NO. 21-0999
Polk County No. CVCV060495

IN THE
SUPREME COURT OF IOWA

SAVE OUR STADIUMS, DANIEL PARDOCK, TAMARA ROOD, DANIEL TWELMEYER, AND KATIE PILCHER,
Plaintiffs - Appellants,

v.

DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, KYRSTIN DELAGARDELLE, HEATHER ANDERSON, ROB BARRON, DWANA BRADLEY, TEREE CALDWELL-JOHNSON, KALYN CODY, AND KELLI SOYER,
Defendants - Appellees.

ON APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
JEFFREY FERRELL, DISTRICT COURT JUDGE

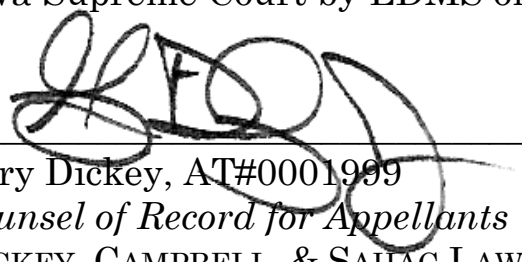
FINAL BRIEF FOR APPELLANTS

Gary Dickey
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

PROOF OF SERVICE & CERTIFICATE OF FILING

On March 11, 2022, I served this brief on all other parties by EDMS to their respective counsel, and I emailed a copy of this brief to appellants.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on March 11, 2022.



Gary Dickey, AT#0001999
Counsel of Record for Appellants
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

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ROUTING STATEMENT

Because this case presents substantial issues of first impression and urgent issues of broad public importance, the Iowa Supreme Court should retain jurisdiction. Iowa R. App. P. 6.1101(2)(f).

STATEMENT OF THE CASE

This action concerns the Des Moines Independent Community School District's ("District") plan to use $15 million from the Secure and Advanced Vision for Education ("SAVE") fund to pay for the construction of an outdoor athletic facility in cooperation with Drake University. The District's school board refused to direct the county auditor to place ballot issue on the proposed use of SAVE fund revenue at the next election despite receiving a referendum petition containing over 7,100 signatures. Plaintiffs filed suit in district court seeking a declaratory judgment, writ of mandamus, injunctive relief, monetary damages, punitive damages and attorney fees against the District and members of the school board of directors. (App. at 7). Following cross-motions for summary judgment, the district court entered an order dismissing plaintiffs' claims. (App. at 432). This appeal follows. (App. at 453).

STATEMENT OF THE FACTS

On November 13, 2019, the District announced a plan to construct a nearly $20 million outdoor athletic sports facility to be located on the Drake University campus. (App. at 34). On May 19, 2020, Defendants passed a resolution proposing to use SAVE revenue for the construction of the proposed stadium on Drake University's campus. (App. at 35). All seven individual Defendants voted in favor of the resolution. (App. at 35). The resolution, by its own terms, provides the right of eligible electors in the school district to petition for a referendum on the proposed use of the SAVE revenue:

> Eligible electors of the school district have the right to file with the Board Secretary a petition pursuant to Iowa Code § 423F.4(2)(b), on or before close of business on June 2, 2020, for an election on the proposed use of SAVE Revenue. The petition must be signed by eligible electors equal in number to not less than one hundred or thirty percent of those voting at the last preceding election of school officials under Iowa Code § 277.1, whichever is greater.

(App. at 34).

In response to the District's resolution, Daniel Pardock formed a group on Facebook called "Save our Stadiums" to

organize citizens concerned about stadium proposal. (App. at 585). On Tuesday, June 2, 2020, Pardock delivered a petition containing 7,120 signatures from eligible electors requesting a special election on the question of the District's proposed use of SAVE revenues. (App. at 621). The other individual plaintiffs are signatories to the referendum petition. (App. at 10).

Pardock handed the petition to Erin Jenkins who was acting as a representative on behalf of the District's board secretary Shashank Aurora. (App. at 609, 634, 654-655). Jenkins brought the petition to Aurora's office. (App. at 656). Defendants did not return the petition to Pardock, nor did they notify him that he lacked the number of required signatures. (App. at 612, 659). The next day, the attorney for Save our Stadiums emailed the District's board members correspondence requesting that they place the issue on the next agenda to the next meeting and "either rescind [the] prior resolution or direct the county commissioner of elections to put the question to a vote." (App. at 532).

Defendants did not rescind the original resolution proposing to use SAVE fund revenue for the outdoor athletic facility. (App.

at 38). Nor did they direct the county auditor to call a special election upon the question of using SAVE fund revenue for the stadium. (App. at 38). Accordingly, plaintiffs filed a lawsuit in the Iowa District Court for Polk County. (App. at 7).

The parties filed cross-motions for summary judgment. In their motion, plaintiffs asked the court to decide as a matter of law that (a) the 7,120 signatures on the referendum petitions constituted more than thirty percent of people who voted in the November 5, 2019, election of school officials pursuant to Iowa Code section 423F.4(2)(b); and (b) defendants waived to reject the petition for insufficient signatures by failing to return the petition to Pardock. (App. at 54-59). In turn, Defendants filed a motion for summary judgment asserting that (a) Plaintiffs failed to submit the requisite number of signatures; (b) Plaintiffs did not present a facially valid petition; (c) Plaintiffs have not been deprived of due process; and (d) Plaintiffs were not entitled to punitive damages.

After hearing, the district court entered summary judgment in Defendants' favor. (App. at 432). At the outset of the ruling,

the court concluded that the District had not filed the procedures set forth in Iowa Code section 277.7 for rejecting a petition for insufficient signatures. (App. at 438). Nonetheless, the district court concluded that the District's failure to follow the statutory procedures was simply a "technical violation" and therefore harmless. (App. at 439-441). The district court also concluded that the 7,120 signatures in the election petition did not constitute more than "thirty percent of the number of voters at the last preceding election of school officials under section 277.1" as required under Iowa Code section 423F.4(2)(b). (App. at 441-446). Finally, the court concluded that Plaintiffs' due process claim failed because section 423F.4(2)(b) only grants them a "right to petition to obtain the right to vote." (App. at 449-450). Accordingly, the District's conduct did not burden Plaintiffs' right to vote. Additionally, the court ruled that the District's failure to return the petition for insufficient signatures was not "conscience-shocking." (App. at 450).

Plaintiffs filed a timely notice of appeal. (App. at 453).

ARGUMENT

I. THE SCHOOL BOARD AND ITS MEMBERS VIOLATED IOWA CODE SECTION 423F.4(2)(b) AS A MATTER OF LAW BY FAILING TO HOLD A REFERENDUM OR RESCINDING THEIR RESOLUTION AFTER RECEIVING A PETITION WITH A SUFFICIENT NUMBER OF SIGNATURES

Error Preservation

Appellants preserved the issues presented in this appeal by moving for summary judgment and obtaining a ruling in which the court necessarily decided the issues. (App. at 50, 345, 432).

Standard of Review

The Court reviews rulings on motions for summary judgment for correction of errors of law. *Winger Contracting Co. v. Cargill, Inc.*, 926 N.W.2d 526, 535 (Iowa 2019).

Analysis

A. Applicable Legal Principles

In 2008, the Iowa General Assembly created the Secure an Advanced Vision for Education ("SAVE") program in the state treasury under the control of the department of revenue. Iowa Code § 423F.2(2). The moneys available in a fiscal year in the SAVE fund are distributed by the department of revenue to each

school district on a per pupil basis calculated using each school district's budget enrollment. *Id.* § 423F.3(a). As relevant to this litigation, a school district may use allocated SAVE revenue for any authorized infrastructure purpose as well as the payment of principal and interest on bonds issued for such infrastructure purposes. *Id.* § 423F.3(1). A school district may issue bonds from its anticipated share of future SAVE fund revenue to pay for current infrastructure projects. *Id.* § 423F.4(1).

Prior to the sale of bonds, the district must publish notice and hold a hearing. *Id.* § 423F.4(2)(a). Additionally, the public may petition for a referendum:

> if at any time prior to the fifteenth day following the hearing, the secretary of the board of directors receives a petition containing the required number of signatures and asking that the question of the issuance of such bonds be submitted to the voters of the school district, the board shall either rescind its adoption of the resolution or direct the county commissioner of elections to submit the question to the registered voters of the school district at an election held on a date specified in section 39.2, subsection 4, paragraph "c". The petition must be signed by eligible electors equal in number to not less than one hundred or thirty percent of the number of voters at the last preceding election of school officials under [Iowa Code] section 277.1, whichever is greater. If the board submits the question at an election and a majority of those voting

> on the question favors issuance of the bonds, the board shall be authorized to issue the bonds.

Id. § 423F.4(2)(b). Any petition filed with the school board to request an election on a public measure[1] "shall be examined before it is accepted for filing." *Id.* § 277.7. If the petition "lacks the required number of signatures," the school board must return it to the petitioners. *Id.* § 277.7(1). "Petitions which have been accepted for filing are valid unless written objections are filed." *Id.* § 277.7(2). "Objections must be filed with the secretary of the school board within five working days." *Id.* Such objections "shall be considered not later than two working days following the receipt of the objections by the president of the school board, the secretary of the school board, and one additional member of the school board chosen by ballot." *Id.* §§ 277.5(2), 277.7(2).

B. The thirty-percent threshold necessary to force a referendum under Iowa Code section 423F.4(2)(b) was only 5,353 voters based on the certified abstract of the November 5, 2019, election of school officials

The core issue in this litigation requires the Court to determine the "number of voters at the last preceding election of

[1] A public measure includes bond issues. *Id.* § 52.25(1).

school officials" as set forth by the Iowa General Assembly in Iowa Code section 423F.4(2)(b). If it is the number of people who actually cast votes in the at-large school board director's race, then Plaintiffs are entitled to judgment as a matter of law. If it is the number of people who received a ballot in the 2019 general election — even if they did not cast a vote in the school election races — then Plaintiffs are not entitled to judgment as a matter of law.

The unambiguous text of section 423F.4(2)(B) decides this case. The number of signatures required to trigger a referendum on the Defendants' stadium financing proposal is "the number of *voters* at the last preceding *election of school officials* under [Iowa Code] section 277.1." Iowa Code § 423F.4(2)(B) (emphasis added). A "voter" is a person who performs the act of voting.[2] *See* Voter,

[2] "Voter" sometimes refers to someone who is eligible to vote. In section 423F.4(2)(b), however, the Iowa General Assembly uses the term "eligible elector," which means a "person who possesses all the qualifications necessary to entitle the person to be registered to vote, whether or not the person is in fact so registered." Iowa Code §39.3(6). It also uses the term "registered voter" elsewhere in the Code to refer to the class of people "registered to vote pursuant to chapter 48A." *Id.* §39.3(10). From its various word choices for different classifications of voters, it is

Black's Law Dictionary at 1576 (6th ed. 1998); Voter, www.merriam-webster.com/dictionary/voter#legalDictionary ("one that votes"); *see also Young v. Iowa City Cmty. Sch. Dist.*, 934 N.W.2d 595, 606 (Iowa 2019) (expressing preference for *Black's Law Dictionary* and *Merriam Webster's Law Dictionary*). A person performs the act of voting in Iowa occurs by marking marks on his or her ballot in the corresponding space provided. *See* Iowa Code §§ 49.46, 49.84, 49.92, 49.98, 49.99, 52.1(2). As Polk County election director John Chiodo explained, a person marks his or her ballot by filling in the oval or square for a particular race:

> Q. So when somebody obtains a ballot, and let's walk through all four ways, how do they cast a vote in that election?
> A. How do they cast a vote?
>
> Q. Correct.
> A. Casting a vote is filling in the oval before their name, or the square.

(App. at 542). A person also may "write-in" the name of another for whom he or she desires to vote, but "the ballot must also be marked in the corresponding space in order to be counted." Iowa

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clear the General Assembly intended for "voter" to refer to the narrow class of people actually perform the act of voting.

Code § 49.99(1). Ballots are "counted according to the voters' marks on them." Iowa Code § 49.98. A ballot is not counted if it is not marked or if the choice of the voter is impossible to determine. *Id.* Likewise, "[i]f a person votes for more than the permitted number of candidates, the vote for that office shall not count." *Id.* § 49.93.

From the ordinary meaning of the text of section 423F.4(2)(b), it necessarily follows that the "number of voters at the last preceding election of school officials" refers to the number of people who performed the act of marking their ballots for the November 5th at-large school board director race. The last election of school officials preceding the District's resolution occurred on November 5, 2019. (App. at 37). The "election of school officials" on the ballot included contests for Director Districts #1, #2, and #3 as well as a race for a Director At Large. (App. at 248, 491, 530-531). On November 19, 2019, the Polk County Board of Supervisors certified the "abstract of votes cast" in the November 5th election. (App. at 524, 549-550).

According to the certified abstract, 25,009 individuals residing in the District received a ballot for the November 5th school and city elections. (App. at 570). Of those receiving a ballot, only 17,843 individuals voted in the at-large school district race. (App. at 570). Thirty percent of the 17,843 voters in the November 2019 "election of school officials" equals 5,353 voters. (App. at 37). Thus, Pardock's referendum petition contained more than enough signatures under section 423F.4(2)(b). At that point, the District had two options: (a) direct the county auditor to put the question to the voters at the next election; or (b) rescind the resolution for the use of SAVE fund revenue. Iowa Code § 423F.4(2)(b). The District's refusal to do either constitutes an undeniable violation of section 423F.4(2)(b).

C. Plaintiffs' interpretation of section 423F.4(2)(b) is consistent with its purpose, and history

The interpretation of a statute is "ideally organized in four parts: text, structure, purpose, and history." Bryan Garner, *Tips on organizing your table of contents for statutory and contractual*

interpretations, ABA Journal (Oct. 1, 2015);[3] *see also Gen. Dynamics Land Sys., Inc., v. Cline*, 540 U.S. 581, 600 (2004) ("We see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one."); *accord Doe v. State*, 943 N.W.2d 608, 610, 613-14 (Iowa 2020). Even if the text of section 423F.4(2)(b) is ambiguous (which it is not), the other traditional tools of statutory construction support Plaintiffs' interpretation. *See* Iowa Code § 4.6 (identifying extrinsic aids to consider when interpreting ambiguous statutes). The language and structure of section 423F.4(2)(b) make clear "the purpose of the statute is to give voters an avenue to regulate" their school district's use of SAVE funds. *See Young*, 924 N.W.2d at 607. By giving the voters the right to call a special election, "the legislature provided a check on potential abuse by elected school officials" in the use of their district's SAVE funds. *Id.* Accordingly, Plaintiffs are

[3] *Available at:* https://www.abajournal.com/magazine/article/tips_on_organizing_your_table_of_contents_for_statutory_and_contractual_int

entitled to a "liberal construction" of section 423F.4(2)(b) that will "best effect its purpose rather than one which defeat it." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 15 (Iowa 2010) ("We look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purposes rather than one which will defeat it").

The legislative history further supports Plaintiffs' interpretation. The General Assembly granted voters the ability to seek a special election in 2019 as part of a package of oversight measures specifically related to the use of SAVE funds for the construction of athletic facilities. *See* 2019 Iowa Acts, ch 166 §§ 12-17. For example, in the same legislation, the legislature expressed its intent that districts prioritize the use of SAVE funds to improve attendance centers before expending revenues for athletic facility infrastructure projects. *Id.* at § 15. Further, the legislature added the requirement that a district hold a public hearing on the issue of the construction of an athletic facility prior to using SAVE funds under an existing revenue purpose

statement. *Id.* at § 16. It was against this backdrop that the Iowa General Assembly granted Iowa citizens that right to petition for a special election as to the use of SAVE funds. Plaintiffs' interpretation, therefore, is consistent with that text and purpose of section 423F.4(2)(b) as well as its legislative history—all of which demonstrate the legislature's intent to give the public a means of oversight of a school board's use of SAVE funds. It makes sense, therefore, to tether the signature threshold to the number of individuals who actually voted in the prior election of school officials rather than to the number of people who received a ballot to vote in the city election but did not bother to vote in the school election.

D. The district court's interpretation of section 423F.4(2)(b) ignores the statute's text, structure, and history

Rather than engage in the conventional process of statutory interpretation by analyzing the text, structure, purpose, and history, the district court relied upon a hodgepodge of other considerations. Strangely, the court below entirely sidestepped any textual analysis of section 423F.4(2)(b) and instead examined

the legislative history of section 277.1. (App. at 443). In particular, the court found persuasive the General Assembly's 2017 amendment, which moved school and city elections to the same date. (App. at 443). The court also noted that the General Assembly amended section 49.41 a person to run for city office and a school board office "in the same election." (App. at 444). From these amendments, the court concluded that "the legislature viewed city and school board elections a combined election." (App. at 444).[4] Consequently, the court adopted the District's interpretation that the required number of signatured should be calculated from the total number of voters in the 2019 election—

[4] To make matters worse, the district court is simply wrong in its view of the historical significance of the 2017 legislative amendments. By its terms, HF566 merely provided for the "combined administration" of the city and school elections. *See* HF566 at Div. II (2017) (www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HF%20566) Specifically, the legislation synchronized the dates of the city and school elections as well as specified the order in which the offices shall appear on the ballot. *Id.* It did nothing more. In all substantive respects, the city and school elections remain entirely separate and distinct. School elections remain governed by Chapter 277 of the Iowa Code, and city elections remain governed by Chapter 376 of the Iowa Code.

regardless of whether a voter marked his or her ballot for any school board race. (App. at 442, 446).

The district court's reliance on the 2017 amendments as persuasive authority is puzzling. The text of section 423F.4(2)(b) adopted by the General Assembly in 2019 requires the court to determine the number of voters in the preceding "election of school officials." Iowa Code § 423F.4(2)(b). Thus, even if the legislature intended to combine the elections in 2017, it expressly limited the calculation in section 423F.4(2)(b) to the "election of school officials." The express mention of the "election of school officials" in section 423F.4(2)(b) necessarily infers that the legislature did not intend to count individuals who marked their ballots for the city council races but not the school board candidate races. *See Peak v. Adams*, 799 N.W.2d 535, 548 (Iowa 2011) (finding persuasive the statutory construction rule *expression unius est exclusion alterius*).[5]

[5] The district court also noted that 23,154 people voted on the school district's public measure on the ballot in November 2019. (App. at 444). A vote on a public measure does not fall within the ambit of section 423F.4(2)(b)'s referendum calculation because it does not involve an "election of school officials." Iowa

The district court also criticized Plaintiffs' interpretation as unworkable because some people may have voted for in a district race, but not in the at-large race—and vice-versa. (App. at 444). According to the court below, the only way to count the undervotes would be to manually review the ballots, which the auditor may not have even retained. (App. at 445). The court, however, overlooks that the county auditor maintains "tally books" which are "individual reports from each scanner at the precinct level," which the Polk County Auditor retains permanently. (App. at 135, 545, 548). According to Chiodo, the tally books include the number of undervotes:

> Q. And if you wanted to figure out the official number of undervotes, how would you do that?
> A. How would I get the number of undervotes for --
>
> Q. Yes.
> A. From a report.
>
> Q. You do generate it and call it an undervote?
> A. Yes.
> Q. Or I'm sorry, what's the report called?
> A. What's that?
>
> Q. What's the report called?

Code § 423F.4(2)(b). For this reason, the 23,154 votes for the public measure are wholly immaterial.

A. You have the election summary that you can include under and overvotes, the voter turnout report and the canvass report.

Q. And so you would have to look at all of those to determine that?
A. One of those would have unders and overvotes included in there. You can figure it from either one of those.

Q. On the tally, does the tally have over and undervotes on it?
A. What do you mean by tally?

Q. The tally books?
A. The tape?

Q. Yes.
A. From the machines, yes.

(App. at 157-158, 570-571). Accordingly, the auditor is able to get an accurate count of the undervotes for each race at the scanner level within each precinct.

E. The district court's interpretation of section 423F.4(2)(b) undermines the statute's purpose

If the purpose of school board referendum statutes is to provide voters a "check on potential abuse by elected school board officials," it would naturally follow that the referendum threshold would be determined by the universe of voters that have demonstrated an interest in the election of school board officials.

Conversely, it makes little sense to count individuals who obtained a ballot in November 2019 simply to vote in the city election but not in any school board director races. The district court's interpretation, therefore, would undermine the purpose of section 423F.4(2)(b) by raising the bar on citizens who desire to provide oversight of school officials by including individuals who did not even bother to vote in the election involving some of the same officials. The 2019 Des Moines city election is a case in point. The top of the ticket featured a hotly contested mayoral race that featured a former state senator and Democratic nominee for governor challenging a multi-term incumbent mayor.[6] Not surprisingly, a total of 24,836 votes were cast in the mayoral race—compared to only 17,843 votes cast in the DMICSD director at large race. The district court did not meaningfully explain how including single-contest voters in the calculation furthered the legislative purpose behind section 423F.4(2)(b).

[6] *See* https://en.wikipedia.org/wiki/2019_Des_Moines_mayoral_election

II. THE DISTRICT AND ITS MEMBERS WAIVED THE RIGHT TO CHALLENGE THE NUMBER OF SIGNATURES IN THE REFERENDUM PETITION WHEN THE SECRETARY FAILED TO RETURN IT TO THE PETITIONERS AS REQUIRED UNDER IOWA CODE SECTION 277.7

Error Preservation

Appellants preserved the issues presented in this appeal by moving for summary judgment and obtaining a ruling in which the court necessarily decided the issues. (App. at 50, 345, 432).

Standard of Review

The Court reviews rulings on motions for summary judgment for correction of errors of law. *Winger Contracting Co.*, 926 N.W.2d at 535.

Analysis

The court below correctly found that the District failed to comply with the procedures set forth in Iowa Code chapter 277 for rejecting a petition for an insufficient number of signatures. Iowa Code section 277.7(1) requires a school board to "examine" a special election petition "before it is accepted for filing.". Iowa Code § 277.7(1). That did not happen. Pardock delivered the petition on June 2, 2020, but the board secretary did not examine

the petition until three days later on June 5, 2020. (App. at 656). In addition, if a petition "lacks the required number of signatures it shall be returned to the petitioners." Iowa Code §277.7(1). *Id.* Otherwise, it "shall be accepted for filing." *Id.* Because the District never returned Pardock's petition – either before or after examination – it was accepted for filing as a matter of law. And, once a petition has been accepted for filing, it is "valid unless written objections are filed . . . within five working days after the petition was filed." *Id.* at § 277.7(2). It is undisputed that no objections were filed to Pardock's petitions. In sum, the District could have either returned Pardock's petition for an insufficient number of signatures or filed an objection to the petition after it was accepted for filing. Because they did neither, they waived any right to challenge the validity of the petition under section 277.7.

Despite finding that the District failed to comply with section 277.7, the district court concluded the error harmless. This is clear error. The reason for the procedures set forth in section 277.7 is self-evidence. First, the requirement for the immediate return of the petition is so that petitioners can obtain

additional signatures to meet the legal threshold before the filing deadline expires. Second, the objection process allows the dispute to be considered administratively where a record can be developed for judicial review. Both purposes were frustrated by the District's statutory violation.

More importantly, the violation implicates the right of citizens to petition their government and vote on a matter of public importance. The Iowa Supreme Court has long recognized that "regulatory measures abridging the right to vote must be carefully and meticulously scrutinized." *Chiodo v. Schultz*, 846 N.W.2d 845, 856 (Iowa 2014) (quoting *Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978)). Because the right to vote is so highly prized, statutes "must be construed liberally" in favor of the voter. *Devine*, 268 N.W.2d at 623; *accord Young*, 934 N.W.2d at 605. The district court's application of harmless error to the District's clear statutory violation is incompatible with these longstanding principles.

III. THE REFUSAL TO HOLD AN ELECTION AS REQUIRED UNDER IOWA CODE SECTION 423F.4(2)(B) VIOLATES PLAINTIFFS' DUE PROCESS

Error Preservation

Appellants preserved the issues presented in this appeal by moving for summary judgment and obtaining a ruling in which the court necessarily decided the issues. (App. at 50, 345, 432).

Standard of Review

The Court reviews rulings on motions for summary judgment for correction of errors of law. *Winger Contracting Co.*, 926 N.W.2d at 535.

Analysis

If due process means anything, it means that a school district cannot deprive its residents the right to vote when the legislature has clearly vested them with that right. There can be no meaningful dispute that the right to vote is a fundamental right in Iowa and across the country. *Chiodo*, 846 N.W.2d at 848. "It occupies an irreducibly vital role in our system of government by providing citizens with a voice in our democracy and in the election of those who make the laws by which all must live." *Id.*

"The right to vote is found at the heart of representative government and is preservative of other basic civil and political rights." *Id.*

Two cases from federal courts of appeals aptly illustrate that the wholesale deprivation of the right to vote gives rise to a due process violation. In *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), for example, the Fifth Circuit held that the refusal by Georgia state officials to call a special election to fill a position on the Georgia Supreme Court violated the electors' constitutional right to vote. *Id.* at 693. The court reasoned that because Georgia law required a special election following the resignation of any elected official, the governor's appointment of a successor to a retiring justice constituted a violation of substantive due process. *Id.* at 699-700. Officials who deny the "electorate the right granted by state statute" present a "patent and fundamental unfairness in the electoral process." *Id.* at 703. In the Fifth Circuit's view, no claim is "more deserving of constitutional protection than the allegation that state officials have purposely abrogated the right to vote." *Id.* at 704. Accordingly, the court held that "the due

process clause of the fourteenth amendment forbids state officials from unlawfully eliminating that fundamental right." *Id.*

Similarly, in *Bonas v. Town of North Smithfield*, 265 F.3d 69 (1st Cir. 2001), the First Circuit held that a Rhode Island town's failure to hold an election as required by its charter gave rise to a due process claim. *Id.* at 71, 73, 78. The court held that the town's refusal to hold an election required by state law "would work a total and complete disenfranchisement of the electorate, and therefore, would constitute a violation of due process (in addition to being a violation of state law)." *Id.* at 75. From *Duncan* and *Bonas*, it follows *a fortiori* that the District's disregard of Plaintiffs' right to a referendum on the bond issuance violates their substantive due process right to vote.

The district court's analogy of this case to *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 694 (Iowa 2002) is misplaced. In that case, a Polk County citizen challenged the "petition process" for obtaining a public vote on the issuance of urban renewal bonds on the basis that it "violates the due process rights under the Iowa Constitution because it unreasonably limits

the ability of citizens to petition the Board for a referendum." *Id.* at 688. In rejecting Bowers' challenge, the Iowa Supreme Court identified the liberty interest at stake as "the right to petition for the right to vote, which was not guaranteed because the Board retained the ability to abandon the bond issue if it so chose." *Id.* at 694. Because the right to petition for the right to vote is not fundamental, the court held that rational basis review applied. *Id.* at 694-95. Almost reflexively, the court found a reasonable fit between the government purpose and the petition process. *Id.* at 695.

Plaintiffs' due process claim is an animal of a different stripe. Here, Plaintiffs do not challenge the petition process under section 423F.4(2)(b). Instead, they seek to vindicate the substantive right to vote section 423F.4(2)(b) grants them *because they satisfied the petition process*. In this way, Plaintiffs' due process claim involves their fundamental right to vote. Any analogy to the *Bowers* decision, therefore, misses the mark.

It is somewhat academic in the end. Even under *Bowers*, the Iowa Supreme Court identified the right to petition for the right to

vote as a liberty interest subjection to rational basis review. *Id.* at 694-95. Defendants do not assert any basis for failing to call a special election as required by section 423F.4(2)(b) – let alone a rational one. Their deliberate indifference to the substantive and procedural requirements of section 423F.4(2)(b) and chapter 277 is not a rational basis sufficient to survive Plaintiffs' due process challenge.

CONCLUSION

For the reasons set forth above, the district court's summary judgment ruling must be reversed.

REQUEST FOR ORAL ARGUMENT

Appellants requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $15.00, and that that amount has been paid in full by me.

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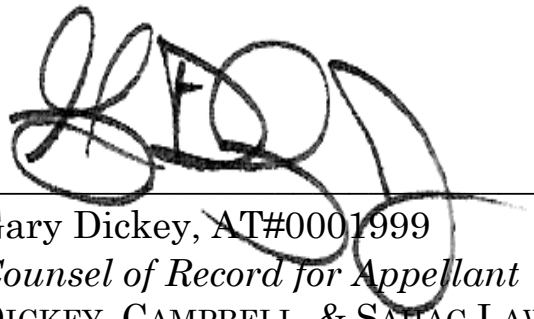

Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com