and avoids an absurd result. *Id.*

But here, the Respondent asks this Court to violate those longstanding principles of statutory construction, by (a) ignoring the plain language of the statute itself (in its limited prohibition on "expenditure"), instead searching for legislative intent in the Respondent's subsequent regulations (in their far broader prohibition on "use"); and (b) in rendering meaningless the expressed legislative intent to read the statute narrowly to avoid infringing on protected speech.

A. The plain language of the statute regulates expenditure of monies, not mere use.

In the first instance, Respondent argues in support of its interpretation of section 68A.505 that "the legislature adopted section 68A.505 in order to prohibit express advocacy while on government property or using government resources absent one of the exceptions found in rule 351—5.5." Resp't Br. at 11. Rule 351—5.5, however, did not exist when the legislature created section 68A.505, and thus legislative intent cannot be gleaned from Respondent's own interpretation of the law after the fact (which is not entitled to deference). "Expenditure" means what it did when the legislature adopted it, and not what Respondent attributes to it after the fact. *See Pub.*

Emp't Relations Bd., 744 N.W.2d at 360–61 ("To determine the legislature's intent, we first examine the language of the statute.").

While Respondent references various exceptions to its expenditure rules contained in the regulations, those exceptions sidestep the issue at hand. For example, Iowa Administrative Code rule 351—5.5(2)(68A) permits "[a]ny public resource that is open to a member of the general public" to be used for political purposes. This is irrelevant to Petitioner's claim. Whether Petitioner engages in such speech in his individual office or a member of the public engages in such speech in the hallways outside of that office, in neither case has a public resource been "expended" as per the definition of Iowa Code section 68A. Respondent still has cited no authority for its assertion that "expenditure" means "use."

If the legislature wanted to limit mere use, and not expenditure, which necessarily entails the consumption or diminution of money, assets, or value, it would have used the word "use" as Respondent did in its regulation; it did not do this. Given the stringent requirements for public employees that exist in the Hatch Act (discussed below), for example, the legislature certainly had available to it the knowledge of how to do this (i.e., it could have chosen to prohibit engaging in political activity by public employees while merely

present on government property). Instead, the legislature chose not to do so as evidenced by the plain text of section 68A.505.

In this case, assuming this Court agrees with Respondent that Petitioner is a "governing body" within the meaning of section 68A.505, Respondent simply has not and cannot demonstrate any expenditure of public money—diminution of value or assets. *See* Pet'r. Br. at 23–28. Respondent concedes this by instead arguing that mere use should be sufficient. Resp't Br. at 16 ("It is not necessary that the Board prove an *additional* expenditure or depreciation of the office building.")

B. The plain language of the statute contemplates narrow construction to avoid infringing on protected speech, not broad construction as Respondent asserts.

Respondent also suggests that, in addition to being entitled to deference in its statutory interpretation of section 68A.505, it has broad authority to interpret section 68A.505. Resp't Br. at 14 ("In keeping with this broad authority to interpret and enforce chapter 68A . . . ."; "Mr. Slockett criticizes the Board's broad construction [of "expenditure"] . . . ."); *see also* Iowa Admin. Code r. 351—5.1 (stating that the Board will "broadly" construe "expenditure" in section 68A.505 "to include the use of public resources generally"). On the contrary, the legislature expressly limited that scope of 68A.505 to prohibit the encroachment on free speech.

Iowa Code § 68A.505 ("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 fact that section 68A.505 includes this express constitutional limitation is further evidence that the legislature did not intend to vest interpretive authority to an administrative agency. Additionally, "administer[ing] and establish[ing] standards for" campaign finance practices does not imply the legislature intended Respondent to have full and vast interpretive authority over section 68A.505. *See* Iowa Code §68B.32(1).

As then-Administrative Law Judge Farrell discussed in his proposed order at the agency level, the legislature intended section 68A.505 to be interpreted extremely narrowly:

> [Section 68A.505] was first adopted in 1991 at a time when there was litigation and other debate about the ability of political subdivisions to use public funds to support or oppose ballot issues. At the same time the legislature considered the adoption of the statute, the Iowa Supreme Court was considering a case whether a school board improperly authorized public funds to retain a consulting firm to perform a facilities assessment prior to a bond issues. The decision was issues on June 19, 1991, but the case was pending while the legislature considered the same issue. During that same year, the Attorney General issued an opinion to Kay Williams, the Executive Director of the Campaign Finance Disclosure Commission, on a similar question regarding use of funds to advocate on ballot issues. The opinion was issued after the

> legislation had taken effect, but Ms. Williams sought advice regarding whether a political subdivision could legally use public funds to support a ballot issue prior to the effective date of the statute. The opinion also stated that a prior opinion request had been denied, thus showing the issue was raised more than once during 1991. This history shows a public concern focused specifically on the question whether public funds could be used to support or oppose ballot issues, as opposed to a wide range of conduct.
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> Section 68A.505 was directly responsive to those concerns. . . . The governing body simply cannot use public moneys to otherwise promote its position. Because the expenditure of public funds must be authorized by the political subdivision's governing body, there was no reason for the statute to reference other government officials or employees.

Ruling on Mot. for Summ. J. at 6–7, R. Ex. 9 (internal footnote omitted); *see also* 1991 Iowa Acts 463 (creating now-section 68A.505); 1999 Iowa Acts 281 (adding "the state" among covered entities and expanding the exceptions by allowing for opinions through the passage of resolutions and proclamations). The case referenced by Judge Farrell was *Leonard v. Iowa St. Bd. of Educ.*, 471 N.W.2d 815 (Iowa 1991), wherein the Iowa Supreme Court held that the local school board's retaining of a consulting firm with public money was not improper.

For these reasons, Respondent's proposed expansive interpretation of section 68A.505 is unsupported by the plain text of the statute and is legislative history.

II. Petitioner was neither a governing body nor the agent of one

In response to Petitioner's argument that a county auditor is not a 'governing body' subject to Respondent's reach under section 68A.505, *see* Pet'r Br. at 19–23, Respondent strains to argue for the first time that Petitioner was acting as an agent of a governing body at the time he engaged in the political speech at issue in this case, and therefore, was himself a governing body. *See* Resp't Br. at 12–13. Respondent notably cites no authority for the proposition that independently elected county auditors are "agents" of county boards of supervisors, as contemplated in agency law.

The Restatement (Third) of Agency states that "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01, at 17 (2006); *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 100 (Iowa 2011). Agency law applies in situations where "one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person." Restatement (Third) of Agency § 1.01 cmt. *c*, at 18.

The county auditor is not an agent of the county board of supervisors. The county auditor is independently elected, with unique duties and functions in government, as are the individual members of the board of supervisors, and cannot affect the "legal rights and duties" of the board of supervisors. The auditor cannot bind the board of supervisors, by, for example, passing county ordinances, or in any other manner. The county auditor is the agent only of the Office of the County Auditor, as are those employees which are vested with authority to bind the office, and the Office of the County Auditor is not a governing body. *See* Pet'r Br. at 19–23.

Ironically, even if this were true, it would not impute the obligations and requirements of section 68A.505 on the board of supervisors to each of their agents; rather, it would be a means of securing a chain of liability from the agent to the principal in the event the agent violated the law. In other words, were Respondent correct that Petitioner was acting as an agent of the county board of supervisors in engaging in the speech at issue in this case—which is untenable—then the county board of supervisors, as the principal, and not Petitioner, would be the properly sanctioned party.

III. The legislature has not vested Respondent with the broad authority it asserts to regulate all expenditure of public moneys.

In the alternative to its agency argument, Respondent argues that it has been vested, through section 68A.505, with the authority to limit the expenditure of public moneys for political purposes by anyone. *See* Resp't Br. at 13 ("It is reasonable for the Board to interpret the statute to mean that the Board, acting on behalf of 'the state,' shall not 'permit the expenditure of public moneys for political purposes,' which the Board has done through the promulgation of rules that apply to all government employees and officials, including a county auditor.").

This novel interpretation of section 68A.505 is perplexing. As an initial matter, the board cannot assert alternative ad hoc justifications for limiting core political speech in this way. Moreover, of course, the plain text of the statute is where the Court must first look to construe the legislature's intent, and here, the plain text of the statute is clear, and belies the Respondent's bizarre interpretation.

Section 68A.505 first designates who is subject of the regulation: "the state and the governing body of a county, city, or other political subdivision." Then, it sets out the regulation imposed on the subjects' behavior: "shall not expend or permit the expenditure of public moneys for

political purposes, including expressly advocating the passage or defeat of a ballot issue." Iowa Code § 68A.505. Here, the normal construction of "permit the expenditure" refers to when the state or governing body of a county, city, or other political subdivision" should allow its employees or others in possession of its funds to expend those funds. By its own terms, only those who are currently in possession or control of "public moneys" could not expend those monies for political purposes.

This is the only reasonable interpretation of section 68A.505. By Respondent's 'alternative' construction, the word "state" would mean that *any* agency or commission, and not only Respondent, could control and sanction "all government employees and officials, including a county auditor." *See* Resp't Br. at 13. Finally, again by the plain text of the statute, the 'state' is not the same as the 'board' as they are used in Chapter 68A. Section 68A.102 sets out the definitions for many of the words used throughout the chapter, including the contested provision, section 68A.505. Had the legislature intended the statute to read that 'the *Board* shall not permit' it would have done so.

Indeed, chapter 68A defines "Board" to mean "the Iowa ethics and campaign disclosure board established under section 68B.32." When the Board is referred to throughout the chapter, the word "Board" is accordingly

used; as contrasted to the chapter's use of "state," which also occurs throughout chapter 68A. Then, throughout the chapter, the two words are used to refer to Board as opposed to the larger state, distinctly, and where state is being used to refer to the government of the state of Iowa, as opposed to a political subdivision. *See*, Iowa Code chapter 68A, *passim*. The legislature clearly by its plain text intended the two words to have two different meanings. Accordingly, as used in chapter 68A, the "Board" is the entity that enforces the campaign finance provisions *against* the "state."

Because Respondent is a state agency, *see* Iowa Code section 68B.32(1), it would be reasonable to read section 68A.505 as prohibiting the Respondent itself from expending money for political purposes or permitting its employees to do so. However, 68A.505 is clearly not meant to vest all of the state and the governing body of every county, city, or political subdivision of the state with enforcement capacity, as Respondent's 'alternative' ad hoc theory of its own power posits.

IV. Respondent's reliance on the Hatch Act in support of its argument is misplaced, and further supports a finding that Petitioner is not an "employee" for purposes of *Pickering*.

Respondent's discussion of the Hatch Act provides further support for this Court finding that Petitioner, as an elected official, is not an "employee" for First Amendment purposes.

Respondent suggests that its own regulations governing elected officials' exercise of their right to engage in core political speech is reasonable compared with the Hatch Act's regulations, which are more restrictive. The Hatch Act, for example, prohibits certain federal employees from engaging in political activity "in any room or building occupied in the discharge of official duties" of anyone employed by the United States Government. 5 U.S.C. §7324(a)(2).

Importantly, *no elected officials fall within the Hatch Act's scope*. By design, the Hatch Act only applies to employees of the executive branch of the Federal Government; exempt are the only members of the executive branch who are elected to their positions—the President and Vice President. *See* 5 U.S.C. §7322(1). The Act does not apply to any federal employees of the legislative or judicial branches. *See id.*

The Hatch Act generally serves to address three key goals: 1) fighting corruption and partisanship; 2) ensuring that political affiliation does not become a requirement for government hiring and protecting them from being required to engage in political activity; and 3) maintaining the appearance of nonpartisanship and propriety to the civilians with whom these employees interact. *See generally* Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. Pa. J. Lab. &

Emp. L. 225, 272–73 (2005). Maintaining impartiality and efficiency of government offices engaged in routine administration is a compelling and necessary component of governance. That the government has an interest in restricting non-elected federal employees from engaging in express partisan political activity to achieve these goals is persuasive. That the government similarly has an interest in likewise restricting elected officials is not. The constitutionality of the Hatch Act, however, is not at issue in this case.[1]

At the State level, this same reasoning does not apply to individuals who hold, and are seeking to continue to hold, offices that are themselves subject to partisan elections. The structure of Iowa's executive branch is inherently different than the Federal Government's, and the many elected officials therein who hold office at the county or municipal level have a

[1] It should be noted, however, that the Supreme Court has not ruled on whether the government-property restrictions, for example, of the Hatch Act are constitutional as applied. Further suspect is whether such restrictions, as applied here, would survive strict scrutiny as applied to an elected official. Further, Respondent's suggestion that the definition of "political activity" and "express advocacy" found in Iowa Code section 68A.102(14) is necessarily less restrictive than that found in the regulations governing the Hatch Act are highly suspect. *Compare* Iowa Code § 68A.102(14) *with* 5 C.F.R. 734.101. While the Hatch Act prohibits *partisan* political activity in a government building, it would not prohibit the advocacy of a ballot measure, making Iowa's regulations more expansive. *See* 5 C.F.R. 734.101. Further, the reach of the Hatch Act to mere expressions of opinions is questionable and chills the expression of otherwise protected political speech. *See* Carolyn M. Abbate, Note, *It's Time to "Hatch" A New Act: How the OSC's Interpretation of the Hatch Act Chills Protected Speech*, 18 Fed. Circuit B.J. 139 (2008).

unique relationship to both their constituents and to the State. The citizens expect that unelected government employees who hold non-elected office will not, for example, engage in partisan political activity in their office; the same is not true for elected officials holding an elected office amidst, who are literally hired by their constituents to fulfill partisan objectives.

In short, Iowa Code section 68A.505 is not an Iowa version of, nor analogous to, the Hatch Act. For these reasons, it is far more compelling that Petitioner, as an elected official, should not be subject to the same requirements as unelected government employees for purposes of a *Pickering* analysis.

V. Forum analysis does not apply to this case, and in the alternative, the government's regulations are unreasonable and arbitrary.

Finally, Respondent's jurisprudentially erroneous introduction of forum analysis into this case would improperly lower the standard of review this Court must apply to Respondent's actions. Forum analysis simply has no applicability here.

Courts "[employ] forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech." *Christian Legal Soc'y of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010). Importantly, this Court will only reach

Petitioner's First Amendment claims if it rejects all of Petitioner's previous arguments and finds that Petitioner is properly within section 68A.505's scope and that mere physical presence within a structure constitutes an "expenditure of public moneys."

Engaging in forum analysis further demonstrates why Respondent's interpretation of "expenditure" is flawed. In enacting section 68A.505, the legislature was not attempting to regulate the expenditure of money that occurs in only nonpublic fora, but expenditure generally and in any location. If a government employee within section 68A.505's reach was to, for example, use government money to purchase political campaign signs while in the comfort of their own home, they would obviously still run afoul of section 68A.505. Section 68A.505 contains absolutely no limitation on *where* the expenditure must occur; it is sufficient that an improper expenditure occurred at all. *See* Iowa Code § 68A.505.

The problem with Respondent's interpretation of "expenditure" is that it seeks to morph a statute aimed at combatting the improper spending of public money into a Hatch Act-like ban on partisan speech on government property. The problem with this reasoning is that the purpose of the public-property exclusions in the Hatch Act itself is not preventing the misuse of funds, but avoiding the appearance of impropriety during daily government

operations within the executive branch. Those same justifications, as discussed above, are simply inapplicable in the offices of partisan elected officials. The President does not suddenly become nonpartisan upon his or her inauguration; rather, the President is considered the national standard-bearer of his or her political party *while simultaneously* executing the duties of the office on behalf of all Americans. To expect anything less of elected officials across the country is untenable.

If it is true that physical presence in a structure constitutes "use" which thereby constitutes an "expenditure," then Respondent, as directed by the legislature, would not have the authority to create "forum exceptions" because section 68A.505 contains no exceptions based on the location of the expenditure. Respondent cannot implicitly *authorize* the expenditure of public moneys in public fora merely because it has determined that such an expenditure would not be inappropriate. But the definition of "public moneys" cannot change based on where the "expenditure" occurs; an expenditure has either occurred or it has not. Respondent cannot have its cake and eat it too. By suggesting forum analysis applies here, Respondent is yet again proposing an ad hoc justification for its reprimand of Petitioner that is unsupported by the text and history of section 68A.505.

Alternatively, even if this Court were to disagree with all of Petitioner's arguments, and find that forum analysis applies here, Respondent's regulation of Petitioner in this case fails to pass constitutional muster. In nonpublic fora, the government may place restrictions on speech that may be otherwise protected under the First Amendment "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). For all the reasons expressed above, Respondent's regulation is utterly arbitrary in its determination that the political speech at issue here may not occur in nonpublic fora, while the exact same speech would be unrestricted in public fora, despite the fact that the *exact* same "use" or "expenditure" of both properties would result.

As discussed above, the application of section 68A.505 only to such speech occurring in nonpublic fora serves no campaign finance or ethical objectives, let alone the objections of laws such as the Hatch Act, because elected officials are *expected* to engage in partisan speech and further partisan objectives to fulfill the expectations and desires of their constituents. Respondent has conceded that the exact same speech occurring in a public forum contained within a government building would not run

afoul of section 68A.505, Respondent's Brief at 16–20, 30, but offers no reason as to why, for example, the speech at issue here is more properly reserved for the public hallway of the county administration building, rather than behind the closed doors of the county auditor's office.

This arbitrary result is patently unreasonable, and fails to suffice even the lowest burden of review.

VI. Conclusion

Petitioner was reprimanded simply because Respondent did not like the speech in which Petitioner engaged while in the county auditor's office. But this is not an employment case; Petitioner was reprimanded for "expending" resources for political purposes. However, the Board has failed to demonstrate that his merely being inside of an office, let alone a building, causes the "expenditure" of public resources, and has further failed to prove any such loss at the agency level.

When elected officials engage in activity that frustrates or angers the public, and no *employment* action is taken to remedy it, or it is not actionable in an employment context because no such remedy is needed, the public may oust that individual in the next election by exercising their right to vote. Here, while the Board may be dissatisfied that a salaried incumbent county auditor of thirty-plus years spent some time during one week of an election

year answering campaign-related phone calls on his personal cell phone in his office, it has not proven that Petitioner "expended" county funds in doing so.

For these reasons, the Court should grant Petitioner's requested relief in this case.

Respectfully submitted,

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