IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KIM SCHMETT and LEANNE PELLETT, Petitioners, v. STATE OBJECTIONS PANEL, Respondent, ABBY FOR IOWA, Intervenor-Respondent	No. CVCV063390 MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

Petioners submit this memorandum of law in support of their petition for judicial review.

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I. Factual and procedural background

To qualify for the primary ballot, a candidate for U.S. Senator needs signatures from not less than 3,500 eligible electors on her nominating petition. Iowa Code § 45.1(1). In addition, the candidate must have signatures of at least 100 eligible electors from at least 19 counties in the district. *Id.* Abby Finkenauer filed her petition,

along with an affidavit of candidacy, in the Office of the Secretary of State on March 10, 2022. She seeks the nomination of the Democratic Party.

On March 25, 2022, objectors filed their objections to the Finkenauer petition. Their objections cited several deficiencies in the nomination petition sheets, including improperly dated signatures lines, a petition sheet that had missing information in the header, signature lines that had only a partial address, and certain duplicate signatures. Because of these deficiencies, Finkenauer did not have the mandatory 19 counties where she submitted at least 100 signatures.

An objection was also filed to the nomination petition of Attorney General candidate Tom Miller. The Miller petition suffered from the same flaws as the Finkenauer petition. Miller was required to submit at least 77 signatures in 18 or more counties. Iowa Code § 45.1(2). The deficient signatures left him short of this requirement.

The State Objections Panel convened on March 29, 2022, at the State Capitol to hear the objections.[1] Iowa Code § 43.24(3)(a) states that the members of the panel are the Secretary of State, the Auditor of State, and the Attorney General. Because Attorney General Tom Miller's petitions were challenged, however, the panel followed

[1] In total, the panel considered objections to the nomination petitions of seven candidates. According to the Secretary of State's candidate list, another 277 candidates filed for federal, statewide, or legislative races without garnering an objection. https://sos.iowa.gov/elections/pdf/Candidates/primarycandidatelist.pdf (last visited April 5, 2022).

the statutorily defined recusal process and substituted Miller with the Lieutenant Governor to consider the objections to the Miller petition. The objectors to the Miller and Finkenauer petitions filed before the hearing a motion for the Auditor of State to recuse himself because of comments made on his behalf about the attorney for the objectors that demonstrated his prejudice and bias. The objectors also noted that Miller would be required to recuse himself from consideration of the Finkenauer objection because of the similarity of the issues presented in both objections.

Before addressing the Miller petition, the Auditor of State refused to recuse himself. During the hearing, the panel voted 2-1 (with the Secretary of State and Lieutenant Governor in the majority) to not count a signature where the signer had failed to provide a correct date of the signature. Other signature objections, not relevant here, were denied by the panel. The panel voted to deny the Miller objection, determining that Miller had met the 77-signature threshold in 18 counties with two signatures to spare.

After a lunch break, the panel reconvened to consider the Finkenauer petition. The objectors renewed their motion for the Auditor of State to recuse himself. He again declined. The objectors then renewed their objection to the Attorney General's participation. They pointed out that Miller still had a live legal controversy about the validity of his petition (because of the possibility that the denial of the objection could be challenged in a judicial review action) and he had an incentive to go against the

panel's precedent from that morning in his resolution of the objection to the Finkenauer petition.

Despite this, Miller refused to recuse himself. He cited three reasons for his refusal. He claimed that the objection to his petition had been resolved, that he had a statutory obligation to sit on the panel, and that he would follow panel precedent.

The panel then considered the objections to the Finkenauer petition. On the issue of improperly dated signatures, the panel voted 2-1 (with the Attorney General and Auditor of State in the majority) to deny objections to counting those signature lines. Thus, the substantive rule applied by the panel on this question changed from the morning to the afternoon.

The change in the panel's rule made the difference of whether Finkenauer qualified for the ballot. The panel denied an objection to one signature from Allamakee County and two signatures from Cedar County. Because Finkenauer was left with 100 signatures in Allamakee County and 101 in Cedar County, the enforcement of the signature date rule would have left her without enough counties that reached the 100-signature threshold to qualify for the ballot.

II. The State Objection Panel is an "agency" within the meaning of the Iowa Administrative Procedure Act, meaning its decisions are subject to judicial review by this Court

An "agency" for purposes of the Iowa Administrative Procedure Act "means each board, commission, department, officer or other administrative office or unit of the state." Iowa Code § 17A.2(1). This is why the panel's decision to not disqualify a candidate for state senate because of a criminal conviction was subject to judicial review under the IAPA. *Chiodo* v. *Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014) ("The Iowa Code authorizes judicial review of agency decisions that prejudice the 'substantial rights' of the petitioner. Iowa Code § 17A.19(1), (10).") The panel claims in its answer that it is not an agency and that review of its decision must be by writ of certiorari. But if the panel claims it is a "tribunal, board or officer" for purposes of certiorari under Iowa R. Civ. P. 1.1401, then it must be a "board…or other administrative office or unit of the state" for purposes of the IAPA.

III. Standard for judicial review of agency action

Judicial review of agency action is controlled by the provisions of Iowa Code § 17A.19(10). Agency action may be reversed by the Court when it is based on an erroneous interpretation of law that had not been clearly vested by a provision of law in the agency and it violates the plaintiffs' substantial rights. Iowa Code § 17A.19(10)(c). And an agency decision may be reversed when it violates substantial rights and was

"[t]he product of decision making undertaken by persons who were…subject to disqualification," Iowa Code § 17A.19(10)(e).

The Court owes no deference to the panel's legal interpretations because the legislature has not granted it such authority. No provision of law speaks to this question. To say that an agency has been granted such interpretive authority "means that the reviewing court, using its own independent judgment and without any required deference to the agency's view, must have a firm conviction from reviewing the precise language of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question." *Renda* v. *Iowa Civil Rights Com'n*, 784 N.W.2d 8, 11 (Iowa 2010) (citing Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 62 (1998)).

General rulemaking power is not sufficient to give an agency the authority to interpret statutory language. *Id.* at 13. The Iowa Supreme Court has found that agencies like the Iowa Civil Rights Commission, Iowa Finance Authority, and Iowa Department of Revenue lack such authority. *Id.* And while the Court has found authority vested "when the statutory provision being interpreted is a substantive term within the special expertise of the agency." *Id.* at 14. But terms that have "an

independent legal definition that is not uniquely within the subject matter expertise of the agency" the Court generally concludes "the agency has not been vested with interpretive authority." *Id.*

Thus, the Court recently concluded that the Iowa Board of Medicine lacked the authority to interpret the phrase "privileged and confidential" in a statute regulating its investigative powers. *Calcaterra* v. *Iowa Bd. of Medicine*, 965 N.W.2d 899, 903 (Iowa 2021). The phrase "is not informed by the Board's special expertise." *Id*. The phrase "is not unique to the Board; it applies to many different licensing boards…Furthermore, courts frequently interpret the terms…in a variety of contexts." *Id.*

The panel cannot point to any provision of Iowa's elections laws that gives it the power to interpret for itself what the law means or to adopt a particular standard for judging the adequacy of nomination petitions. Thus, this case presents a pure question of law about which the Court owes the panel no deference.

IV. Objectors have standing to pursue this action

The objectors challenged the Finkenauer nomination petition under Iowa Code § 43.24(1)(a), which gives the right to challenge to "any person who would have the right to vote for the candidate for the office in question." The panel concedes that objectors have standing to pursue relief in this Court. But the intervenor claims they do not and raises two arguments in support. First, intervenor says this language limits the ability to file a challenge before the panel to a registered Democrat. Second,

inventor says that objectors lack standing to bring a judicial review action. Both assertions lack merit.

The text of Iowa Code § 43.24(1)(a) does not lend itself to the cramped reading suggested by the intervenor. Notably absent from this language is any same-party restriction. Surely the legislature knew how to limit petition challenge to be strictly inter-party affairs. But they did not so. In addition, the language used is focused on the general election, not the primary. It speaks of the ability of the objector to "vote for the candidate for the *office* in question" (emphasis added). The winner of a primary election is entitled to place on the general election ballot, not a certificate of election and the right to hold office. Because it is uncontroverted that objectors have the right to vote at the general election for the office of U.S. Senator, the claim should be rejected.

But even if the language could be limited to a right to the primary election only, the objectors have every right to vote in the Democratic primary. Iowa is a same-day registration state. Iowa Code § 43.41 (primary voter may declare party affiliation through the close of voter registration for the primary election) and Iowa Code § 48A.7A (permitting registration on the day of the election). Although they are registered Republicans now, they can be registered Democrats on or before the June 7, 2022, primary election. Thus, even if the grant of standing to eligible voters is read in an atextual and cramped manner, the objectors still have standing.

Intervenor cites *Dickey* v. *Iowa Ethics & Campaign Disclosure Bd.*, 943 N.W.2d 34 (Iowa 2020) in support of his second standing argument. In *Dickey*, the plaintiff filed a complaint with the board over a campaign disclosure report of Governor Kim Reynolds. *Id.* at 36. The Governor received air travel from a supporter on a privately owned aircraft. *Id.* Her campaign disclosure report listed the value, according to the applicable administrative code provision, based on the value of commercial airfare for the same trip. *Id.* The plaintiff believed the rule treated the costs of such travel incorrectly and filed a complaint with the board, asking it to require the Governor's disclosure report to be restated. *Id.*

The campaign board rejected the complaint because it "found no indication that the Governor's campaign committee had violated any law." *Id.* at 37. The plaintiff then sought judicial review of this determination. *Id.* The district court found the plaintiff had no standing to pursue the matter further. *Id.* The Iowa Supreme Court agreed.

The Court recognized that the plaintiff's claimed injury was no more than a disagreement with how the board resolved his complaint. "The relief that Dickey seeks from the Board—a determination that the Governor's candidate committee underreported the fair market value of the trip—will not provide him any additional information." *Id.* at 39. "His petition and exhibits make clear that there is no gap in his knowledge regarding [the flight] that would be filled by granting his Board complaint." *Id.* at 41. At that point he had no more than the kind of general grievance about the law

that is insufficient for standing. *Id.* at 38 (citing *Godfrey* v. *State*, 752 N.W.2d 413, 423-24 (Iowa 2008)). But objectors' case is different.

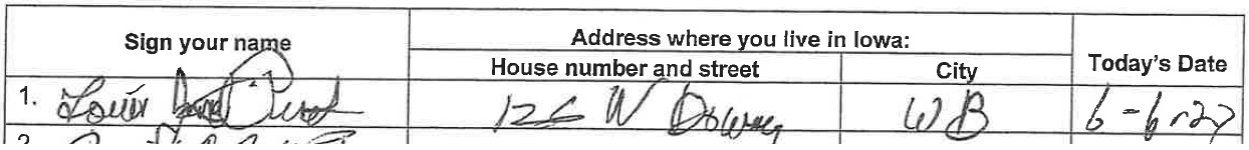
Dickey approached the Iowa Ethics and Campaign Disclosure Board as an enforcement agency. He wanted the IECDB to pursue an action as an exercise of *its* prosecutorial power. Its decision to decline his request did not cause Dickey a legally cognizable injury. Objectors, in contrast, approached the State Objections Panel as a quasi-judicial body. They wanted the panel to adjudicate *their* claims—claims that the law gave them the right to raise. Because of this distinction, *Dickey* is no obstacle to the objectors' pursuit of judicial review.

V. Signatures on nominating petitions must be accurately and completely dated by the signer of the petition. For three signatures, the elector failed to put the date he or she signed it. If these signatures are not counted, Finkenauer failed to qualify for the ballot. Should the ballot objection have been sustained?

Objectors challenged three signatures relevant to this judicial review action. The first was an undated signature from page 10, line 2 of Finkenauer's Allamakee County petition:

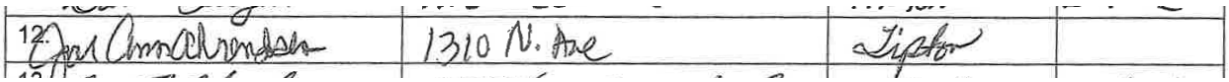
Sign your name	Address where you live in Iowa:		Today's Date
	House number and street	City	
1. Cheryl Adams	1028 W Main St	Waukon	2-10-22
2.	240 16th Ave	Waukon	52077

Objectors also challenged two signatures from Cedar County. The first was from page 6, line 1 with an obviously incorrect date:



Sign your name	Address where you live in Iowa:		Today's Date
	House number and street	City	
1.	126 W	WB	6-6-22

And the second was from page 10, line 12 that was undated:



12.	1310 N. Ave	Tipton	

If the panel would have sustained the Allamakee County signature objection, Finkenauer would have been left with only 99 valid signatures from that county. Similarly, if the panel would have sustained the Cedar County signature objections, she would have also had only 99 valid signatures there. The loss of either county from her 100-signature list would have meant she failed to qualify for the ballot.

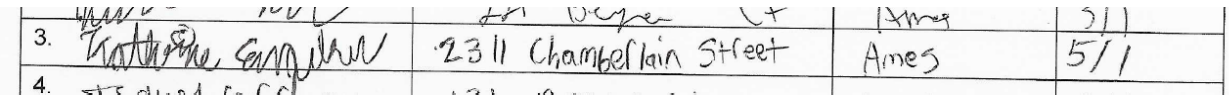
A. A petition signer must personally add the date he or she signed the petition

The requirement that the individual signer provide the date of signing comes from Iowa Code § 43.15(2): "The following *requirements shall be observed* in the signing and preparation of nomination blanks: …(2) Each signer *shall* add the signer's residential address, with street and number, if any, and the date of signing." (emphasis added). Of course, no substantial compliance standard can be gleaned from this language, for these are "requirements" that "shall be observed." And the date of the signature is not something that can simply be assumed from other information on the

sheet. "*Each signer* shall add *the signer's*…date of signing." *Id.* In other words, the date of signing cannot come from another voter's date of signing, nor can it come from the person who circulated the petition.

Requiring the signer to personally date his or her signature is an important measure to prevent fraud in the nomination petition process. Unlike casting a ballot, an act that takes place under the supervision of elections officials, gathering of petition signatures is conducted by candidates and campaigns themselves. The law sensibly requires the petition signer to personally provide his or her address and date of signing. Requiring this information to come from the signer, not the candidate, helps to ensure that a sheet of signatures is what it purports to be: an expression of genuine support for the candidacy rather than a fiction created by a desperate candidate. [2]

The panel had granted a challenge to an improperly dated signature when considering the Miller petition in the morning. It accepted a challenge to a signature from page 3, line 3 of Story County:



[2] Fraud of this kind is hardly unknown. In 2018 a federal candidate's campaign ended abruptly when her campaign manager admitted to forging signatures on her nomination petition. https://www.desmoinesregister.com/story/news/politics/2019/04/07/congress-3rd-district-iowa-theresa-greenfield-apologizes-falsified-signatures-register-ad/3393810002/

But in the afternoon, with Miller on the panel, the panel said that date failings could be excused because it would apply a "substantial compliance" standard. The panel would accept any signature on a page so long as someone who signed that page put the correct date on it. Thus, the panel's decision was contrary to the rule it used in the morning and contrary to the statutory requirement that the signer provide the date of his or her signature.

B. Iowa court decisions on statutory interpretation, including in the context of election law, do not support the panel's choice to ignore the date of signature requirement

No Iowa court decision has construed the legal standard to apply to the consideration of challenges to nomination petitions for the failure to comply with statutory requirements. But familiar legal principles from other Iowa cases, combined with decisions from other states considering challenges to nominating petitions, make clear that "close enough" is not the correct standard. The Iowa legislature has promulgated rules about how a candidate gets on the ballot. The statutes mean what they say, and candidates simply need to follow them. And for the candidate who is concerned about a signature here or there being invalid, there is a simple answer: turn in more signatures than the bare minimum.

Regulation of access to the ballot serves important state interests. "It is beyond question that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Clingman* v.

Beaver, 544 U.S. 581, 593 (2005). Thus, regulations dealing with ballot access "do not compel strict scrutiny." *Id.* (citing *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972)). "The general rule is that, unless there is language allowing substantial compliance, election statutes are mandatory and must be strictly complied with." *State ex rel. Simonetti* v. *Summit County Bd. of Elections*, 85 N.E.3d 728, 734 (Ohio 2017).

"When interpreting the meaning of a statute, we start with the statute's text." *Calcaterra*, 965 N.W.2d at 904. "If statutory language in its proper context is unambiguous, we do not look past the plain meaning of the words." *Id.* Considerations of alternative views of the policy considerations involved is not the basis to ignore the plain meaning of a statute's text. *Id.* at 908. Words like "requirement" and "shall" must be given their plain meaning. "Shall" imposes a duty. Iowa Code § 4.1(30)(a). "[W]e have interpreted the term 'shall' in a statute to create a mandatory duty, not discretion." *State* v. *Klawonn*, 609 N.W.2d 515, 522 (Iowa 2000). Similarly, a "requirement" is "something required; something obligatory or demanded, as a condition [the *requirements* for college entrance], something needed; necessity; need." Webster's New World Collegiate Dictionary, 5th Ed. 1235 (2014).

Rules of statutory interpretation should be applied consistently, regardless of the perception of the statute's overall salutary purpose. For example, in construing language in the Iowa Civil Rights Act, the Court—although mindful that the statute shall "be construed broadly to effectuate its purposes"—cannot go beyond "a fair

interpretation" of what its words actually mean. *Vroegh* v. *Iowa Dep't of Corrections*, ___ N.W.2d ___, 2022 WL 981824 at*24 (Iowa). "We effectuate the statute's "purposes" by giving a fair interpretation to the language the legislature chose; nothing more, nothing less. 'Sex' doesn't expand to 'gender identity' (or anything other than 'sex') simply because the statute contains an instruction that it be 'construed broadly.'" *Id.* Likewise, although "it is correct that we interpret workers' compensation statutes in favor of the worker, we still must interpret the provisions within…the statutory scheme 'to ensure our interpretation is harmonious with the statute as a whole.'" *Chavez* v. *MS Technology LLC*, ___ N.W.2d ___, 2022 WL 981813 at *10 (Iowa).

In construing other election statutes, the Iowa Supreme Court has disavowed the view that voters need not comply with neutral and nondiscriminatory rules. Thus, in *League of United Latin American Citizens of Iowa* v. *Pate*, 950 N.W.2d 204, 210 (2020), the Court declined to disturb the district court's refusal to enjoin a statute that required voters themselves to provide complete information on an absentee ballot request form. Legitimate interests were served by placing an obligation on the *voter*, rather than an election official, to supply the information. "[The statute] directs auditors faced with 'insufficient' information on the ballot request, which might be of two types: (1) missing identification (such as a line left blank); or (2) inaccurate information provided (such as a wrong birthdate)." *Id.* "Both types of insufficient information raise potential concerns about whether the person completing the form is

in fact the registered voter. *Missing* information raises a legitimate question of why it wasn't provided; *wrong* responses (such as listing a wrong birthdate) arguably give rise to even sharper questions of why the applicant supplied incorrect information." *Id.* (emphasis original).

This approach to interpretation of an election statute (which, unlike the signing of a nomination petition, implicates voting interests) lends no support to a "substantial compliance" standard. Indeed, the words "substantial compliance" or "substantially comply" do not appear anywhere in Iowa's election laws. The legislature's directions mean little, if anything, if the panel will simply waive its hand at them and utter the phrase "substantial compliance."

And it should be noted that in several places, Iowa election law disclaims the existence of a substantial compliance test. Iowa law makes clear the information that is required in the nominating petition and gives candidates who submit deficient papers no ability to argue that the deficiency is immaterial. "Signatures on a petition page shall be counted *only* if the information required in subsection 1 is written or printed at the top of the page." Iowa Code § 43.14(2)(a) (emphasis added). If objections are made to a nominating petition "relating to incorrect or incomplete information for information that is required under sections 43.14 or 43.18" those objections "*shall be sustained*" (emphasis added). This sentence was added by the legislature last year. 2021 Iowa Acts, Ch. 147, § 9.

In other words, the panel lacked the discretion to excuse a failure to provide sufficient information. The legislature has directed in two locations that the petition header information must be complete and accurate for the signatures on that page to be counted. Iowa's election laws contain numerous provisions couched in mandatory language. There certainly is nothing in the text of Iowa's election laws that suggests that compliance with them is not required. Consider, for example, the requirement in Iowa Code § 45.6(4) that nomination petitions sheets "shall be neatly arranged and securely fastened together before filing…" Does substantial compliance save the candidate who shows up with a handful of loose sheets? No. "Nomination papers which are not securely fastened together shall be returned to the candidate or the candidate's designee without examination." *Id.* And, setting aside candidates who die or withdraw before a deadline, a candidate who does not file as provided by Iowa Code § 43.13 shall have his or her name "not be printed on the official primary ballot…" Iowa Code § 43.13.

It is inevitable that any nomination petition will contain signatures that cannot be counted. There is a simple remedy for this: campaigns should collect more than the bare minimum number of signatures required. As the Secretary of State's guide to primary candidates includes in the filing checklist:

☐ **Count the signatures.**

Best Practice: File more than the required number of signatures since it is possible for signatures to be challenged. If there are signatures on a petition that should not be included, simply draw a line through the names. Those signatures will not be counted.

(Secretary of State Guide for Primary Candidates 9). A candidate ignores this advice at his or her peril.

C. Other states do not apply a "substantial compliance" standard to the requirements of a nomination petition

The Illinois Supreme Court's resolution of a challenge to a nomination petition in *Jackson-Hicks* v. *East St. Louis Bd. of Election Com'rs,* 28 N.E.3d 170 (Ill. 2015) is instructive. A candidate for municipal office had turned in more than the minimum number needed but a review by the election commissioners found "at least 48 of the signatures on [the candidate's] petitions were invalid." *Id.* at 172. The candidate was left with 123 valid signatures when 136 were required. *Id.* But the commissioners declined to remove his name because the candidate showed "substantial compliance" with the requirement.

The Illinois Supreme Court rejected this analysis. "The dispositive question is whether the Election Board was correct when it interpreted the Election Code to permit the minimum signature requirement for nominating petitions to be judged based on a theory of 'substantial compliance.'" *Id.* at 175. The court held that election statutes should be subject to ordinary rules of statutory interpretation. *Id.* "When

statutory language is plain and unambiguous, the statute must be applied as written without resort to aids of statutory construction." *Id.*

The candidate argued the election board had discretion to excuse his failing. Not so, according to the court. "Generally speaking, requirements of the Illinois Election Code are mandatory, not directory." *Id.* at 176. "Implicit in the law's provision that nominations may be made through nomination papers containing 'not less than' the required minimum number of signatures is that nominations may *not* be made through nomination papers containing a number of signatures which *is* less than the minimum required by law. The latter proposition is a corollary of the former." *Id.* at 178 (emphasis original). "When the law provides that a certain threshold is required in order to win an election, it is understood that if one fails to attain the threshold, one loses. Runners-up have no claim to office on a theory that they came close enough. So it has always been in American electoral politics. So it remains." *Id.*

Similarly, the Colorado Supreme Court rejected out of hand the view that substantial compliance was the appropriate legal standard in all situations. "In our most recent analysis of the Election Code, we noted that there are some aspects of the Code that simply cannot be subject only to substantial compliance." *Griswold* v. *Ferrigno Warren*, 462 P.3d 1081, 1085 (2020). As an example, a statutory requirement that signature collectors be Colorado residents "is not a mere technical requirement that is subject to substantial compliance. A person either is a resident for purposes of the

Election Code or he is not." *Id.* The court recognized "a specific statutory command could not be ignored in the name of substantial compliance." *Id.*

Specific statutory commands cannot be ignored, even when a court "liberally construes" election provisions. *In re Silcox*, 674 A.2d 224, 225 (Pa. 1996). "The language of this statute clearly requires the elector to sign the petition, add his occupation and residence, and also add the date of signing. When the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Id.* "It is well-settled that the 'so-called technicalities of the Election Code' must be strictly enforced, 'particularly where…they are designed to reduce fraud.'" *In re Scroggin*, 237 A.3d 1006, 1018 (Pa. 2020).

"Strict compliance with the requirements of the Election Law is mandates as to matters of prescribed content of nominating petitions." *DeBerardinis* v. *Sunderland*, 714 N.Y.S.2d 858 (N.Y. Gen. Term 2000). "[T]he requirement that each signature be dated is a requirement of content and not merely one of form." *Id.* "It is wholly immaterial that the courts might reasonably conclude that what they perceive as the ultimate legislative objectives might better be achieved by more flexible prescriptions, prescriptions which might be judged by some to be more equitable. Whatever may be our view, the Legislature has erected a rigid framework of regulation, detailing as it does throughout specific particulars." *Hutson* v. *Bass*, 426 N.E.2d 749, 774 (N.Y. 1981).

An Illinois case illustrates when substantial compliance is the appropriate standard to consider a technical violation. In *Samuelson* v. *Cook County Officers Electoral Bd.*, 969 N.E.2d 468 (2012), the court considered a challenge to a judicial candidate's petition consisting of "428 consecutively numbered pages of petition sheets containing a total of 4,242 signatures." *Id.* But included with his pages was a sheet of signatures for a candidate running in a different race. Because the law required signatures to be on consecutively numbered pages, an objector claimed that the inclusion of the other candidate's page invalidated the entire petition. The Court rejected this argument.

"Our courts have previously held that 'substantial compliance with the Election Code is acceptable when the invalidating charge concerns a technical violation…But substantial compliance is not operative to release a candidate from compliance with the provisions intended by the legislature to guarantee a fair and honest election." *Id.* at 475. "[T]he inclusion of one nonconforming petition sheet out of many cannot, by any stretch of the imagination, constitute a complete disregard for the provisions of [the statute requiring pagination], justifying the application of such a rigorous standard." *Id.*

Finkenauer's petition cannot be saved by this logic. No one has attacked for including erroneously a stray sheet from another candidate. The objection is based on failing to do something that the code says is a requirement. In this context, strict compliance is necessary.

D. The Court should reverse the determination of the panel, find the signatures from Allamakee County and Cedar County were not valid, and that Finkenauer failed to file a petition that reached the 100-signature threshold in the required number of counties

The panel should have not counted the signatures from Allamakee and Cedar counties that lacked proper dates. Striking either county from the 100-signature list would have left Finkenauer with too few counties to qualify for the ballot. Because the panel's decision was based on an erroneous interpretation of law that prejudiced the substantial rights of the objectors, it should be reversed. Iowa Code § 17A.19(10)(c).

VI. Officials who decide contested cases under the Iowa Administrative Procedure Act are subject to the same disqualification rules as judges. The Attorney General had a personal interest in the outcome of the Finkenauer objections and the Auditor of State had previously shown bias against the attorney for the objectors. Should the matter be remanded for a new hearing before different officials?

Because the panel's decision was based on an erroneous determination of law, it may be remedied by this Court on judicial review. But there is an alternate basis to set aside the panel's decision: it was the product of a panel where two of the three members should have been disqualified.

A. Standard for recusal

The State Objections Panel operates under the provisions of Iowa Code § 43.24(3). Subsection (a) contains an automatic recusal mechanism, requiring the members of the panel to recuse themselves when their own nomination petitions are challenged, and it provides alternate members to sit on the panel under this circumstance.

But this is not the only recusal requirement for the panel. There is a common-law rule of recusal that "extends to every tribunal exercising judicial or quasi-judicial functions." *In re Gianforte*, 773 N.W.2d 540, 549 (Iowa 2009) (applying rule to school board members adjudicating contested case for termination of a teacher's contract of employment.) "Any board member who harbors prejudice or predilection should recuse himself or herself." *Id.* "As with judges, recusal by board members will depend on the remoteness of the interest and the extent or degree of the interest." *Id.* Because the State Objections Panel is an "agency" of state government under the Iowa Administrative Procedures Act, its members are "subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is or may be disqualified." Iowa Code § 17A.11(2).

The Iowa Code of Judicial Conduct provides guidance for when a judge must disqualify himself or herself from a proceeding. These grounds include circumstances where the judge "has a personal bias or prejudice concerning a party or a party's

lawyer," or when the judge has "more than a de minimis interest that could be substantially affected by the proceeding or has a personal economic interest in the "subject matter in controversy." Iowa Code of Judicial Conduct 51:2.11(A)(1), (2)(c), and (3).

A judicial officer's own interests being in play raise particularly strong recusal concerns. *In re Howes*, 880 N.W.2d 184, 200 (Iowa 2016) (judge disciplined for signing ex parte order for attorney who had recently provided the judge free legal representation.) "[A] judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case. This rule reflects the maxim that no man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *Caperton* v. *A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (cleaned up).

B. Attorney General Miller should have recused himself from consideration of objections to a petition where a claim was made that was substantially similar to a claim made against his own petition

Miller was automatically recused from the consideration of the objections to his own petition. Iowa Code § 43.24(3)(a). But he could not fairly consider objections to other petitions where substantially similar grounds are raised to those against his own petition. He was placed in the untenable position of affirming or rejecting panel

decisions from earlier in the day when the legitimacy of those decisions would be material to any appeal of the denial of the objection to his petition.

Miller hardly helped his own cause when he argued against the Finkenauer objection by stating that she was "a former U.S. Representative" and "a legitimate candidate" in the election. The law cannot tolerate having one set of rules for candidates who are perceived as legitimate because of their prior federal service and another for candidates who are seen as lesser. Surely equal treatment before the law is a proposition that needs no further explanation to justify it.

If a judge could not have refused to disqualify himself or herself, then the panel members could not either. Iowa Code § 17A.11(2). Consider an example from current events. There is presently a proposal[3] to build a carbon capture pipeline in Iowa. Imagine that a group of landowners resort to litigation to block the construction of the pipeline across their land. And suppose that one of the landowners is a district court judge. Finally, imagine that there is a court hearing where the claims of the landowners will be heard sequentially by the district court.

Of course, the landowner/judge could not preside over his own hearing. He would need another judge to decide that case. But would anyone plausibly think that,

[3] https://www.desmoinesregister.com/story/money/business/2021/11/28/what-is-carbon-capture-pipeline-proposals-iowa-ag-ethanol-emissions/8717904002/

once the judge's own hearing has concluded, he could properly take the bench and decide the other cases against the pipeline? Surely any observer would conclude that the landowner/judge needs to sit the entire matter out. He plainly would have his own personal interests at stake when deciding other carbon pipeline cases. Recusal under such circumstances would be mandatory. Miller was subject to the same standard and failed to meet it.

C. Auditor of State Sand should have recused himself because of his personal bias against the attorney for objectors

Personal bias against a party's attorney is a basis for judicial recusal. Iowa Code of Judicial Conduct 51:2.11(A)(1). Counsel for objectors is President and Chief Counsel of the Kirkwood Institute, a nonprofit public-interest law firm. The Kirkwood Institute is the plaintiff in a lawsuit against State Auditor Sand, Sand's chief of staff John McCormally, and the Office of the State Auditor because of their failure to release public records as required by the provisions of Iowa Code Chapter 22. See *Kirkwood Institute, Inc.* v. *Rob Sand, et al.*, Polk County No. EQCE087052.

The public records case stems from a Kirkwood Institute investigation into State Auditor Sand's use of his office to issue an audit report of a public awareness campaign regarding COVID-19 mitigation efforts. Because Governor Kim Reynolds, along with numerous other noteworthy Iowans, appeared in a television advertisement promoting the campaign, Auditor Sand claimed the expenditures for the advertisement violated a

provision of state law restricting public officials from using their likeness in radio and TV spots. The Iowa Ethics and Campaign Disclosure Board later rejected Auditor Sand's allegations.

The Kirkwood Institute's investigation of the State Auditor would not ordinarily form the basis for recusal here. But the fact that the State Auditor frames his view of the objector's attorney through the lens of politics is confirmed by his spokesperson's reaction to the public records suit. Auditor's office spokeswoman Sonya Heitshusen was quoted in a Des Moines Register story[4] stating "[b]ecause the Governor herself ignores open records requests, a political hack who previously attacked Rob Sand with baseless legal claims is now attempting to drag him down to her level." This intemperate remark requires recusal of Auditor Sand here. A reasonable observer would question whether he can make decisions solely based on the requirements of Iowa law after his response to the Kirkwood Institute's lawsuit.

D. The statutory alternates to Attorney General Miller and Auditor Sand could have served in their stead

Iowa Code § 43.24(3)(a) specifies who should replace each member if the member's own nomination petition is challenged. As discussed above, a challenge to the Attorney General's petition results in his replacement by the Lieutenant Governor.

[4] https://www.desmoinesregister.com/story/news/2021/10/12/lawsuit-claims-rob-sand-illegally-hiding-emails-iowa-governor-kim-reynolds-probe-kirkwood-institute/6056406001/

The Auditor of State is replaced by the Secretary of Agriculture. The statute does not provide for a replacement mechanism for other conflicts. But this question is answered by Iowa Code § 17A.11(5)(a). That provision states that "[i]f a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute shall be appointed by…the governor, if the disqualified or unavailable person is an elected official."

The Governor should have been asked to appoint replacements for the Attorney General and Auditor of State. Because the legislature has already instructed that the Lieutenant Governor and Secretary of Agriculture are the appropriate replacements when the panel members' own petitions are challenged, the Governor could have been asked to appoint those same officials for their recusal here. This choice by the Governor would have honored the legislative determination that a statewide elected official be replaced by another statewide elected official to decide petition objections.

E. The panel's decision must be reversed because of the participation of two members who were subject to disqualification

The panel's decision was the "[t]he product of decision making undertaken by persons who were…subject to disqualification," Iowa Code § 17A.19(10)(e). Because it violated the substantial rights of the objectors, it must be reversed and remanded to the panel for decision. The Court should order the disqualification and replacement protocol of Iowa Code § 17A.11(5) be implemented.

VII. Conclusion

The electoral process, much like other aspects of life, is full of rules. Rules mean nothing if they are ignored for unprincipled reasons. There are 27 candidates for statewide or federal office who did not have their petitions challenged. There are 250 candidates for the state legislature who similarly received no objection. Those campaigns did not rely on "substantial compliance." Rather, they achieved "actual compliance." Any claimed unfairness in sustaining these objections pales in comparison to the potential unfairness to the candidates and campaigns who expended the time and resources to follow the law. The panel's decision should be reversed.

In the alternative, the panel's decision must also be set aside because of the failure of two of its members to recognize and respect the ethical limits on them when adjudicating objections. The law requires them to act like judges. Because they failed to do so, at a minimum the panel decision must be remanded for a new hearing before officials who are not subject to disqualification.

Respectfully submitted,

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