IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1427

JOHNSON COUNTY LAW NO. CVCV07149

HEATHER YOUNG, DEL HOLLAND, AND BLAKE HENDRICKSON,
Plaintiffs/Appellants

VS.

THE IOWA CITY COMMUNITY SCHOOL DISTRICT; CHRIS LYNCH INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF THE BOARD OF DIRECTORS AND DIRECTOR; LATASHA DELOACH INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF THE IOWA CITY COMMUNITY SCHOOL DISTRICT; BRIAN KIRSCHLING INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF THE IOWA CITY SCHOOL DISTRICT; AND PAUL ROESLER INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF THE IOWA CITY COMMUNITY SCHOOL DISTRICT;
Defendants/Appellees

Appeal from the Iowa District Court for Johnson County
The Honorable Sean McPartland, Judge

# APPELLANTS' FINAL BRIEF
# AND
# REQUEST FOR ORAL ARGUMENT

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## PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 24th day of January, 2019, I electronically filed this pleading with the Clerk of Court for the Supreme Court of Iowa. I certify that all participants in the case are registered electronic filing users and that service will be accomplished by this electronic filing.

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## STATEMENT OF THE CASE

### A. Nature of the Case

What should the remedies be when a governmental body refuses to hold a statutorily required referendum election which threatens to overturn the government's chosen course of action? Plaintiffs contended that these remedies include a civil rights cause of action and therefore brought this 42 USC §1983 and §1985 case after Defendants Iowa City Community School District and certain of its school board members (collectively "The School District") refused to hold a required referendum election which threatened to derail The School District's plan to demolish an elementary school building. The Trial Court ruled that Plaintiffs were statutorily entitled to a referendum vote but also ruled that their constitutional rights were not violated. This appeal followed.

### B. Course of Proceedings.

The relevant procedural events are as follows:

1. The School District scheduled a general obligation bond referendum vote for September 12, 2017 to fund a building plan which contemplated the demolition of its Hoover Elementary Building ("Hoover"). Plaintiffs (collectively "Referendum Petitioners") opposed this demolition and circulated a Code §278.1 referendum

petition to require an election, also to be held on September 12, 2017, on whether Hoover should be demolished. (Ex. A to July 17 petition; App.P. 32-207) (Heather Young Affidavit Paragraphs 2-3; App.P. 420-421). The School District conceded that this petition contained the required number of signatures, was timely submitted to The School District, met all other statutory requirements, and that no objections under Code §277.7 were filed against it. (Defendants' Response to Plaintiffs' Statement of Undisputed Facts, Paragraphs 2-3, 5- 7; App. Pages 852-854).

2. On July 11, 2017 the individual defendants, following the advice of The School District's attorney, voted to declare the demolition referendum petition to be unauthorized by Iowa law, refused to forward it the County Auditor, and thereby blocked the election on the demolition question. (July 11 minutes; App. Page 421, 464-465).

3. On July 17, 2017 Referendum Petitioners filed their lawsuit seeking damages and injunctive relief mandating submission of their petition to the County Auditor in time to be placed on the September 12, 2017 school election ballot. (Petition; App. Page 24).

4. On September 6, 2017 the Trial Court issued its ruling which granted a temporary injunction ordering The School District to submit the referendum petition to the County Auditor. However the Trial Court did not order placement of the demolition question on the September 12th ballot because early voting had already started for this election. Instead the Trial Court ordered the demolition issue to be decided at the next general election which will be in November of 2019. (September 6, 2017 Ruling p. 26; App. Page 245, 270).

5. Referendum Petitioners filed an amended petition which was approved by the Trial Court on September 27, 2017. This amended petition sought damages under 42 USC §1983 and §1985, attorney fees, and injunctive and other relief. (Amended Petition; App. Page 273).

6. On June 12, 2018 Referendum Petitioners filed a motion to compel discovery. This motion sought additional evidence of the motivation for the attorney's opinions which The School District relied on to declare the demolition referendum petition to be illegal and contended that by publically relying and commenting on these opinions The School District waived attorney-client privilege. (Motion to Compel;

App.P. 293) This motion was denied on February 12, 2018. (February 12, 2018 Ruling; App.P. 818-821).

7. On February 1, 2018 Referendum Petitioners sought summary judgment on numerous issues and on February 2, 2018 The School District did likewise. (Referendum Petitioners' Motion for Summary Judgment; App.P. 379; The School District's Motion for Summary Judgment; App.P. 537).

8. A hearing on these cross-motions for summary judgment was held on March 16, 2018 and the Trial Court thereafter issued its ruling on April 26, 2018. This ruling re-affirmed the earlier decision that the Referendum Petitioners were entitled to an election and also made permanent and expanded the earlier injunction by prohibiting any steps by The School District to demolish Hoover. This expanded and permanent injunction was requested by Referendum Petitioners because after the Trial Court's September 6, 2017 temporary injunction order The School District made numerous public comments stating that Hoover would nevertheless be demolished and announced that accelerated plans would soon be prepared showing what uses would be

made with the former Hoover site. (Young Affidavit Paragraph 6; App.P. 422-423). The Trial Court, however, also ruled that none of the Referendum Petitioners' constitutional rights had been violated and that all the Defendants were entitled to qualified immunity. This ruling specifically stated that it was not the final disposition of the case. Instead the court set a deadline for the parties to submit their views on what issues remained and scheduled a June 15, 2018 hearing regarding the same. (Summary Judgment Ruling P. 8-11, 17; App.P. 915, 922-925, 931).

9. Referendum Petitioners and The School District timely filed reports regarding these remaining issues. (Petitioners' Report Re: Remaining Issues; App.P. 933; The School District's Report on Remaining Issues, App.P. 975). Following the June 15th hearing the Trial Court issued its ruling on August 2, 2018. This decision denied Referendum Petitioners' claim for attorney fees, confirmed that the Trial Court did not intend to express an opinion on what the legal effect of a "no" vote would be if this was the result of the ordered 2019 referendum election and also released the posted temporary injunction bond. This

ruling specifically stated that it was the final disposition of this case. (Final Ruling; App.P. 980-982).

10. Referendum Petitioners timely filed their notice of appeal on August 17, 2018. (Appellants' Notice of Appeal; App.P. 984-986). The School District did likewise on August 23, 2018. (Appellees' Notice of Cross-Appeal; App.P. 987-989).

## C. Statement of Facts

In 2013 The School District adopted what is known as its Facilities Master Plan ("FMP"). This plan proposed extensive construction plans for many of the district's buildings including the eventual demolition of Hoover and the use of the Hoover site by the adjacent City High School. (July 23, 2013 minutes; App.P. 447-448, 453).

In 2017 The School District sought to obtain funding for the demolition of Hoover and the rest of its FMP through a bond referendum to be included on the ballot for the September 12, 2017 school election. Referendum Petitioners believed that demolishing Hoover was imprudent because it would require an expensive replacement building to house the students who currently attended Hoover, would lower property values, and would result in considerable change and inconvenience in the education of neighborhood children. (Heather Young

Affidavit Paragraph 2; App.P. 420-421). To challenge this demolition Referendum Petitioners therefore prepared a referendum petition authorized by Code §278.1 seeking a public vote on whether Hoover should be demolished. The question proposed was straight-forward:

> Shall the Iowa City Community School District in the County of Johnson, State of Iowa, demolish the building known as Hoover Elementary School, located at 2200 East Court Street in Iowa City, after the completion of the 2018-2019 school year, with proceeds of any resulting salvage to be applied as specified in Iowa Code section 297.22(b) (Petition Exhibit A; App.P. 35)

Referendum Petitioners believed that fiscally conservative voters would be motivated to go to the polls and vote against the September 12th bond proposal and that these voters would likely also oppose demolishing Hoover. Therefore having the demolition question on the same ballot as the bond question was important to their cause because it would attract more anti-demolition voters than would an election without the bond question also being on the ballot. (Heather Young Affidavit Paragraphs 9-10; App. P. 423-424).

To meet the deadline for inclusion on the September 12th ballot Referendum Petitioners over a four week period actively solicited voters and obtained approximately 2,400 signatures on their petition. The School District concedes that this was a sufficient number of signatures and that the petition met the filing deadline and all other statutory requirements. The School District also concedes that no objections to the petition were filed under the Code §277.7

objection process. (Defendants' Response to Plaintiffs' Statement of Undisputed Facts Paragraphs 2-3; 5-7; App.P. 852-854).

On July 11, 2017 The School District's school board considered the demolition petition. Although this petition met all statutory requirements and was not objected to the individual Defendants, who were a majority of the School Board, nevertheless voted to declare the petition to be unauthorized by Iowa law and refused to forward it to the County Auditor. (July 11, 2017 minutes; App. P. 464-465).

This refusal was based on the advice of The School District's attorney who opined that the term "disposition" in Code §278.1 was limited to conveyances of school buildings and therefore did not apply to demolitions. This conclusion was based on one definition of "disposition" contained in legal dictionaries but ignored layman's dictionaries and alternative definitions of "disposition" in other legal dictionaries. Also ignored was the landmark Berent decision which holds that under an identical statutory process The School District was without authority to determine what "disposition" means or any other question about the legality of the referendum. Berent v. Iowa City, 738 NW2d 193, 197-201(Iowa 2007). (Opinions, July 11, 2017 minutes; App. P. 464-487).

As a result of the school board's vote the demolition question was not presented to the voters at the September 12, 2017 election. However The School

District did allow the bond proposal to fund the Hoover demolition and the rest of its FMP to be voted on at this election. (Heather Young Affidavit Paragraph 10; App. P. 424).

If the referendum issue proposed by Referendum Petitioners had gone to the voters and resulted in a vote against demolition The School District would not have been able to obtain vacant ground to expand City High School and otherwise to fully implement its FMP. (Liebig Affidavit Paragraph 14; App. P. 450). The School District had made a considerable investment of time and resources in its $191,000,000.00 FMP. Since 2013 numerous professionals were hired to prepare and publicize this plan and numerous public meetings were held to finalize and promote it. (June 28, 2017 Minutes; App.P. 606) Further, the individual Defendants actively campaigned for the FMP and also publically criticized the demolition referendum petition. (Liebig Affidavit Paragraphs 12, 13 and 18; App.P. 450-451). The threat that the referendum petition posed to the FMP is perhaps best demonstrated by an email written by the district's Assistant Superintendent to the district Superintendent the day after the decision was made to block the referendum election. This email listed specific City High uses for the Hoover site which could now be considered "…knowing that the Hoover petition will now not make the ballot in September…" (Degner email; App.P. 443-444).

## D. Routing Statement

This is an important case involving constitutional rights which have been violated by the refusal to hold a statutorily required election. It is the Referendum Petitioners' contention that our government's obligation to hold required elections is our most bedrock constitutional right because without elections we cannot have a democracy. Therefore because fundamental constitutional issues are involved this appeal should be retained by the Iowa Supreme Court. Iowa Ct. R. 6.1101(a).

# ARGUMENT

## I. WHETHER PLAINTIFFS' CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED THEREBY MAKING DEFENDANTS LIABLE UNDER 42 USC §1983 AND §1985.

### A. Standard of Review.

This issue was resolved by the Trial Court's summary judgment decision entered on April 26, 2018. (Summary Judgment Decision, P. 9-10; App.P. 915, 923-924). The standard of review for summary judgment decisions is usually errors of law. However since constitutional issues are involved review in this appeal is de novo. Varnum v. Brien, 763 NW2d 862, 874 (Iowa 2009). Summary

judgment is only appropriate if there are no disputed material facts. All inferences that can be derived from record facts are to be construed in favor of the party who opposes the summary judgment. Mueller v. Wellmark, Inc., 818 NW2d 244, 253 (Iowa 2012). Further, a determination of the motivation for a party's action and other issues regarding intent are generally not determinable by summary judgment. Hoefer v. Wisconsin Education Association Trust, 470 NW2d 336, 338 (Iowa 1991).

B. Issue Preservation.

Referendum Petitioners' claim that they suffered a violation of their constitutional rights actionable under 42 USC §1983 and §1985 was raised in their amended petition. Each of the rights discussed below, including the rights to vote and access the ballot, was specifically pled or argued at the summary judgment level. (Amended Petition Paragraph 6. 32; App.P. 273, 279; Summary Judgment briefs; App.P. 867, 875) In its Summary Judgment ruling the Trial Court determined that none of these rights had been violated. (Summary Judgment Ruling P. 9-10; App.P. 923-924). Accordingly error has been preserved on this issue because it was both presented to and decided by the Trial Court. Meier v. Senecaut, 641 NW2d 532, 537 (Iowa 2002).

C. Argument.

1. *Legal Background*

The United States Supreme Court has recognized that the referendum process is a "…classic demonstration of devotion to democracy…" which is not merely an expression of opinion but is instead the "…exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest…" City of Eastlake v. Forest City Enterprises, Inc., 426 US 668, 678-679 (1976). Although a state is not required to have a referendum procedure once it creates such a process the government cannot unduly restrict its use in a way which violates referendum supporters' right to communicate with voters or their other constitutional rights. Meyer v. Grant, 486 US 414, 428 (1988).

Fortunately for our democracy American public officials rarely refuse to hold a statutorily required referendum or other election. As with the present Hoover dispute when such a denial does occur it is because the incumbent government wishes to pursue its own agenda rather than risk letting the voters choose a different path. However, because numerous constitutional rights are central to the election process courts vigilantly protect the same under 42 USC §1983 when

these refusals do occur. In so doing courts have unanimously concluded that although isolated unintentional failures in the election process, such as the breakdown of a voting machine, do not give rise to a §1983 claim the intentional refusal to hold a statutorily required election such as what occurred in this case is actionable under §1983. Griffin v. Burns, 570 F2d 1065 (1st Cir. 1978); Nolles v. State Committee for the Reorganization of Schools, 524 F3d 892, 898-899 (8th Cir. 2008) (citing cases); Bonas v. Town of North Smithfield, 265 F3d 69, 75-76 (1st Cir. 2001); Duncan v Poythress, 657 F2d 691, 708 (5th Cir. 1981) The Iowa Supreme Court has itself addressed this issue and has carefully distinguished referendum petitions which require an election and those petitions which do not. Citing Duncan, this court indicated that ignoring the first type of petition is actionable under §1983 but ignoring the second is not. Peterson v. Davenport Community School District, 626 NW2d 99, 103 (Iowa 2001).

In the present case the Trial Court properly determined that Referendum Petitioners were entitled to an election under the referendum process contained in Code Chapters 277 and 278. (Summary Judgment Decision P. 9; App.P. 923) The relevant portions of these Code provisions state:

278.1 Enumeration.

1. The voters at the regular election have power to: …
direct the sale, lease, or other disposition of any schoolhouse or school site or other property belonging to the corporation, and the application to be made of the proceeds thereof.

278.2 Submission of proposition.

1. The board may, and upon the written request of one hundred eligible electors or a number of electors which equals thirty percent of the number of electors who voted in the last regular school board election, whichever number is greater, shall, direct the county commissioner of elections to provide in the notice of the regular election for the submission of any proposition authorized by law to the voters….

2. Petitions filed under this section shall be filed with the secretary of the school board at least seventy-five days before the date of the regular school election, if the question is to be included on the ballot at that election. The petition shall include the signatures of the petitioners, a statement of their place of residence, and the date on which they signed the petition.

277.7 Petitions for public measures.

A petition filed with the school board to request an election on a public measure shall be examined before it is accepted for filing. If the petition appears valid on its face it shall be accepted for filing. If it lacks the required number of signatures it shall be returned to the petitioners.

Petitions which have been accepted for filing are valid unless written objections are filed. Objections must be filed with the secretary of the school board within five working days after the petition was filed. The objection process in section 277.5 shall be followed for objections filed pursuant to this section.

277.5 Objections to nominations.

Objections to the legal sufficiency of a nomination petition or to the eligibility of a candidate may be filed by

> any person who would have the right to vote for a candidate for the office in question. The objection must be filed with the secretary of the school board at least thirty-five days before the day of the school election. When objections are filed notice shall forthwith be given to the candidate affected, addressed to the candidate's place of residence as given on the candidate's affidavit, stating that objections have been made to the legal sufficiency of the petition or to the eligibility of the candidate, and also stating the time and place the objections will be considered.
>
> 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….

This court has previously construed an identical statutory process and ruled that a governmental body that timely receives a referendum petition can only review it to determine if on its face it contains sufficient signatures and shows the date of signing and residence of the signers. If these requirements are met the petition is valid and must be forwarded to the county auditor for inclusion on the ballot. If the government wishes to challenge the legality of the petition an objection under §277.7 must be filed and a declaratory judgment proceeding must be commenced so that a proper court can determine any legal issues. Berent v. Iowa City, 738 NW2d 193, 197-201 (Iowa 2007).

Therefore since The School District concedes that no Code §277.7 objection was filed and that the petition contains sufficient signatures

and shows the date of signing and residence of the signers the Trial Court under Berent correctly determined that the Hoover referendum petition was valid and that an election should be held on the same. (Defendants' Response to Plaintiffs' Statement of Undisputed Facts, Paragraphs 2-3, 5-7; App.P. 852-854); (Summary Judgment Ruling P. 9; App.P. 923).

Referendum Petitioners, although they agree with the Trial Court's decision to require an election, also believe that the Trial Court erred when it determined that The School District did not violate their constitutional rights when it refused to hold the 2017 election. Each of these rights is discussed below.

2. *The Specific Constitutional Rights at Issue*

A review of the cases reveals that multiple constitutional rights are violated when the government refuses to hold a statutorily required election. Although the courts base their decisions on different constitutional rights all are in agreement that the refusal to hold a statutorily required election is actionable under 42 USC §1983.

a. *The Right to Vote.*

The right to vote is considered by the Iowa Supreme Court and other courts as being the most fundamental of our constitutional

rights. Devine v. Wonderlich, 268 NW2d 620, 623 (Iowa 1978). It is a multi-faceted right which protects different types of conduct. At its most basic level it protects a qualified voter's right to cast a vote and to have this vote fairly counted. Reynolds v. Sims, 377 US 533, 554-555 (1964). But it goes much further and also protects the right to access the ballot and have issues and candidates voted on once statutory requirements for the same are met. This is because keeping an issue or candidate off the ballot effectively eliminates the right to vote held by those citizens who support the excluded issue. Williams v. Rhodes, 393 US 23, 31-32 (1968). And there is a fundamental constitutional right to vote at all elections established by state statute. Bush v. Gore, 531 US 98, 104 (2000); ("…the right to vote as the legislature has prescribed is fundamental…"). The right to vote also applies to referendum elections to the same extent that it applies to general elections. Phoenix v. Kolodziejski, 399 US 204, 209 (1970). And once having created a referendum or other electoral process the government cannot unduly restrict the same without a compelling state interest. Meyer v. Grant, 486 US 414, 419-425, 428 (1988).

In applying these principles to a local government which refused to hold a required election the Second Circuit explained the constitutional right to have a referendum election as follows:

> It is certain that the right to vote---the wellspring of all rights in a Democracy---is constitutionally protected. The Supreme Court long ago described that right as a "fundamental political right." (citing cases) Thus, the Constitution "protects the right of all qualified citizens to vote in state as well as in federal elections." (citing cases) Since municipalities are political subdivisions of state government, this means that the right to vote in local elections (including referendum elections) is constitutionally protected. Bonas v. Town of North Smithfield, 265 F3d 69, 74 (1st Cir. 2001)

Based on the above principles the following conclusions are clear: (1) since the Iowa legislature has enacted and otherwise prescribed the referendum process contained in Code §278.1 and since the Hoover referendum petition met all statutory requirements Referendum Petitioners under Williams, Phoenix and Bush had the constitutional right to access the ballot, have an election and vote on their referendum petition, (2) under Meyer referendum supporters had a constitutional right to use the referendum process free of undue restriction and to thereby determine the fate of Hoover and (3) also under Meyer a §1983 claim exists when these rights are violated. Accordingly, when The School District kept Referendum

Petitioners' statutorily compliant referendum proposal off the ballot it violated their right to vote in a manner which is actionable under 42 USC §1983.

The Trial Court disagreed with the above and concluded that there is no constitutional right to pursue a referendum vote. It cited Bowers v. Polk County Board of Supervisors, 638 NW2d 682, 692 (Iowa 2002) as support for its conclusion that "…even if the petition process is successful, a right to vote is not guaranteed." (Summary Judgment Ruling, Page 8; App.P. 922-924). However in Bowers the Plaintiff was unable to timely obtain the required number of signatures on his referendum petition and unsuccessfully sued under equal protection and due process theories claiming that Iowa's statutory signature requirement was too onerous. Bowers therefore follows a long line of cases which hold that a citizen does not have a constitutional right to have a referendum issue placed on the ballot if this citizen does not obtain sufficient signatures or otherwise fails to meet statutory referendum requirements. See, Kendall v. Balcerzak, 650 F3d 515, 525 (4th Cir 2011); Taxpayers United for Assessment Cuts v. Austin, 994 F2d 291 (6th Cir. 1993). Indeed, the cases cited in Bowers are also cases in which the statutory

requirements for holding a referendum were not met. Kelly v. Maron-Bibb School District, 608 F. Supp. 1036 (M.D. Ga. 1985) (not enough signatures); Spalding v. Illinois Community College, 356 NE2d 339 (Ill. 1976) (proposed referendum topic not authorized by statute). Referendum Petitioners agree that there is no requirement that a state provide a referendum process, that a state can impose neutral requirements, such as a particular number of signatures, for a referendum, and that citizens who fail to meet these requirements have no constitutional or other right to have their referendum issue placed on the ballot. But that is not what happened in the Hoover case. Instead, unlike in Bowers, Referendum Petitioners met all of Iowa's statutory requirements for a referendum and under Code §278.1 and Berent The School District was mandated to forward the Hoover referendum question to the auditor for inclusion on the ballot. (Defendants' Response to Plaintiffs' Statement of Material Facts, Paragraphs 2-3; 5-7; App.P. 852-854). Therefore Bowers is not applicable.

Additionally, Bowers involved a bond referendum and the court noted that there is no guaranty of a vote in the bond referendum context because the government could abandon its bond proposal.

Bowers, 632 NW2d at 692. But under Code Chapters 277 and 278 The School District had no choice but to forward the statutorily valid Hoover referendum petition to the auditor for inclusion on the ballot. Therefore, the referendum process prescribed by the legislature mandates that a vote be held and the right to this vote is a fundamental constitutional right. Bush v. Gore, 531 US 98, 104 (2000)

Finally, the Trial Court's conclusion that the referendum process is not protected by the constitution directly contradicts the United States Supreme Court's Meyer decision which holds that the referendum process is "…at the core of our electoral process and of the First Amendment freedoms…" and is entitled to First Amendment protection "at its zenith." Meyer v. Grant, 486 US 414, 425 (1988). Taxpayers United for Assessment Cuts v. Austin, 994 F2nd 291 (6th Cir 1993), a case cited in Bowers, explains Meyer as follows:

> "(a)lthough Meyer (v. Grant, id.) dealt with a limitation on communication with voters and not with methods used to validate and invalidate signatures of voters to an initiative petition, the principle stated in Meyer is that a state that adopts an initiative procedure violates the federal constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative. Accordingly, we conclude that

> although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal constitution…" id. 295

The School District in this case clearly caused such an improper restriction when without authority it illegally blocked the referendum election by refusing to forward the Hoover petition to the auditor for inclusion on the ballot.

In summary the crucial difference between the Hoover case and Bowers is that the Hoover referendum election was statutorily required while the referendum in Bowers was not. Accordingly, as explained in Bush, Meyer, and the other above authorities The School District's denial of this statutorily required election is actionable under 42 USC §1983.

b. *Procedural Due Process.*

In the present case the Berent decision makes it clear that The School District did not have the authority to decide whether the demolition referendum petition was "authorized by law." Instead a Code §277.7 objection needed to first be filed and a declarative judgement action commenced so that a proper court could determine the legality of the petition. Berent v. Iowa City, 738 NW2d 193,

197-201 (Iowa 2007). Further, Referendum Petitioners had a constitutional right of notice and an opportunity to be heard before a qualified tribunal before a determination on the legality of their petition was made. Ward v. Village of Monroeville, 409 US 57, 58 (1972). Accordingly The School District denied Referendum Petitioners their constitutionally protected procedural due process right when it invaded the province of the court system and without authority declared on its own that the demolition petition was unlawful. (July 11 minutes; App.P. 421, 464-465). This deprivation of procedural due process is actionable under 42 USC §1983 and Referendum Petitioners are entitled to financial damages for their emotional and other damages caused by the same. At a minimum they are entitled to nominal damages and their attorney fees. Petersen v. Davenport Community School District, 626 NW2d 99, 105 (Iowa 2001).

The Trial Court agreed that The School District denied Referendum Petitioners their constitutional right of procedural due process. But it also determined that by ordering the 2019 election this deprivation has been cured. (Summary Judgment Ruling P. 10; App.P. 924) This is error, as a belated 2019 election is at best a

partial remedy for the violation of first amendment rights which occurred in 2017 and in no way cures this past violation or the damages caused by it. As further discussed below damages and other remedies should also be awarded.

c. *Substantive Due Process.*

Since at least 2002 Iowa has used two separate tests to determine if a government action violates substantive due process. If the action runs afoul of either test it is a substantive due process violation. The first of these is the "shocks the conscience" test which requires a court to determine if what the government did offends judicial concepts of fairness and shocks the conscience. The second is the "strict scrutiny" test which is applied if fundamental constitutional rights have been denied as a result of the government's action. In re: KM, 653 NW2d 602, 607 (Iowa 2002); Behm v. City of Cedar Rapids, __ NW2d __, __(Appeal No. 16-1031) (Iowa 2018).

In the present case the Trial Court found "…nothing in Defendants' actions that 'shocks the conscience or interferes with the rights implicit in the concept of ordered liberty.'" (Summary Judgment Ruling P. 10; App.P. 924). This conclusion is contrary to

the decision of all other courts who have addressed this issue and who have concluded that the intentional refusal to hold a required election shocks the conscience. Duncan v. Poythess, 657 F2d 691, 708 (5th Cir. 1981); Griffin v. Burns, 570 F2d 1065 (1st Cir. 1978); Nolles v. State Committee for the Reorganization of Schools, 524 F3d 892, 898-899 (8th Cir. 2008) (citing cases); Bonas v. Town of North Smithfield, 265 F3d 69, 75-76 (1st Cir. 2001) Therefore when this court conducts its de novo review it should likewise determine that The School District's refusal to hold the statutorily required Hoover election violated substantive due process. Indeed, one would be hard-pressed to find anything that is more disruptive to our way of life or to our "ordered liberty" than is the refusal by an incumbent government to hold a statutorily required election. Indeed, without elections we can have neither "order" nor "liberty" or, for that matter, even a democracy.

Further, using Iowa's referendum process or otherwise voting "as the legislature has prescribed" is a fundamental constitutional right. Bush v. Gore, 531, US 98, 104 (2000); Meyer v. Grant, 486 US 414, 425 (1988). Therefore the In re: KM and Behm strict scrutiny test also applies to determine whether a substantive due process

violation has occurred. Under this test The School District has to provide a compelling reason for why it refused to hold the election and it must have had no less restrictive alternatives to this refusal. id. However the interest that The School District claims to have been acting to protect in the Hoover case--that the election was unauthorized by law--was not under Berent even within its authority to determine. Further The School District clearly had less restrictive alternatives to stonewalling the Hoover election. All that it needed to do was to have a §277.5 objection filed (which any school board member could do) and then through a declaratory judgment action have a proper court determine the issue. This could have been accomplished prior to the election thereby eliminating any need to cancel it. Even simpler, provisional ballots could have been cast on the Hoover demolition issue and these ballots held until the appropriateness of the election was decided by the courts. The failure to use these much less restrictive alternatives makes the denial of the election a substantive due process violation. Therefore under either test a substantive due process violation has occurred.

d. *Freedom of Speech.*

The United States Supreme Court has recognized that utilizing a legislature-provided referendum process is "core political speech" and that undue interference with this process is a violation of the first amendment actionable under 42 USC §1983. Meyer v. Grant, 486 US 414, 421 (1988). In the present case The School District concedes that all of the statutory requirements for the Hoover referendum petition were satisfied. (Defendants' Response to Plaintiffs' Statement of Undisputed Facts, Paragraphs 2-3, 5-7; App.P. 852-854). The issue therefore becomes whether The School District unreasonably interfered with the referendum process when it refused to perform its duty to forward this admittedly valid ballot proposal to the county auditor so that it could be voted on at the September 12, 2017 election. A comparison with Meyer demonstrates that the interference committed by The School District in the Hoover case is far more egregious than the modest interference at issue in Meyer and which itself was found to be unconstitutional. Specifically, Meyer involved a governmental prohibition against paying referendum solicitors. This limitation was found to be unconstitutional. Meyer v. Grant, 486 US 414, 424-

425 (1988). In Meyer the referendum petitioners therefore at least had the opportunity to obtain their desired election provided they could get the needed number of signatures without using paid solicitors. However The School District in the present Hoover case eliminated all access to an election by illegally declaring the Hoover petition to be "unauthorized." Therefore The School District in the Hoover case completely shut down the election process while in Meyer the process was only made more difficult. Since under Meyer we know that making the referendum process more difficult may be unconstitutional then surely the complete obstruction of this process is unconstitutional as well.

The Trial Court, however, determined that Referendum Petitioners' right of free speech was not violated because they at all times remained free to communicate. (Summary Judgment Ruling P. 9; App.P. 923) Factually this is a correct statement. But the same could also be said for the referendum supporters in Meyer as the government in that case allowed all communication except through paid solicitors. Additionally the Supreme Court deemed the government's conduct in Meyer to be unconstitutional because it reduced the quantum of speech and also interfered with the message

that the petitioners chose to communicate. In doing so it ruled that referendum supporters have the first amendment right to choose who they wish to communicate with--which in the Hoover case was the September 12th voters--and what they wished to communicate--which in the Hoover case was the ballot question contained in their referendum petition. Meyer v. Grant, 486 US 414, 424 (1988). Therefore, because The School District blocked both what Referendum Petitioners wanted to say and who they wanted to say it to Referendum Petitioners' freedom of speech was violated in a manner which is actionable under §1983.

e. *Freedom of Association*.

The right to associate with those of similar political beliefs and to jointly pursue political change is a fundamental constitutional right. This right includes the right to advance these shared beliefs through the election process once statutory requirements for the same are satisfied. Therefore the unauthorized exclusion by government of political issues from the election process violates this right of association. Anderson v. Celebreeze, 460 US 780, 787-788 (1983); Williams v. Rhodes, 393 US 23, 31-32 (1968).

In the present case Referendum Petitioners were therefore denied their right to associate and make political change when The School District excluded the demolition question from the September 12th ballot, thereby eliminating their right to jointly advance this issue. Under the above authorities this lost opportunity to associate and legislate change through the referendum process is actionable under 42 USC §1983.

f. *Equal Protection.*

Similarly situated citizens have an equal protection right to be treated by their government in the same manner. In the election context equal protection is therefore violated when some citizens are allowed to have their issues or candidacies voted on while others are not. Illinois State Board of Elections v. Socialist Workers Party, 440 US 173, 184-185 (1979). In the Hoover case The School District on September 12, 2017 allowed pro-demolition and pro-FMP voters to vote at a bond referendum to fund the Hoover demolition (and the rest of The School District's FMP) but denied anti-demolition voters the chance to preserve the Hoover building through the statutory referendum process. (Young Affidavit Paragraph 10; App.P. 424). This blatantly inconsistent and unequal treatment is therefore a

violation of equal rights actionable under 42 USC §1983. See, American Party of Texas v. White, 415 US 767, 794-795 (1974) (violation of equal protection when party kept off the ballot).

3. *Additional Trial Court Errors.*

In addition to the Trial Court's faulty conclusions and reasoning discussed above it also made the following erroneous conclusions:

a. *Providing for the Future Exercise of Constitutional Rights does not Correct or Compensate for the Past Deprivation of those Rights.*

The Trial Court stated that because it ordered the election requested by the Referendum Petitioners to be held in 2019 this adequately remedies the violation of constitutional rights which was committed in 2017. (Summary Judgment Ruling, Paragraph 10; App. P. 923) This conclusion is error because any delay in the exercise of constitutional rights is recognized as being compensable. This is especially true in the present case because the 2019 election is less likely to result in an anti-demolition vote than was the 2017 election. (Young Affidavit Paragraphs 9-10; App.P. 423-424). The rule is that "…the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable

injury…" Elrod v. Burns, 427 US 347, 373 (1976). Therefore, Referendum Petitioners are entitled to financial damages including presumed substantial and nominal damages. They are also entitled to attorney fees. This additional relief is discussed in detail below.

b. *Violating a State Election Statute May Create a Civil Rights Claim.*

The Trial Court stated that because this case involved only a disagreement over state law Referendum Petitioners' claim did not rise to the level of a constitutional claim. (Final Ruling, P. 11; App.P. 925). However, a state statutory election process creates a fundamental constitutional right to utilize and vote as established by this process. Bush v. Gore, 531 US 98, 104 (2000). Indeed, courts have specifically found that the failure to hold an election required by state statute is actionable under §1983. Duncan v. Poythress, 657 F2d 691, 708 (5th Cir. 1981). Accordingly The School District's illegal rejection of the Hoover referendum petition was both a statutory and constitutional violation.

c. *It is Not Necessary That The School District Intended to Violate the Referendum Petitioners' Civil Rights*

The Trial Court justified its refusal to award Referendum Petitioners further relief in part on its belief that The School

District's action in denying the Hoover election was a good faith disagreement over the interpretation of a statutory process. (Summary Judgment Ruling P. 11; App.P. 925). Referendum Petitioners disagree with this and believe that The School District's refusal to follow the Berent decision, its stated desire to advance and even accelerate its FMP, its inadequate attorney's opinions, and its open hostility to the Hoover referendum create a factual issue on whether The School Board merely violated the statute or instead intentionally acted out of a desire to avoid the consequences of the referendum vote. (July 11 minutes, Liebig Affidavit Paragraphs 12-14, 18; Opinions App.P. 450-451). This evidence precludes summary judgment on the intent issue. Hoefer v. Wisconsin Education Trust, 470 NW2d 336, 338 (Iowa 1991). In any event a §1983 civil rights action does not require that the actor intend to violate constitutional rights. Accordingly it was error for the Trial Court to conclude otherwise. Coffman v. Trickey, 884 F2d 1057, 1061-1062 (8th Cir. 1989) (citing cases).

d. *Sufficient Evidence of a Conspiracy Exists.*

The Trial Court determined that there was no evidence to support Referendum Petitioners' 42 USC §1985 conspiracy claim.

(Summary Judgment Ruling Paragraph 10; App.P. 924). The elements of a conspiracy claim are (1) a conspiracy (2) for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection under the laws, or equal privileges or immunities, of the laws (3) an act in furtherance of this conspiracy (4) by which a person is injured or deprived of any right or privilege of a citizen of the United States. United Brotherhood of Carpenters v. Scott, 463 US 825, 828-829 (1983). The conspiracy must be against a class of citizens and must involve a fundamental constitutional right. Great American Savings and Loan v. Novotny, 442 US 366 (f.n.6) (1979). Voting, as stated above, is such a fundamental constitutional right. Reynolds v. Sims, 377 US 533, 561-562 (1964). It is undisputed that the individual Defendants had a meeting for the purpose of discussing the Hoover demolition petition and after discussion agreed to deny the Referendum Petitioners their voting rights and then acted to further this agreement by refusing to forward the petition to the auditor for inclusion on the ballot. (July 11 minutes; App. P. 464-465). These actions satisfy all the elements of §1985 liability. There is also no dispute that because of The School District's actions the

Referendum Petitioners and the several thousand other people who signed the Electors' Petition were deprived of their right to vote. This satisfies the class requirement. Accordingly Plaintiffs are entitled to summary judgment as to Defendants' liability under 42 USC §1985.

The Trial Court also concluded that no conspiracy existed because the individual Defendants were carrying out the regular business of The School District when they agreed to obstruct the Hoover election. (Summary Judgment Ruling Paragraph 10; App.P. 924). This conclusion is factually incorrect because under Berent the individual Defendants had no authority to do what they did and therefore could not be considered as acting within the regular course of their duties as school board members. Further, the fact that the conspiracy in this case did not occur in the proverbial "smoke filled back room" does not mean that there was not a conspiracy. Instead conspiracies made in public should be just as actionable under 42 USC §1985 as conspiracies made in secret. Accordingly it was error for the court to conclude otherwise.

## II. WHETHER DAMAGES AND ADDITIONAL OTHER RELIEF SHOULD BE AWARDED TO PLAINTIFFS.

A. Standard of Review.

This issue was resolved by the Trial Court's partial summary judgment decision entered on April 26, 2018. The standard of review for summary judgment decisions is generally errors of law. However since this case involves the deprivation of constitutional rights issues related to these rights, including damages, should be reviewed de novo. Varnum v. Brien, 763 NW2d 862, 874 (Iowa 2009). Summary judgment is only available if there are no disputed material facts. All inferences that can be derived from record facts are to be construed in favor of the party who opposes the summary judgment. Mueller v. Wellmark, Inc., 818 NW2d 244, 253 (Iowa 2012). Further, a determination of the motivation for a party's action and other state of mind issues are not properly determinable by summary judgment. Hoefer v. Wisconsin Education Association Trust, 470 NW2d 336, 338 (Iowa 1991).

B. Issue Preservation.

Referendum Petitioners' claim that they were entitled to financial damages was raised in their amended petition. (Amended Petition

Paragraph 6.35; App.P. 7). In its Summary Judgment ruling the Trial Court determined that Plaintiffs' were not entitled to damages. (Summary Judgment Ruling P. 16-17; App.P. 423). Accordingly error has been preserved on this issue because it was both presented to and decided by the Trial Court. Meier v. Senecaut, 641 NW2d 532, 537 (Iowa 2002).

C. Argument.

Documentation of the frustration, hurt, loss of political advantage and other damages incurred by Referendum Petitioners was detailed in the summary judgment materials submitted to the Trial Court. (Young Affidavit Paragraph 9; App.P. 423). The School District has made no attempt to challenge or refute these record facts. Therefore it was error to summarily deny awarding the following damages:

1. *Nominal Damages*. When a Plaintiff in a §1983 case establishes that he has been deprived of a constitutional right he is entitled to at least nominal damages without proof of actual injury. Carey v. Piphus, 435 US 247, 266 (1978); Peterson v. Davenport Community School District, 626 NW2d 99, 105 (Iowa 2001).

Therefore Referendum Supporters are entitled to at least nominal damages.

2. *Presumed Substantial Damages.* In cases involving the denial of the right to vote the United States Supreme Court has taken the concept of nominal damages a significant step further and has ruled that a deprived voter is also entitled to presumed substantial damages because of the unquantifiable value of this fundamental constitutional right. Memphis Community School District v. Stachura, 477 US 299, 316 f.n. 14 (1986). The court was clear on this point, stating:

> "In the eyes of law th(e) right (to vote) is so valuable that damages are presumed for wrongful deprivation of it without evidence of actual loss of money, property or other things…" id

Examples of awarding presumed substantial damages for the loss of the right to vote go back many years and include Nixon v. Herndon, 273 US 536 (1927) (award of $5,000.00) and Wayne v. Venable, 260 F. 64 (8th Cir. 1919) ($2,000.00 award). Therefore the value of the right to vote was significant as early as 1919 and certainly has increased in value over the intervening 100 years. Referendum Petitioners should accordingly be awarded the same.

3. *Actual Damages.* Referendum Petitioners are also entitled to actual damages for the frustration, loss of time, and other harm they have suffered. Carey v. Piphus, 435 US 247 (1978) (f.n. 22-24) (citing cases) The affidavit submitted in the summary judgment materials establishes that these damages have occurred. (Young Affidavit Paragraph 9; App.P. 423). It was therefore error for the Trial Court to rule otherwise. Referendum Petitioners' should also receive compensation for the loss of political opportunity because even though a new election has been ordered this future election will not attract as many anti-demolition voters as would have voted at the September 12, 2017 election and therefore the anti-demolition question is less likely to pass in 2019 than it would have if The School District had complied with the law and allowed the 2017 demolition referendum to be held. Further, Referendum Petitioners may not even be alive or otherwise able to vote in 2019, thereby making the court-ordered 2019 election at best only a partial remedy. And future circumstances such as 2019 economic conditions will certainly impact the 2019 vote and may also make this election less favorable for Referendum Petitioners. Finally The School

District's ongoing campaign to convince the voters that the Hoover demolition is an irreversible "done deal" certainly will discourage anti-demolition voters from going to the 2019 polls and will further reduce the chance of stopping the Hoover demolition. (Young Affidavit Paragraphs 6-8; App.P. 423-424). All of these factors justify a monetary award for lost political opportunity and other actual damages.

4. *Punitive Damages*. Punitive damages are available in 42 USC §1983 cases if a Defendant acts intentionally, recklessly, maliciously or with a callous disregard of a citizen's rights. Smith v. Wade, 461 US 30, 56 (1983). Punitive damages may be awarded without actual damages being awarded. Carey, 435 US 247 (f.n. 22) Because §1983 and §1985 claims are based on federal law punitive damages may be assessed against a Defendant even though this Defendant may be immune from punitive damages under state law. Felder v. Casey, 487 US 131, 150-152(1988). The following record facts justify an award of punitive damages in this case:

a. The Berent decision provided ample advance warning to the Defendants that their course of action was unlawful. Their failure to heed this warning demonstrates callous indifference.

b. Iowa Code §39A 2 (1)(b)(5) clearly warned Defendants that blocking the election was potentially a felony, thereby demonstrating the reprehensible nature of their actions.

c. Defendants' actions deprived Plaintiffs of their most precious right, the right to vote, as well as numerous other constitutional rights.

d. Defendants acted intentionally and deliberately after a discussion of their options, including their option to comply with the law. (July 11 minutes; App.P. 464-465)

e. The Defendants acted as they did in a deliberate attempt to gain political advantage. Specifically, if the voters rejected demolition they would have prevented the completion of the Facilities Master Plan which the ICCSD and the four individual Defendants staunchly supported. Defendants therefore eliminated this political risk when they eliminated the Referendum Petitioners' right to vote. (Liebig Affidavit Paragraph 14; App. P. 450)

f. The School District's actions did not violate the constitutional rights of just the Plaintiffs. Instead more than 2,000 other citizens who also signed the demolition petition lost their rights as well.

These factors under Smith are sufficient to establish that The School District and the individual defendants are liable for punitive damages and it was error for the court to conclude otherwise.

5. *State Law Damages.* The Trial Court concluded that The School District violated Iowa's election law when it refused to allow the vote on the demolition question. Under Iowa law

Referendum Petitioners are entitled to nominal as well as actual and punitive damages for the loss of their state law right to vote. Lane v. Mitchell, 133 NW 381 (Iowa 1911) An award of attorney fees under common law should also be awarded as The School District denied the Referendum Supporters their most fundamental right and acted with malice, oppression and through connivance. See, Hockenburg Equipment Company v. Hockenburg Equipment and Supply Co., 510 NW2d 153, 159 (Iowa 1993). The Trial Court therefore erred when it failed to allow recovery of damages and fees.

## III. WHETHER QUALIFIED IMMUNITY IS AVAILABLE TO DEFENDANTS.

A. Standard of Review.

This issue was resolved by the Trial Court's summary judgment decision of April 26, 2018. The general standard of review for summary judgment decisions is errors of law. However for issues related to the violation of constitutional rights the standard of review is de novo. Varmum v Brien, 763 NW2d 862,874 (Iowa 2009) Summary judgment is only available if there are no disputed material facts and all inferences that can be derived from record

facts are to be construed in favor of the party who opposes the summary judgment. Mueller v. Wellmark, Inc., 818 NW2d 244, 253 (Iowa 2012). Finally, a determination of the motivation for a party's action and other state of mind issues are not properly made by summary judgment. Hoefer v. Wisconsin Education Trust, 470 NW2d 336, 338 (Iowa 1991).

B. Issue Preservation.

Defendants raised qualified immunity as an affirmative defensive in their answer. (Amended Answer; App.P. 287). In its Summary Judgment ruling the Trial Court determined that all Defendants were entitled to qualified immunity. (Summary Judgment Ruling p. 11, 16-17; App.P. 925, 930-931). Accordingly error has been preserved on this issue because it was both presented to and decided by the Trial Court. Meier v. Senecaut, 641 NW2d 532, 537 (Iowa 2002)

C. Argument.

The Trial Court determined that all Defendants were entitled to qualified immunity. As explained below this was error.

1. *No Immunity for The School District as it is an Entity.*

Qualified immunity is never available to governmental entities like a school district but is instead only available to individual Defendants. Owen v. City of Independence, 445 US 622, 638-639 (1980). Under Iowa law a school district is a distinct legal entity. Code §274.1. Therefore since The School District is an entity it is not entitled to immunity and it was error for the Trial Court to rule otherwise.

2. *No Immunity for Non-discretionary Functions.*

Qualified immunity can only be considered if a government actor was given the discretion to carry out the type of conduct which resulted in the loss of the constitutional rights in question. It is not available to defendants who act outside this authority. Scheuer v. Rhodes, 416 US 232, 247 (1974); Nixon v. Fitzgerald, 457 US 731, 746 (1982); Johnson v. Phillips, 664 F3d 232, 236-237 (8th Cir. 2011); Hawkins v. Holloway, 316 F3d 777, 788 (8th Cir 2003). As explained in Issue I Berent and the statutes in question give school board members no discretion or authority to determine that a referendum is unauthorized. Instead Code §278.2 clearly states that school board members "shall" forward a valid Electors' Petition to

the auditor. The term "shall" is defined by the legislature as being mandatory and creates a statutory duty to comply. Code §4.1(30). Because it is undisputed that the Hoover referendum petition was "valid" under Code §277.7 the individual Defendants are therefore not entitled to qualified immunity because they had no authority to do anything with the admittedly valid Hoover petition other than through a purely ministerial action forward it to the County Auditor. Berent v. City of Iowa City, 738 NW2d 193, 200-201 (Iowa 2007) Further, Defendants' obstruction of the required election falls under the criminal prohibition against the same contained in Code §39A 2 (1)(b)(5). Surely the Defendants do not have the discretion to commit a criminal act. Accordingly the individual defendants are not entitled to qualified immunity and the Trial Court erred when it concluded otherwise.

3. *The Constitutional Rights Now in Question are Clearly Established and Have Been Violated.*

To further determine if an individual Defendant receives qualified immunity this court must answer two questions: (1) do the facts alleged by the Referendum Petitioners make out a violation of a constitutional right? and (2) was this right clearly established? If the answer to either or both question is "no" the individual

defendants are entitled to qualified immunity. If the answer to both questions is "yes" there is no immunity. Pearson v. Callahan, 555 US 223, 231-232 (2009); Dickerson v. Mertz, 547 NW2d 208, 214-215 (Iowa 1996).

In determining whether a constitutional right is clearly established it is not necessary that a Plaintiff be able to point to an identical or even a factually similar prior case. All that is needed is a prior case or an existing statute which gives a Defendant "fair warning" that his conduct violates a constitutional right. The standard is an objective one based on what a public official should know about the law and not on what he or she actually knows. Hope v. Pelzer, 536 US 730, 741 (2002). Therefore ignorance of the law is not an excuse and an official is charged with knowledge of all laws and decisions affecting his office even if he lacks actual knowledge of the same. Harlow v. Fitzgerald, 457 US 800, 818-819 (1980).

a. *A Violation of Constitutional Rights Has Occurred.*

The specific constitutional rights at issue and an explanation as to how they have been violated by The School District are set out above in Issue I. Further, Referendum Petitioners wish to point out

that the Trial Court ruled that by pursuing this litigation Referendum Petitioners have received their procedural due process rights and will also receive their right to vote by voting at the court-ordered 2019 election. (Summary Judgment Ruling Page 10; App. P. 924). When the Trial Court made this ruling it therefore recognized that Referendum Petitioners' constitutional rights had in fact been violated. After all, there would be no reason for the Trial Court to conclude that the 2019 election will provide the right to vote or that this litigation has provided procedural due process unless these constitutional rights had not previously been denied by The School District. This court should likewise conclude that the Referendum Petitioners have suffered a violation of their constitutional rights.

b. *The Constitutional Rights at Issue are Clearly Established.*

For well over 100 years the United States Supreme Court has repeatedly ruled that the right to vote is a fundamental constitutional right. Yik Wo v. Hopkins, 118 US 356, 370 (1886); Reynolds v. Sims, 377 US 533, 562 (1964); United States v. Classic, 313 US 299, 315 (1941) ("…obviously included within the right to choose, secured by the constitution, is the right of qualified voters within a

state to cast their ballots and have them counted…") And more than 50 years ago the United States Supreme Court specifically held that a cause of action exists under §1983 when that right to vote is denied. Reynolds v. Sims, 377 US 533, 554-555 (1964). It is also equally clear that the federal constitution protects not just a citizen's right to cast his or her vote but also a citizen's right to use and vote at a referendum or other election process provided by state law. Meyer v. Grant, 486 US 414, 419-425 (1988); Bush v. Gore, 531 US 98, 104 (2000). The Iowa Supreme Court has itself stated that the right to vote is our most highly prized constitutional right. Devine v. Wonderlich, 268 NW2d 620, 623 (Iowa 1975). And the constitutional right to vote at a referendum was established nearly 50 years ago. Phoenix v. Kolodziejski, 399 US 204, 209 (1970).

Accordingly the right to vote and have a statutorily required election are not only clearly established but undoubtedly are the most clearly established of our constitutional rights. Therefore because Referendum Petitioners' clearly established constitutional rights have been violated no Defendant is entitled to qualified immunity.

4. *Advice of Counsel is Not a Defense.*

The individual Defendants claim that they were relying on the advice of The School District's counsel when they ruled that the Hoover referendum was unauthorized by law. (July 11 minutes; Opinions, App.P. 421, 467-487). The Trial Court ruled that this was a factor in its decision that Defendants were entitled to qualified immunity. (Summary Judgment Ruling p. 11; App.P. 925). However reliance on counsel's advice does not result in qualified immunity because an elected official is charged with knowing the laws which pertain to his office even though they may have no actual knowledge of the same. Harlow v. Fitzgerald, 457 US 800, 818-819 (1982) The Iowa Supreme Court has itself recognized this rule. Blessum v. Howard County, 295 NW2d 836, 849 (Iowa 1980) (compensatory and punitive damages awarded in §1983 action even though the Defendants followed the advice of their counsel in terminating their employee without due process) In the present case there are four additional reasons why the opinions now at issue do not support qualified immunity:

a. *The Opinions Are Unreasonable*.

The subject opinions failed to consider that the plain language of the applicable statutes and the Berent decision made the forwarding of the referendum question to the auditor a mandatory duty once it was determined that a sufficient number of qualified signatures were on the petition and that the addresses of the signers and dates of signing were shown. (Opinions; App.P. 467-487). Unless an opinion is objectively reasonable it provides no support for a claim of qualified immunity. Malley v. Briggs, 475 US 335, 341 (1986) (police officer not entitled to qualified immunity even though he relied on a judge's unreasonable determination that probable cause existed) The opinions now at issue come nowhere close to meeting the requirement that they be reasonable and under Malley they therefore cannot support qualified immunity.

b. *The Opinions Do Not Discuss Constitutional Issues*.

The opinions also do not address whether denying an election on the Hoover demolition issue would be a constitutional violation. Instead they only provide advice about how to process an Electors' Petition under state law. (Opinions; App.P. 467-487). It is not

enough that an opinion interpret state law. Instead it must advise as to the constitutionality of the conduct in question. Lindsey v. City of Orrick, 491 F3d 892, 901-902 (8th Cir. 2007). Therefore because the opinions now at issue provide no guidance on constitutional rights but only give advice on state law procedural issues they provide no support for qualified immunity.

c. *The Opinions Were Prepared by Regular Counsel.*

A third reason why the opinions at issue provide no basis for qualified immunity lies in the fact that they were prepared by The School District's regular counsel and not by an independent outside attorney. (Opinions; July 11 minutes; App.P. 421, 467-487). When regular counsel prepares opinions there is a significant risk that he or she is doing so not for purposes of providing independent objective advice but to instead provide "cover" for an unconstitutional pre-determined course of action. The United States Supreme Court has itself ruled that such opinions cannot support a qualified immunity defense because the attorney and the client in these situations are "…part of the same team..." Messerschmidt v. Millender, 565 US 535, 554-555 (2012), see also, Silberstein v. City

of Dayton, 440 F3d 306, 317-318 (6th Cir. 2005) ("…Board members cannot cloak themselves in immunity simply by delegating their … decisions to their legal department, as the availability of such a defense would invite all government actors to shield themselves from §1983 by first seeking self-serving legal memoranda…"). Accordingly the attorney's opinions now at issue provide no support for Defendants' qualified immunity claim.

d. *No Excuse for Erroneous Advice.*

A fourth reason why the subject opinions provide no basis for qualified immunity lies in the fact that there was no reason or excuse as to why the opinions could not have been more accurate. There are some cases which have allowed qualified immunity if there was an emergency or other unique circumstance. For example, if there had been a critical time urgency or other extraordinary circumstance which prevented the individual Defendants from accurately determining the law the resulting illegal conduct may be excusable. Lawrence v. Reed, 406 F3d 1224, 1230-1231 (10th Cir. 2005) However in the present case there was no time emergency as the opinions themselves state that they were being worked on for many

weeks. (Opinions; App.P. 467-487). And unlike the ambiguous nature of most §1983 cases, which tend to involve nebulous concepts such as probable cause or excessive force, the present Defendants and their counsel had the advantage of a clear statutory process to follow and the Berent case which thoroughly discussed this process. Nevertheless the opinions completely ignored this authority and as a result provide no basis for qualified immunity.

The bottom line on attorney's opinions and qualified immunity is that an attorney's opinion is not a "get out of jail free card." Instead under Harlow, Messerschmidt and Iowa's own Blessum decision public officials are charged with knowledge of the law, are responsible if they choose to break it, and cannot blame their lawyer when they are given advice which is contrary to their legal responsibility. Accordingly none of the present Defendants should receive qualified immunity.

## IV. WHETHER DISCOVERY SHOULD BE AVAILABLE TO PLAINTIFFS REGARDING THE TRUE NATURE OF AND MOTIVATION FOR DEFENDANTS' ATTORNEY'S WRITTEN OPINIONS.

A. Standard of Review.

The standard of review for decisions involving discovery disputes is generally abuse of discretion. Smiley v. Twin City Beef, 236 NW2d 356, 359 (Iowa 1975). However on constitutional issue appellate review is de novo. Because the discovery dispute now in question involves the discovery of evidence pertaining to the violation of constitutional rights this discovery issue should likewise be decided de novo. Varnum v. Brien, 763 NW2d 862, 874 (Iowa 2009).

B. Issue Preservation.

Referendum Petitioners' filed their motion to compel on January 12, 2018. (Motion to Compel; App.P. 293). This motion was denied on February 12, 2018. (February 12, 2018 Ruling; App.P. 818). Accordingly, error has been preserved on this issue because it was both presented to and decided by the Trial Court. Meier v. Senecaut, 641 NW2d 532, 537 (Iowa 2002).

C. Argument.

Referendum Petitioners by interrogatories and requests for production sought to obtain additional evidence as to the true reason why The School District's attorney issued the opinions which Defendants used as justification for preventing the election on the demolition referendum. (Motion to Compel; App.P. 293, 377). The School District asserted that these opinions were issued in good faith, were correct and therefore supported both its blockage of the Hoover election and the qualified immunity defense. Referendum Petitioners, however, believe that the opinions were a sham excuse to block an undesired election. The School District asserted attorney-client privilege and refused to provide the requested information. (Resistance to Motion to Compel; App.P. 372).

However no attorney-client privilege exists regarding the evidence which was sought. Instead, The School District put in issue the attorney opinions they received and therefore waived attorney-client privilege as to these opinions and all conversations related to the same. Specifically, The School District (1) posted the opinions on their website and (2)

publically discussed and used these opinions as the reason for denying Referendum Petitioners their voting rights. (July 11 minutes, App.P. 421, 464-465). By using the opinions in this manner The School District waived privilege and should now provide information as to all communications and other evidence related to these opinions. Miller v. Continental Insurance Company, 391 NW2d 500, 504-505 (Iowa 1986).

## V. WHETHER ATTORNEY FEES SHOULD BE AWARDED.

A. Standard of Review.

The standard of review for fee awards is abuse of discretion. Boyle v. Alum-Line, Inc., 773 NW2d 829, 832 (Iowa 2009). It is ordinarily an abuse of discretion to not award fees to a prevailing party in a §1983 action. Lefemine v. Wideman, 568 US 1, 4-5 (2012).

B. Issue Preservation.

Referendum Petitioners' claim that they should receive attorney fees was raised in their Petition, Amended Petition and Report Regarding Remaining Issues. (App.P. 279, 933-934). In its final

ruling the Trial Court denied the request for fees. (Final Ruling; App.P. 982). Accordingly error has been preserved on this issue because it was both presented to and decided by the Trial Court. Meier v. Senecaut, 641 NW2d 532, 537 (Iowa 2002).

C. Argument.

The Trial Court was inconsistent on the fee issue. On one hand it ruled that the pursuit of this lawsuit resulted in Referendum Petitioners receiving their constitutionally protected procedural due process right and their right to vote. (Summary Judgment Ruling Page 10; App.P. 924). At the same time it concluded that fees were not awardable because no constitutional rights had been violated. (Final Ruling; App.P. 981-982). However by ruling that Referendum Petitioners' rights to vote and to receive procedural due process were vindicated by this litigation the Trial Court implicitly found that these rights had in fact been violated. Further, the United States Supreme Court has ruled that when §1983 litigation results in a court decision which allows constitutional rights to be exercised the plaintiff is a prevailing party and is therefore entitled to receive attorney fees under 42 USC §1988. This is true even though all of

the Defendants may have qualified immunity, no monetary damages are awarded and the only relief granted is an injunction or other order which vindicates these constitutional rights. Lefemine v. Wideman, 568 US 1, 4-5 (2012), see also, Planned Parenthood v. Williams, 863 F3d 1008, 1011(8th Cir. 2017). This case has resulted in such an order because of the permanent injunction which orders the 2019 election and which affirms Plaintiffs' procedural due process rights. (Summary Judgment Ruling Pages 9-10; App.P. 924-925). Issue I in this brief discusses the additional constitutional rights which have been denied Referendum Petitioners and which should also now be vindicated by this appellate court.

In denying the request for fees the Trial Court also stated that this litigation has not resulted in permanent change and therefore fees should not be awarded. This conclusion was based on the fact that we will not know whether Hoover will or will not be demolished until after the 2019 election. (Final Order; App.P. 982). But 42 USC §1988 attorney fees are not awarded based upon whether free speech or an election actually makes political change. Instead fees are awarded for the vindication of constitutional rights which allows participation in the political process even though this participation

ultimately has no effect. For example in Lefemine fees were awarded after that litigation resulted in anti-abortion demonstrators being able to carry out their protest even though they and other abortion protesters have failed to succeed in banning abortions. In the present Hoover case, this litigation has resulted in a permanent change in the parties legal status because without this action there would not be an election and now there will. Additional examples of cases which allow fees even though no policy or legal change may result include those cases where third party candidates were excluded from the political process even though their chance of actually winning office was scant. Green Party of Tennessee v. Harget, 767 F3d 533, 551-553 (6th Cir. 2014); Libertarian Party of Arkansas v. Martin, 876 F3d 948, 952 (8th Cir. 2017). Further, the cause of Referendum Petitioners in this case was very viable as they succeeded in obtaining over 2,000 signatures in a short time period and therefore clearly had a legitimate possibility to prevail at the election which The School District squelched. Indeed, The School District's decision to stop the election is itself an admission that Referendum Petitioners were likely to succeed for otherwise The

School District would have simply followed the law and let the 2017 election take place.

Therefore because Referendum Petitioners prevailed in obtaining their most important objective --the constitutional right to have an election--an award of attorney fees and expenses in the itemized amount submitted to the Trial Court should be awarded. Attorney fees and expenses for this appeal should likewise be awarded.

## VI. WHETHER A "NO" VOTE ON THE PROPOSED REFERENDUM QUESTION WOULD MANDATE THAT THE HOOVER BUILDING NOT BE DEMOLISHED.

### A. Standard of Review

The standard of review for determining whether a controversy is ripe for adjudication is generally errors of law. However as this case involves constitutional rights the Trial Court's determination of this issue should be reviewed de novo. Varnum v. Brien, 763 NW2d 862, 874 (Iowa 2009).

### B. Issue Preservation

The School District requested that the Trial Court determine the effect of a "no" vote in their counterclaim. (Answer and Counterclaim; App.P. 289). Referendum Petitioners did likewise in

their Report of Remaining Issues. (Report of Remaining Issues; App.P. 954-955). In its final order the Court ruled that this issue was not ripe for determination. (Final Ruling; App. P.___) Accordingly error has been preserved on this issue because it was both presented to and decided by the Trial Court. Meier v. Senecaut, 641 NW2d 532, 537 (Iowa 2002).

C. Argument

For the following reasons Referendum Petitioners believe that a "no" vote at the 2019 referendum election should be binding on The School District. Referendum Petitioners also believe that whether an Iowa referendum is binding on the government is a question of great public interest which should be answered.

First, allowing a school board to ignore a referendum election outcome is directly contrary to the plain language of the applicable statutes. Specifically, Iowa Code §278.1 states as follows:

> …The voters at the regular election shall have the power to: Except when restricted by section 297.25, direct the sale, lease, or other disposition of any schoolhouse or school site or other property belonging to the corporation, and the application to be made of the proceeds thereof…(emphasis added)

Therefore the legislature in §278.1 very consciously stated that the voters "shall" have the "power" to "direct" whether or not a schoolhouse should be disposed of. The legislature's use of the word "shall" makes the grant of this power mandatory and one which cannot be disregarded. See, Code §4.1(30). Further, the word "power" means "…the ability to compel obedience" and the word "direct" means "…to dominate or determine the course of…" Webster's Third New International Dictionary of the English Language. If The School District was free to ignore the result of a §278.1 election the voters would therefore have no "power" and could not "direct" anything. This is not what the legislature intended when they chose the dominative words "shall", "power" and "direct" when prescribing the authority it wanted Iowa referendum voters to have. Conversely the authority granted by the legislature to a school board is much more limited as a school board under §297.22 cannot "direct" anything. Instead it only "may" dispose of a school site if it follows specific steps. The omission of the words "shall" and "direct" from the authority given a school board therefore demonstrates that the legislature wanted a school

board to be subordinate to the voters and accordingly gave the "final word" on the disposition issue to the voters.

A second reason why the voters have the authority to control whether a demolition occurs lies in the Iowa rule that a statute should be construed liberally in favor of giving effect to the voters' choice. Devine v. Wonderlich, 268 NW 2d 620, 622 (Iowa 1978). "Giving effect" means something much more than just voting. It means having a vote which has real life, non-theoretical consequences. Under this principle it would be inconsistent to say that voters under §278.1 have a right to vote but that public officials under §297.22 are somehow free to ignore this vote and decide for themselves whether to demolish Hoover. Instead, in order for the voters to actually have an effect Devine requires that the voters' decision overrules a contrary view held by a school board. Otherwise the election is nothing more than a sham.

A third reason to interpret §278.1 as giving the voters the ultimate power to decide lies under Articles I and II of the Iowa Constitution. Under Article I all political power is recognized as being "inherent in the people." Article II in turn grants the right of suffrage so that

Article I can be carried out. Barr v. Cardell, 155 NW 312 (Iowa 1915). The Iowa Constitution therefore grants not just the right to vote but also recognizes that the voters have "all political power." (emphasis added) These provisions of Iowa's Constitution would be meaningless if The School District could simply ignore an election result mandating preservation. Instead Iowa's Constitution provides that the authority to make the final decision on a school building's fate lies with the voters as part of the political power, all of which is inherent in the voters under the clear terms of Article I.

A fourth reason establishing why the vote on a Referendum Petition should be binding lies in the nature and purpose of referendums. When authorized by law referendums are a means to change existing government policies and practices. They would therefore have no role to play if they are merely advisory or could otherwise be ignored. See, Berent v. Iowa City, 738 NW2d 193, 209 (Iowa 2007) (stating that a ballot proposal cannot be interpreted as being a nonbinding "public opinion poll"); City of Eastlake v. Forest City Enterprises, Inc., 426 US 668, 678 (1976) (stating that referendums are not "an expression of ambiguously founded neighborhood preference" but are instead an "exercise by voters of

their traditional right through direct legislation to override the views of their elected representatives.")

The Iowa Attorney General reached an identical conclusion when asked to interpret the applicable statutes. This opinion makes it clear that the intent of Code Chapter 278 was to give voters the ultimate say in what happens to a schoolhouse and that there is no discrepancy or conflict between Code Chapters 278 and 297. Iowa Attorney General Opinion 79-7-25. (July 20, 1978).

In summary as long as the voters have not acted to take away its authority by the use of a §278.1 Electors' Petition a school board has the authority to demolish a schoolhouse by using the process outlined in Code §297.22. However since the voters under Code §278.1 hold the "power" to "direct" that a school building not be demolished the voters' decision controls if a referendum is pursued.

Therefore it is requested that this appellate court declare that a determination by the voters that the Hoover building not be demolished would be binding on The School District. Without such a determination The School District would undoubtedly proceed with demolition even though the public's vote was otherwise. This would then result in another round of litigation and appeal.

Additionally, a determination by this court would allow the citizens of Iowa to know, one way or the other, whether referendums in this state can be ignored by their political leaders.

The Trial Court therefore erred when it determined that this matter was not ripe because in cases involving constitutional rights the public benefit in having a determination of constitutional questions outweighs the judicial economy and other concerns which underlie the ripeness doctrine. This is especially true because the 2019 election is close at hand and sure to be controversial. Volume 13B Wright v. Miller, Federal Practice and Procedure §35 32.3 (f.n.35) (3rd Ed. 2014); Martin Tractor Co. v. Federal Election Commission, 627 F2d 375, 384 (D.C. Cir. 1980) (citing cases). Accordingly this court should decide this issue.

## CONCLUSION AND REQUESTED RELIEF

The Trial Court erred when, among other errors, it determined that Referendum Petitioners did not suffer a deprivation of their constitutional rights and were not entitled to damages and other relief. Accordingly Referendum Petitioners request the following:

1. That the Trial Court's decision be reversed and remanded on the issue of whether Referendum Petitioners have suffered a deprivation of their constitutional rights.
2. That this matter be remanded with instructions to the Trial Court to enter summary judgment in favor of Referendum Petitioners on the question of whether they are entitled to relief under 42 USC §1983 and §1985 and to also rule that no Defendant is entitled to qualified immunity.
3. That Referendum Petitioners after remand be allowed to conduct discovery on issues related to the motivation for Defendants' counsel's opinions and that the attorney-client privileges regarding the same be deemed to have been waived.
4. That the Trial Court on remand be instructed to calculate and award Referendum Petitioners nominal, actual, presumed substantial and punitive damages under 42 USC §1983 and §1985 as well as state law damages.
5. That Referendum Petitioners be awarded 42 USC §1988 and state law attorney fees in the amount requested at the trial court level and also be awarded fees and expenses for the appellate proceedings in this matter.

6. That this court determine that a "no" vote on the referendum question proposed by the Referendum Petitioners would prohibit the demolition of the Hoover building.

## REQUEST FOR ORAL ARGUMENT

Appellants request to be heard at oral argument in this matter.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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*/S/ GREGG GEERDES*
Signature

January 24, 2019
Date

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