IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1427
Johnson County No. CVCV07149

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

v.

THE IOWA CITY COMMUNITY SCHOOL DISTRICT; CHRIS LYNCH, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF THE BOARD OF DIRECTORS AND DIRECTOR OF THE IOWA CITY COMMUNITY SCHOOL DISTRICT; 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 COMMUNITY 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
HONORABLE SEAN MCPARTLAND, DISTRICT COURT JUDGE

FINAL BRIEF FOR APPELLEE/CROSS-APPELLANT

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ROUTING STATEMENT

The issues in this appeal include substantial questions of interpretation of an Iowa statute, substantial issues of first impression, and fundamental issues of broad public importance. Therefore, the Iowa Supreme Court should retain the case for decision. *See* Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Appellees/Cross-Appellants Iowa City Community School District and Board Members Chris Lynch, LaTasha DeLoach, Brian Kirschling, and Paul Roesler (collectively, "School District") agree with much of Appellants/Cross-Appellees Heather Young, Del Holland, and Blake Hendrickson's ("Petitioners") summary of the course of factual proceedings in this matter. However, the School District will clarify a few matters.

Contrary to Petitioners' characterization of this matter, this case does not center on the question of remedies following a governmental body's refusal "to hold a statutorily required referendum election." Petitioners Brief at 1. Although less sensational, this case presents questions of statutory interpretation regarding the authority, obligations, and powers of a school board acting pursuant to the Iowa Code.

The Board determined that the proposed referendum was not "authorized by law" under Iowa Code § 278.2. In response, Petitioners filed for an injunction. The School District resisted. App. 227-44. The District Court granted a temporary injunction. Petitioners then filed an Amended Petition. The School District filed an Answer and Counterclaim, denying all allegations in the Amended Petitioner, asserting affirmative defenses, and seeking declaratory relief of its own. App. 282-90. On January 12, 2018, Petitioners filed a motion to

compel discovery.[1] App. 293-96. The District Court denied the motion to compel. App. 818-20.

On April 26, 2018, following written briefing and oral argument on the parties' cross-motions for summary judgment, the District Court issued its ruling. The District Court ruled "as a matter of law, that there has been no violation of Plaintiffs' constitutional rights; that Defendants have not conspired to violate any of Plaintiffs' rights; that Defendants are entitled to qualified immunity; and that Plaintiffs are not entitled to damages" and granted judgment in favor of the School District on those issues. App. 930. The District Court denied Petitioners' Motion entirely "except that the Court orders that the ballot proposition shall be placed on the next regular election ballot; and that any demolition would be a disposition under the applicable statutes." App. 929. Contrary to Petitioners' assertions, the District Court did not "specifically state[] that [this ruling] was not the final disposition of the case." Petitioners Brief at 5. The District Court stated the following:

> It is further ordered that, because the only issues remaining in this dispute relate to the Demolition Petition being placed on the ballot for the next regularly scheduled general election, the parties shall inform the Court, in writing and within thirty (30 days of the entry of this Ruling, as to their positions regarding whether this matter should remain open and active, or whether the Court's ruling that the Demolition Petition be placed on the next general election ballot is sufficient to resolve this controversy, such that the case can be closed. The parties also shall advise the Court as to what specific issues they believe remain for trial of this matter, if any.

[1] Petitioners Brief states this motion was filed on June 12, 2018.

App. 931.

On August 2, 2018, the District Court issued its Memorandum Order and Final Ruling on Requests for Relief. In this Order, the District Court stated that at the June 15, 2018 hearing, "each of the parties acknowledged that [the April 26 Ruling on summary judgment] was a final judgment." App. 980. Additionally, the District Court denied Plaintiffs' request for it "to rule on the binding nature and effect of any eventual vote." *Id.* The District Court did not, however, confirm its intention to not "express an opinion on what the legal effect of a 'no' vote would be" on the petition proposition, as alleged by Petitioners. *See id.*

STATEMENT OF FACTS

Because Petitioners' Statement of Facts includes significant argument and opinion, or at the very least, disputed and irrelevant facts, the School District provides the following brief statement:

On July 24, 2013, the Board of Directors of the Iowa City Community School District ("Board") approved a Facilities Master Plan, which generally described planned changes to facilities across the entire school district. The Facilities Master Plan provided that the Hoover Elementary School building would no longer be used as a school; that the building would be razed; and the site would be used for other District purposes. *See* App. 568-69. A new Hoover Elementary has already been constructed and is currently in use. App. 569. The

"old Hoover" Elementary building will no longer serve students beginning in the fall of 2019 and students will be moved according to a Board-approved attendance plan. *Id.*

On June 29, 2017, a petition was delivered to the Board Secretary of the Iowa City Community School District requesting that a proposition be placed on the ballot at the regular school election to be held on September 12, 2017. *Id.* The petition requested a vote of the electors on the following question:

> 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 2018-2019 school year, with the proceeds of any resulting salvage to be applied as specified in Iowa Code section 297.22(b)?

Id.

On July 11, 2017, a majority of the members of the Board voted against a motion to direct the County Commissioner of Elections to provide for the submission of the proposition to the voters at the regular school election. App. 570. The minutes of this Board meeting reflect that Board members had received and considered a legal opinion prepared for the Board by its counsel that the proposition stated in the ballot petition was not a proposition authorized by law to be submitted to the voters. *See id.* As reflected in the minutes, counsel's recommendation was "that the Board should reject the [ballot petition] as not presenting a public measure and proposition authorized by law, notify the County Commissioner of Elections of the filing of the [ballot petition] and of

the Board's action, and directing that the measure not be on the ballot in September." *See id.* The Board voted 4-2 to accept counsel's opinion and proceed accordingly. *Id.*

The regular school election took place on September 12, 2017. The ballot proposition was not provided in the notice of the regular election and was not included on the ballot. *Id.* Pursuant to the Court's September 6, 2017 Order and April 26, 2018 Ruling, the proposition is scheduled to be placed on the ballot for the September 2019 school election.

ARGUMENT

I. The District Court Correctly Ruled the School District Did Not Violate Petitioners' Constitutional Rights

A. Preservation of Error

The School District agrees that Petitioners have adequately preserved error on the majority of the below issues. However, Petitioners did not present their argument regarding the "less restrictive alternative" in relation to substantive due process to the District Court in this matter. *See* Petitioners Brief at 25-26. Accordingly, error has not been preserved on this issue and the Court should decline to consider this theory. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Additionally, Petitioners failed to preserve error on their equal protection claim. The District Court did not specifically address the equal protection

argument in its ruling granting summary judgment, aside from finding that Petitioners' constitutional claims were all denied. App. 930. Petitioners did not request the District Court enlarge or amend its findings to specifically request consideration of their equal protection argument. Therefore, that issue has likewise not been preserved for appeal. *Meier*, 641 N.W.2d at 537.

B. Scope and Standard of Review

Generally, a ruling on summary judgment is reviewed for correction of errors at law. *Weizberg v. City of Des Moines*, 17-1489, 2018 WL 4178518, at *8 (Iowa Aug. 31, 2018). However, summary judgment on a constitutional issue is reviewed de novo. *Id.*

C. Analysis

Petitioners claim they are entitled to damages under 42 U.S.C. § 1983 and 42 U.S.C. § 1985, as well as attorney's fees under 42 U.S.C.A. § 1988. Under § 1983:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Section 1985 provides an action for recovery of damages against one or more persons who

> conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy . . . .

42 U.S.C. § 1985(3). Section 1988 provides that a court may award reasonable attorney's fees to a prevailing party in a § 1983 or § 1985 action. An essential element of a § 1983 or § 1985 constitutional claim is the deprivation of a federally protected right. *See Schmidt v. City of Bella Villa,* 557 F.3d 564, 571 (8th Cir. 2009); *see also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979) ("Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.").

Petitioners set forth extensive "legal background" for their constitutional claims. Petitioners Brief at 12-16. As part of this background, Petitioners attempt to frame their claims on appeal as involving "the intentional refusal to hold a statutorily required election" actionable under § 1983. For the reasons discussed in the following subsections, the record in this case simply does not support Petitioners' interpretation of the School District's actions. As the District Court correctly ruled, the School District did not violate any of Petitioners' federal constitutional rights and, therefore, Petitioners are not entitled to damages or attorney's fees under § 1983 or § 1985.

1. The School District Did Not Violate Petitioners' Right to Vote

This case does not implicate the right to vote. Petitioners repeatedly characterize the School District's actions in this matter as having refused to hold an election. *See e.g.,* Petitioners Brief at 12-13, 17. The regular school election was held on September 12, 2017. What this case does concern, however, is the propriety of including a referendum proposition on an election ballot in accordance with state law. Because the right to petition for inclusion of a referendum on a school election ballot does not implicate a federal constitutional right to vote, the Court should affirm the ruling of the District Court on this issue.

As this Court explained in *Bowers v. Polk County Board of Supervisors*, "[t]his is not a 'right to vote case; referendums, unlike general elections for a representative form of government, are not constitutionally compelled." *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 692 (Iowa 2002) (quoting *Kelly v. Macon–Bibb County Bd. of Elections,* 608 F. Supp. 1036, 1038 (M.D.Ga.1985)).

> The right to vote in a general election, *i.e.,* the right to participate in *representative* government, is a fundamental constitutional right that may not be abridged absent a compelling state interest. A referendum, however, is a form of direct democracy. Our constitution insures a representative form of government, not a direct democracy. Where a statute provides for an expression of direct democracy, such as by initiative or referendum, it does so as a matter of legislative grace; the right to participate in such a process is not fundamental to our Constitution.

Id.; *see also Kendall v. Balcerzak*, 650 F.3d 515, 523 (4th Cir. 2011) (noting the distinction between the right to vote in a representative election and the right to petition for initiative "is a sound one" because an initiative "is a form of direct democracy and is not compelled by the Federal Constitution"); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993) ("[T]he plaintiffs do not cite to us nor does our research identify any decision of the Supreme Court or a lower federal court holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote.").

Here, Petitioners undertook an effort under state law to place a ballot proposition on the election ballot. After securing signatures, Petitioners presented the petition to the Board. Pursuant to Iowa Code § 278.2(1), the Board then determined whether the petition was authorized by law.

Petitioners attempt to distinguish *Bowers* by arguing that it "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 [the] citizen does not obtain sufficient signatures or otherwise fails to meet statutory referendum requirements" and that, here, Petitioners satisfied "all of Iowa's statutory requirements for a referendum." Petitioners Brief at 19-20. However, the state statute at issue also requires that the petition be "authorized by law." Iowa Code § 278.2(1).

Therefore, because not all of the statutory requirements were met, the petition was not forwarded to the County Auditor.[2]

The litany of cases cited in this section of Petitioners Brief do not stand for the asserted propositions and do not support a finding that the School District violated Petitioners' right to vote. For example, *City of Phoenix, Ariz. v. Kolodziejski* was cited for the proposition that "The right to vote also applies to referendum elections to the same extent that it applies to general elections." Petitioners Brief at 17. *Phoenix* considered the question of a state's exclusion of non-property owners from participating in elections—the right to vote. *City of Phoenix, Ariz. v. Kolodziejski* 399 U.S. 204, 213 (1970) (affirming the trial court's finding that "the challenged provisions of the Arizona Constitution and statutes, as applied to **exclude nonproperty owners from elections** for the approval of the issuance of general obligation bonds, violate the Equal Protection Clause of the United States Constitution" (emphasis added)). *Williams v. Rhodes* does not hold that "keeping an **issue** or candidate off the ballot effectively eliminates the right to vote held by those citizens who support the excluded issue." Petitioners Brief at 17 (emphasis added). *Williams* struck down Ohio laws that made it "virtually impossible for any party to qualify on the ballot except the Republican

[2] To the extent Petitioners' rely on *Berent v. City of Iowa City*, 738 N.W.2d 193 (Iowa 2007), in support of their constitutional claims, that analysis is inapplicable. *Berent* did not involve constitutional issues.

and Democratic Parties" as violating equal protection. *Williams v. Rhodes*, 393 U.S. 23, 25 (1968).

This case involves Petitioners' ability to place a referendum proposition on an election ballot. This is a separate issue from the right to vote. *Compare, e.g., Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 692 (Iowa 2002) and *Kendall v. Balcerzak*, 650 F.3d 515, 523 (4th Cir. 2011), *with Bonas v. Town of North Smithfield*, 265 F.3d 69, 75-76 (1st Cir. 2001) (finding the right to vote was implicated when a town refused to hold a regularly scheduled election); *Reynolds v. Sims*, 377 U.S. 533, 560 (1964) (analyzing the constitutionality of the apportionment of the Alabama legislature); *Marks v. Stinson*, 19 F.3d 873, 875 (3rd Cir. 1994) (addressing the right to vote in the context of a finding that officials conspired to cause illegal absentee ballots to be cast for one candidate).

Petitioners failed to identify any facts that show the School District prevented them from voting in the regular school election held on September 12, 2017 or otherwise interfered with their ability to participate in that election. Petitioners' characterization of the School District having "illegally blocked" a required election are not supported by the record. An election was held on September 12, 2017. *See* App. 570. No one, to the School District's knowledge, was prevented from or discouraged from participating in that election. The fact that a specific ballot proposition was not on the general election ballot does not give rise to a constitutional claim for violation of the "right to vote."

Because this case concerns Petitioners' ability to initiate a referendum, Petitioners claims arise solely, if at all, under Iowa Code Chapter 278 and not under the United States Constitution. Accordingly, the Court should affirm the District Court's ruling on this constitutional claim.

2. The School District Did Not Violate Petitioners' Due Process Rights

The District Court correctly determined that the School District did not violate Petitioners' Due Process rights. Under the Due Process Clause of the Fourteenth Amendment, a state cannot "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend IVX; *see also Walker v. Kansas City*, 911 F.2d 80, 93 (8th Cir. 1990).

a. The District Did Not Violate Petitioners' Procedural Due Process Rights

Petitioners state that the District Court "agreed that [the] District denied Petitioners their constitutional right of procedural due process." Petitioners Brief at 23. This is incorrect. The District Court specifically ruled "Plaintiffs have not met their burden of establishing, based upon undisputed evidence and as a matter of law, that [the School District has] violated [Petitioners] right to procedural or substantive due process." App. 924. The District Court also found that Petitioners were accorded "their procedural due process through this action, in that they have presented the dispute to the Court and have obtained their requested relief of having the proposition [placed on the ballot." *Id.* Finally, the

District Court ruled that "there has been no violation of Plaintiffs' constitutional rights." App. 930. Nowhere in the Ruling does the District Court ever state Petitioners' constitutional rights (due process or otherwise) were violated—in fact, it expressly holds otherwise.

Procedural due process claims involve a two-step analysis. Initially, Petitioners must demonstrate that the District deprived them of a life, liberty, or property interest. If successful, Petitioners must then establish that Defendants deprived them of that interest without sufficient "process." *See Krentz v. Robertson Fire Protection Dist.*, 228 F.3d 897, 902 (8th Cir. 2000); *see also Bowers*, 638 N.W.2d at 690-91. In other words, the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of life, liberty and property. *See Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). Liberty interests stem from the U.S. Constitution and include interests such as "freedom from bodily restraint, the right to contract, the right to marry and raise children, and the right to worship . . . ." *Bowers*, 638 N.W.2d at 691 (citing *Roth*, 408 U.S. at 572). No such rights have been presented or shown here.

Property interests, on the other hand, "are created and their dimensions are defined not by the Constitution but by an independent source such as state law." *Id.* (quotation omitted). Petitioners have not shown that they, or voters in general, have a property interest established by state law. Chapter 278 does not

vest in them any tangible or intangible property interests. *Compare Goss v. Lopez*, 419 U.S. 565, 575-76 (1975) (holding that if a state makes public education programs available to eligible children, a constitutionally protected property interest exists which cannot be denied without appropriate due process), *with Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) (finding appellants had not demonstrated a right or interest in an initiative process "substantial enough to rise to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." (citation omitted)).

Where a protected interest exist, courts then apply a balancing test to determine whether a violation has occurred, analyzing:

> 1) the nature and weight of the private interest affected by the challenged official action; 2) the risk of an erroneous deprivation of such interest as a result of the summary procedures used; and 3) the governmental function involved and state interests served by such procedures, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought.

Hughes v. City of Cedar Rapids, Iowa, 840 F.3d 987, 994 (8th Cir. 2016) (quoting *Booker v. City of Saint Paul*, 762 F.3d 730, 734 (8th Cir. 2004)).

The only arguable interest at issue here is the right created by Chapter 278. This right can be characterized as 'the right to petition to obtain the right to vote." *Bowers*, 638 N.W.2d at 692. This is not a constitutionally protected liberty or property interest. This state statutory right is limited by the very language of Section 278.1, which notes that voters have the powers enumerated "[e]xcept

when restricted by section 297.25." Iowa Code § 278.1(1)(b). As explained in the District Court's ruling, Section 297.25 "explicitly and unambiguously grants a school board the independent power to dispose of, in whole or in part, a schoolhouse, school site, or other property belonging to a school district" and that these powers are in addition to the powers of voters pursuant to the provisions of Section 278.1. App. 928. Therefore, even if Petitioners have demonstrated a protected property interest on their procedural due process claim, such right is limited by the very statute that created it. *Cf. Bowers*, 638 N.W.2d at 692 (explaining the appellant's right was "minimal at best" because even if he succeeded in the petition process, the board of supervisors could abandon the issue if it so chose). The School District maintains that Chapter 278 does not establish any right to life, liberty, or property that is protected under the Due Process Clause. *See Dobrovolny*, 126 F.3d at 1113.

Petitioners argue the District failed to provide them with notice and an opportunity to be heard "before a qualified tribunal before a determination on the legality of their petition was made." Petitioners Brief at 23. In support, Petitioners cite *Ward v. Monroeville*, 409 U.S. 57 (1972). *Ward* involved an individual convicted of two traffic offense and fined $100 by the town mayor sitting as a judge. The mayor was also tasked with responsibility for revenue production and law enforcement in the town. The United States Supreme Court ruled that the mayor could not be impartial because this was a "situation in which

an official perforce occupie[d] two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Ward*, 409 U.S. at 60. This is a completely distinct factual scenario from the present action.

The question facing the District Court was what process, if any, Petitioners were due in light of the protected interest at stake. The District Court determined that Petitioners had obtained the requisite process through the instant action. *See* App. 924 (denying the due process claim because Petitioners "have presented the dispute to the Court and have obtained their requested relief of having the proposition placed on the ballot."). However, even if this action itself does not suffice, Petitioners received sufficient due process from the School Board.

In making its decision regarding whether the referendum petition was authorized by law, the School Board acted in accordance with the text of § 278.2. The statute provides:

> 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.

Iowa Code § 278.2(1). The referendum petition was published as an item for discussion at the July 11, 2017 Board meeting. *See* App. 615-16, 914. The referendum petition was thoroughly discussed and considered by the School Board at that public meeting. *Id.* Therefore, Petitioners had notice that the referendum petition would be considered by the School Board and were welcome to attend and address the School Board at the meeting. Petitioners provided no authority, and the School District is not aware of any, that would provide them with additional due process rights, such as an evidentiary due process hearing on the referendum petition. The relevant state statutory provisions do not provide for any specific hearing procedures. The School District considered the referendum petition at the scheduled Board meeting and, ultimately, determined it was not authorized by law. Even assuming for purposes of this claim that the School District was incorrect in its analysis of the statute, it did not deprive Petitioners of a due process right—they were afforded both notice and an opportunity to be heard.

Petitioners argue they were denied procedural due process because the School District "did not have the authority to decide whether the demolition referendum petition was 'authorized by law,'" and because they were entitled to a hearing before a "qualified tribunal." Petitioners Brief at 22-23. Petitioners have cited no relevant authority for their contention they were entitled to "notice and an opportunity to be heard before a qualified tribunal" before the Board

considered whether the petition was authorized by law. Furthermore, Referendum Petitions have not even suggested what would consist of a "qualified tribunal" for these purposes.[3]

Because there is no evidence in the record demonstrating a genuine issue of fact as to whether the School District denied Petitioners procedural due process, this Court should affirm the ruling of the District Court on this claim.

b. The School District Did Not Violate Petitioners' Substantive Due Process Rights

A party alleging a violation of substantive due process "must overcome a very heavy burden to show a violation of the Fourteenth Amendment." *Hall v. Ramsey Cty.*, 801 F.3d 912, 917 (8th Cir. 2015). Petitioners cannot show merely infringement of an interest, the question is "whether the extent or nature of the [infringement] . . . is such as to violate due process." *Id.* (quotation omitted) (alterations in original). To successfully establish a violation of substantive due process rights, a plaintiff must demonstrate that an official's conduct was both

[3] In making the argument that the Board was not permitted to make the determination, Petitioners attempt to conflate the issues addressed in *Berent* with the allegations in their due process claim. However, *Berent* does not involve constitutional questions, and the procedure identified by Petitioners as the proper channel for addressing the legality of a referendum petition is a separate issue from procedural due process. *See Berent*, 738 N.W.2d 193 (addressing the process that a municipality should utilize to determine the legality of a ballot measure under Iowa Code Section 360).

"conscience-shocking" and "violated one or more fundamental rights that are deeply rooted in this Nation's history and tradition . . . ." *Id.* (quotation omitted).

> In general, substantive due process is concerned with violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Id. at 918 (quotation omitted (alterations in original).

Additionally, although "election practices that systematically deny voting rights may rise to the level of fundamental unfairness by denying the right to vote," those decisions have been limited to "apply only to the process of conducting (or failing to conduct) elections." *Molinari v. Bloomberg*, 596 F. Supp. 2d 546, 569 (E.D.N.Y. 2009), *aff'd*, 564 F.3d 587 (2nd Cir. 2009) (citing Circuit case law). Those are not the facts at issue here. The School District did not deny anyone the right to vote. *See Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 694 (Iowa 2002) (rejecting a plaintiff's alleged due process and right to vote claims in the context of a petition for an election for essential county purpose bonds and noting the only right at issue was plaintiff's "right to petition to obtain the right to vote," not the actual right to vote).[4]

[4] *Bowers* involved challenges to clauses under the Iowa Constitution. However, because Iowa courts "deem the federal and state due process clauses to be identical in scope, import, and purpose," *Bowers*' reasoning applies here. *See Bowers*, 638 N.W.2d at 690.

Furthermore, nothing in the record regarding the School District's actions comes close to shocking the conscience. *See id.* ("With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked.' (quoting *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 265 (Iowa 2001)). The School District's actions with respect to the ballot petition were conducted in accordance with the Board members' duties and involved public discussion and a vote on the propriety of the petition at a regular Board meeting.

Petitioners attempt to raise a new theory on appeal in support of their substantive due process claim. They argue the School District must satisfy a strict scrutiny analysis of its "refus[al] to hold the election" and that the School District's alleged failure to use "much less restrictive alternatives makes the denial of the election a substantive due process violation." Petitioners Brief at 25-26. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 NW2d 532, 537 (Iowa 2002). This argument was never raised in the District Court and is, therefore, waived. Regardless, the School District did not "refuse[] to hold an election" and strict scrutiny does not apply. Additionally, one of the "less restrictive alternatives" identified by Petitioners on appeal, for the Board to order that provisional ballots be cast, is

not even within the scope of a school board's authority, nor is it authorized by state law.

Because there is no evidence generating a question of material fact on Petitioners' substantive due process claim, the Court should affirm the District Court's ruling in favor of the School District.

3. The School District Did Not Violate Petitioners' First Amendment Rights

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. This provision was made applicable to the states through the Fourteenth Amendment. *See Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 7 (Iowa 2012). Although access to a ballot initiative process is not a constitutional requirement, once the State grants such a right it must act "in a manner consistent with the Constitution" regarding any limitations on political expression related to the initiative process. *Meyer v. Grant*, 486 U.S. 414, 420 (1988). "The State, having cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles." *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010) (quoting *Republican Party of Minn. v. White,* 536 U.S. 765, 788 (2002)) (internal quotation marks omitted) (alteration in original).

"A party can show a cognizable injury by showing that its First Amendment rights have been chilled by harm to reputation or threat of criminal prosecution." *Mo. Roundtable for Life v. Carnahan*, 676 F.3d 665, 673 (8th Cir. 2012). Where a party cannot show the State has "impact[ed] the communication of [a] political message or otherwise restrict[ed] the circulation of their initiative petitions or their ability to communicate with voters about their proposals," or even regulated the content of political speech, there is no violation of the First Amendment. *Dobrovolny v. Moore*, 126 F.3d 1111, 1112–13 (8th Cir. 1997).

Petitioners cite *Anderson v. Celebrezze* in support of their claim that the School District violated their First Amendment rights. Petitioners Brief at 30-31. *Anderson* does not involve a proposed referendum, it deals with the eligibility requirements for candidates in general elections and is inapplicable to the present matter. *See Anderson v. Celebrezze,* 460 U.S. 780, 786 (1983) ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights."). Petitioners also rely heavily on *Meyer v. Grant*. Petitioners Brief at 27. In *Meyer*, the Supreme Court struck down a Colorado statute punishing the payment of petition circulators as a felony. *Meyer v. Grant,* 486 U.S. 414 (1988). Petitioners characterize the School District's actions in considering whether a ballot petition is "authorized by law" as "more egregious" than a state government criminalizing individual behavior as a felony. This claim is obviously outlandish. Both *Meyer* and *Anderson* are factually distinct from this matter, particularly since there is no

evidence in the record that the School District interfered whatsoever with Petitioners' communications regarding the referendum petition.

The record shows that Petitioners solicited signatures for their ballot petition and freely communicated with people regarding the issue. App. 632-806, 421. Nothing suggests that the School District interfered or attempted to interfere with any of these actions. App. 923. Petitioners do not cite any facts or legal authority that supports their argument the School District somehow interfered with their First Amendment rights. Accordingly, the Court should affirm the ruling of the District Court on Petitioners' First Amendment claim.

4. The School District Did Not Violate Petitioners' Right to Equal Protection

The District Court did not expressly rule on Plaintiffs' equal protection claim, aside from stating "as a matter of law, that there has been no violation of [Petitioners'] constitutional rights." App. 930. Petitioners did not request the District Court enlarge the Ruling to specifically consider their equal protection claim. Therefore, the equal protection claim has been waived. *Meier v. Senecaut*, 641 N.W.2d 532, 540-41 (Iowa 2002). Nevertheless, out of an abundance of caution, the School District will address Petitioners' equal protection claim, which fails on the merits.

> Equal protection analysis turns on the classification drawn by the statute in question. Unless a law places a burden on a fundamental right or focuses on a suspect class, it is subject to a rational basis standard of

> scrutiny. Suspect classifications include those such as race, alienage, gender, or national origin.

Knapp v. Hanson, 183 F.3d 786, 789 (8th Cir. 1999) (internal citations omitted). As previously discussed, this case does not involve the right to vote. There is no fundamental right at issue. Furthermore, Petitioners' theoretical classifications, the bond initiative supporters and the ballot petition supporters, are not suspect classifications. In fact, there is no evidence such a classification exists at all. *See Gallagher v. City of Clayton*, 699 F.3d 1013, 1018 (8th Cir. 2012) ("A class may be found suspect if the class shares 'an immutable characteristic determined solely by the accident of birth, or is saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." (citations and quotations omitted)); *see also Knapp*, 183 F.3d at 789 (finding rational basis review applied to a case involving a classification between highway patrol workers and other members of the Department of Public Safety). To the extent the Court finds distinct classes exist, rational basis review applies, not any level of heightened scrutiny.

Petitioners are challenging the Board's action in determining that a ballot petition was not authorized by law. It is unclear to the School District how these

facts give rise to an equal protection claim.[5] Cases involving equal protection and the right to vote mainly involve challenges to statutes or other state action that create classifications between voters. *See, e.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). There is no evidence the Board took action based on any classification whatsoever. The Board considered whether the ballot proposition was authorized by law. This was an entirely separate decision from any action regarding the bond initiative (which was clearly authorized by law).

Petitioners attempt to create two classes of individuals based purely on assumption. Nothing in the record supports a finding that the Ballot Petition supporters and the supporters of the bond initiative are two separate classes of people. In fact, there could be significant overlap. Petitioner Young campaigned on behalf of the ballot petition by specifically stating that people could support both initiatives simultaneously. App. 807. Petitioners' argument is an attempt to

[5] Petitioners did not even raise equal protection in their Amended Petition or in their motion for summary judgment. It first appeared in their resistance to the School District's motion for summary judgment. *See* App. 875. Although Iowa's notice pleading standard does not require the pleading of facts in support of the elements of a cause of action, a petition provides "fair notice" of a claim where the petition "states the prima facie elements of the claim and sets forth the general nature of the action." *Schmidt v. Wilkinson*, 340 N.W.2d 282, 283-84 (Iowa 1983) (addressing the sufficiency of pleadings in the motion to dismiss stage of a case). Nothing in the Amended Petition references equal protection, Petitioners' allegedly being treated differently than a similarly situated group of individuals, or anything else that infers an intention to plead an equal protection claim. The School District raised this issue to the District Court in its summary judgment reply. *See* App. 900.

reverse engineer classes of individuals based on the results of the Board's separate decisions regarding the ballot petition and the bond initiative.

Because the Board's decision was not based on any class distinctions and no valid class of individuals been identified, as well as the fact that Petitioners did not adequately plead an equal protection claim and did not preserve this issue for appeal, the Court should rule the equal protection claim fails.

5. The District Court Correctly Ruled on Other Issues Related to Constitutional Claims

Petitioners separately raise three additional issues on appeal that are intertwined with their arguments on the constitutional claims. The School District believes these issues have been sufficiently addressed in the context of each constitutional claim, but will briefly re-address the issues here as well.

a. The District Court Correctly Ruled that Petitioners Did Not Suffer a Deprivation of a Constitutional Right

Petitioners argue the District Court's ruling stated that ordering the election requested "adequately remedies the violation of constitutional rights which was committed in 2017." Petitioners Brief at 31. **The District Court made no such statement regarding a violation of constitutional rights and expressly ruled no violation of Petitioners' constitutional rights occurred.** App. 930 ("The Court has ruled, as a matter of law, that there has been no violation of Plaintiffs' constitutional rights."). Petitioners' insistence that a

constitutional violation occurred is unsupported by the District Court's ruling on summary judgment, the record in this action, and applicable law. Furthermore, the District Court did not "order an election." It ordered the ballot proposition "be placed on the next regular election ballot." App. 930. This is an important distinction Petitioners repeatedly attempt to gloss over.

In considering the question of procedural due process, the District Court stated that Petitioners "have obtained their procedural due process through this action, in that they have presented the dispute to the Court and have obtained their requested relief of having the proposition placed on the ballot." App. 924. As noted above in the discussion on procedural due process, Petitioners were afforded procedural due process in this matter by the Board in an open and public meeting where it deliberated on whether the petition was authorized by law.

The District Court recognized that Petitioners had not suffered a deprivation of procedural due process—or any other constitutional right. If Petitioners believed the District Court meant to rule the School District had violated their procedural due process rights, but that violation had been cured by the District Court, that issue should have been brought to the attention of the District Court in the form of a motion under Rule 1.904. Absent such a request and a corresponding ruling, the District Court's April 26 Ruling clearly finds the School District did not violate Petitioners' constitutional rights.

b. The District Court Correctly Ruled that this Case is Limited to Interpretation of a State Statute

Petitioners argue the District Court "stated that because this case involved only a disagreement over state law Petitioners' claim did not rise to the level of a constitutional claim." Petitioners Brief at 32 (citing generally the April 26 Ruling). This is a mischaracterization of the District Court's ruling. The District Court correctly recognized that, to the extent Petitioners alleged claims under 42 §§ 1983 and 1985, those claims must be based "on a violation of federal law." App. 923. This is a correct statement of the law:

> Plaintiffs in actions under 42 U.S.C. § 1983 must base their claims on a violation of federal law. *Leydens v. City of Des Moines,* 484 N.W.2d 594, 596 (Iowa 1992); *Bailey v. Lancaster,* 470 N.W.2d 351, 356 (Iowa 1991). Whether the board of education or some other agency is empowered to pass on the legal sufficiency of petitions submitted under section 257.18(2) is an issue of state law. Consequently, even if the board misinterpreted that law by assuming authority that it did not have, that conduct would not give rise to a § 1983 claim.

Petersen v. Davenport Comm. Sch. Dist., 626 N.W.2d 99, 103 (Iowa 2001).

Petitioners argue *Duncan v. Poythress* supports their theory that an alleged violation of an Iowa law governing referendum petitions creates an actionable claim under § 1983. *Duncan* considered the question of whether the state of Georgia violated substantive due process when it refused to hold a special election as mandated by Georgia state law for the replacement of a justice on the Georgia Supreme Court. Even under those facts, where the polls were closed and an entire election did not take place, the Fifth Circuit noted that "it is a closer

question" whether the actions of Georgia's state officials "amounted to a constitutional violation entitled to a section 1983 remedy" because "the constitution leaves to the states broad power to regulate the conduct of federal and state elections." *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981).

Peterson represents the better analysis of the issues in this matter. In *Peterson*, this Court noted that a school board's analysis of whether a petition was legally sufficient does not create a claim under 1983. *Petersen v. Davenport Community Sch. Dist.*, 626 N.W.2d 99, 105 (Iowa 2001). The Court also considered whether the plaintiffs in that case had established a violation of their due process rights due to the process the school board used to reject the petition. There, the school board invalidated a petition because it found there was an absence of valid signatures, "as well as on the theory that the wording of the petitions was fatally flawed." *Id.* In making its ruling, the Court relied on the school board's refusal to provide the plaintiffs with an opportunity to examine or otherwise challenge the insufficiency of the signatures.

Here, the School District did not reject Petitioners' petition based on anything other than the issue of whether the referendum proposition was "authorized by law," as directed in Section 278.2. There was no dispute of fact requiring an evidentiary hearing. The Board believes that the statute required it to make that legal determination before forwarding the proposition to the Auditor's office. The Board published notice and held a public meeting at which

it deliberated on that question. Petitioners did not attempt to challenge that determination with the Board prior to filing the instant action. Therefore, nothing in this matter establishes a violation of procedural due process similar to the violation found in *Peterson*. And certainly nothing in this matter rises to the level of the facts illustrated in *Duncan*. Therefore, because Petitioners' claims exist only under the auspices of state law, the Court should affirm the District Court's ruling that "there has been no violation of [Petitioners'] constitutional rights." App. 930.

c. The District Court Correctly Ruled There Was No Evidence of a Conspiracy

Petitioners argue the District Court erred in considering the School District's "intent" and in ruling there was no evidence demonstrating a question of fact to support the conspiracy claim. Petitioners Brief at 32-35.

> To succeed on their § 1983 conspiracy claim against a particular defendant, [Petitioners] must show: that [the School District] conspired with others to deprive him or her of a constitutional right; that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and that the overt act injured [Petitioners].

Askew v. Millerd, 191 F.3d 953, 957 (8th Cir. 1999). Furthermore, Petitioners must also prove that they have been deprived of a constitutional right or privilege to succeed on a § 1983 civil conspiracy claim. *Id.* (noting that "conspiracy to deprive is insufficient . . . [w]ithout a deprivation of a constitutional right or privilege,

[the defendant] has no liability under § 1983" (quotation omitted (alterations in original)).

Petitioners' attempt to cast the July 11, 2017 school board meeting as satisfying the required conspiracy elements is nonsensical. School board meetings are public, regularly held meetings, at which board members discuss the business of a school district and make decisions on all manner of issues. The plain and simple fact is that the Board discussed the ballot petition and then made a decision relating to school operations, and this is in line with the regular duties of Board members. Iowa Code §§ 274.3(1) ("The board of directors of a school district shall operate, control, and supervise all public schools located within its district boundaries and may exercise any broad and implied power, not inconsistent with the laws of the general assembly and administrative rules adopted by state agencies pursuant thereto, related to the operation, control, and supervision of those public schools.") and 274.7 ("The affairs of each school corporation shall be conducted by a board of directors . . . ."). Petitioners cite no authority in support of their conspiracy theories. Petitioners also contend that there is "no dispute that because of [the School District's] actions [Petitioners] and the other several thousand people who signed the [ballot petition] were deprived of their right to vote." Petitioners Brief at 36. The School District did not deprive anyone of their right to vote. Because Petitioners have failed to demonstrate that the School District conspired to deprive them of a

constitutional right, that there was any overt act in furtherance of a conspiracy, and that Petitioners' constitutional rights were actually violated, the Court should affirm the ruling of the District Court.

II. The District Court Correctly Ruled Petitioners are Not Entitled to Damages

A. Preservation of Error

The School District agrees that Petitioners have preserved the issue of whether there are entitled to damages generally. However, Petitioners attempt to insert new legal theories not presented to the District Court in support of their argument on damages. To the extent these issues were not presented to the District Court, as discussed below, these issues have not been preserved for appeal. *Meier*, 641 NW2d at 537.

B. Scope and Standard of Review

The standard of review is for correction of errors at law. *Hagen v. Texaco Refining & Mktg., Inc.*, 526 N.W.2d 531, 534 (Iowa 1995). Petitioners cite no applicable authority for their contention that standard of review is de novo merely because this case also involves constitutional issues.

C. Analysis

As set forth above and in the District Court's ruling on summary judgment, Petitioners have not demonstrated the School District violated any of their constitutional rights. Therefore, Petitioners are not entitled to any damages

based on these claims. Furthermore, the calculation and award of damages is a question of fact inappropriate for summary judgment. Petitioners argue the affidavit submitted by Petitioner Young establishes their entitlement to nominal, actual, and presumed substantial damages.[6] However, Referendum Petitions presented no evidence to the District Court regarding specific amounts of damages sought. Furthermore, Petitioners' argument that punitive damages should be assessed against the School District is unsupported by evidence.

"Punitive damages are awarded to punish the defendant for his [or her] willful or malicious conduct and to deter others from similar behavior." *Coleman v. Rahija*, 114 F.3d 778, 787 (8th Cir. 1997) (alteration in original). "Punitive damages are appropriate in a § 1983 case when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. *Id.* (quotations omitted). As the District Court ruled, nothing in the record supports such a finding. Petitioners' argument that the "record facts" justify punitive damages consists of legal conclusions and faulty conjecture. Petitioners have failed to produce

[6] Petitioners argue they should be awarded damages based on the District Court's ruling that the School District incorrectly interpreted Section 278.1, whether the petition was "authorized by law." The School District contends the District Court erred in determining a private right of action exists under Section 278. This argument is presented in the cross-appeal section of this brief. However, even if the Court determines a private right of action exists, there is no support for awarding money damages in this instance.

evidence sufficient to generate a question of fact on the availability of punitive damages, let alone establish they are entitled to such damages, summary judgment in favor of the School District was appropriate and the District Court ruling should be affirmed.

III. The District Court Correctly Ruled on the Issue of Qualified Immunity

A. Preservation of Error

The School District agrees that Petitioners have preserved error on the issue of qualified immunity.

B. Scope and Standard of Review

The standard of review is for correction of errors at law. *Hagen v. Texaco Refining & Mktg., Inc.*, 526 N.W.2d 531, 534 (Iowa 1995). Petitioners cite no applicable authority for their contention that standard of review is de novo simply because this case also involves constitutional issues.

C. Analysis

Petitioners named Defendants Lynch, DeLoach, Kirschling, and Roesler ("Board Members") in both their official and individual capacities in this action. The District Court ruled that the Board Members were entitled to qualified immunity because they "were not acting outside the clearly established scope of

their discretionary authority." App. 925. Petitioners present numerous theories as to why qualified immunity should not apply, none of which are persuasive.[7]

> Qualified immunity is a defense available to government officials if they have not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." It "allows officers to make reasonable errors so that they do not always 'err on the side of caution' " for fear of being sued. This defense provides "ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law."

Amrine v. Brooks, 522 F.3d 823, 831 (8th Cir. 2008) (citations omitted). Furthermore, "state courts have generally recognized that [school officials] should be protected from tort liability under state law for all good-faith nonmalicious action taken to fulfill their official duties." *Wood v. Strickland*, 420 U.S. 308, 318-20 (1975) ("Liability for damages for every action which is found subsequently to have been violative of . . . constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties. . . . . Denying any measure of immunity in these circumstances would contribute not to principled and fearless decision-making but to intimidation. The imposition of monetary

[7] Petitioners state the District Court ruled that qualified immunity also protected Defendant Iowa City Community School District. Although the District Court's decision in this section does refer to "Defendants," it also notes that "Defendants still were acting within their duties as Board members…." App. 925.

costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." (citations omitted)); *see also Seymour* v. *City of Des Moines*, 519 F.3d 790, 798-800 (8th Cir. 2008).

Petitioners argue that the Board Member Defendants are not entitled to qualified immunity for three reasons: (1) because Defendants did not act within the scope of their authority; (2) because the facts alleged demonstrate a violation of a clearly established constitutional right; and (3) advice of counsel is not a defense.

1. The Board Member Defendants Were Acting Within the Scope of Their Discretionary Authority

Petitioners argue that the Board Members are not entitled to qualified immunity because they were acting outside the scope of their authority. *See* Petitioners Brief at 44-45. The Board Members were serving in their positions for the School District and making decisions in that capacity. After being informed of the possibility there would be a petition for a ballot proposition, the Board undertook to determine its duties with respect to such a proposition. The Board sought an opinion from its legal counsel, who prepared a reasoned opinion which was released as a public document to be discussed at a Board meeting

prior to any decisions being made. Upon receipt of the ballot petition, the Board considered the language of the proposition, discussed how to move forward, and ultimately determined the ballot petition was not "authorized by law" as required by Section 278.2(1). Even if the Court determines this conclusion was incorrect,[8] there is no evidence suggesting the Board was "plainly incompetent or . . . knowingly violate[d] the law" in reaching its decision. *Amrine*, 522 F.3d at 831. The evidence in the record shows the Board considered the text of the ballot proposition, the text of the relevant statute, opinions from the Board's legal counsel, and made a reasoned decision regarding its responsibilities. *See* App. 615-29.

"[A]n official acting outside the **clearly established** scope of his discretionary authority is not entitled to claim qualified immunity under § 1983." *Johnson v. Phillips*, 664 F.3d 232, 236 (8th Cir. 2011) (quotation omitted) (emphasis added). For example, in *Hawkins v. Holloway*, a sheriff's assertion of qualified immunity was rejected when he had "pointed loaded weapons at several employees and threatened to shoot them" as a means of expressing his frustration. 316 F.3d 777, 786-87 (8th Cir. 2003). In making its finding, the Eighth

[8] The Board's consideration of the phrase "authorized by law" and whether *Berent* should control this analysis is more fully addressed in Section VIII. Regardless of the merits of the Board's decision, it was reasonable for the Board to consider whether the ballot petition was authorized by law.

Circuit noted that this conduct "was so far beyond the bounds of the performance of [the sheriff's] official duties that the rationale underlying qualified immunity is inapplicable." *Id.* In considering whether an official's acts were outside the scope of this authority, courts have stated that "[w]e certainly do not want public officials to shrink from fulfilling all of the duties even arguably within the scope of their authority out of fear that an incorrect interpretation of their duties would bar them from claiming qualified immunity." *In re Allen*, 106 F.3d 582, 592 (4th Cir. 1997). Therefore, it is only when an act complained of is "clearly established to be beyond the official's authority" that qualified immunity will be rendered inapplicable. *Id.*

Here, the Board Members were not acting outside the clearly established scope of their discretionary authority. Iowa Code § 278.2 sets forth the procedures for the Board in considering petitions for ballot propositions and the Board Members engaged in that process. Ultimately, and in view of the language in the statute that a proposition must be "authorized by law" before the Board should submit it to the county commissioner for placement on an election ballot, the Board determined the ballot proposition at issue was not, in fact, authorized by law. *See* App. 615-29. As the District Court ruled, despite its finding that the Board construed the statutes erroneously, the Board Members "still were acting within their duties as Board members when they considered whether the ballot proposition was authorized by law." App. 925. Therefore, the Board Members

are entitled to qualified immunity and the Court should affirm the District Court's grant of summary judgment on the basis of qualified immunity.

2. The School Board Correctly Considered Counsel's Advice

Petitioners also argue the District Court erred in finding the Board Members were entitled to qualified immunity because there has been a violation of Petitioners' constitutional rights and the School Board improperly considered the advice of counsel. As previously discussed, Petitioners' constitutional rights have not been violated and the School District will not needlessly re-argue that point here.

"Reliance on the advice of counsel is a factor to be weighed in assessing whether a public official is entitled to qualified immunity." *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 399 (8th Cir. 1995). It is not counsel's opinion that is the subject of inquiry, but whether the Board Members acted in good faith in following counsel's advice. *See Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir. 1984) .

The District Court noted that "the Board, relying in part on its counsel's advice, believed it was acting according to the requirements of the statutes applicable to the ballot petition proposition." App. 925. Petitioners' arguments that counsel's opinions were unreasonable, fail to discuss constitutional issues, "prepared by regular counsel," and could have been "more accurate" are unavailing. Petitioners fail to cite relevant authority applicable to the instant

action that would support finding the Board Members should not have considered their attorney's opinion. Furthermore, the opinions themselves demonstrate careful and thoughtful attention to detail, including citation to relevant authority. App. 615-29. There is simply no support for Petitioners' claims regarding the Board Members' consideration of the counsel's opinion.[9] Accordingly, the Court should affirm the District Court's grant of summary judgment on the basis of qualified immunity.

IV. The District Court Correctly Ruled on Petitioners' Motion to Compel

A. Preservation of Errors

The School District agrees that Petitioners have preserved error on this issue.

B. Scope and Standard of Review

The District Court's ruling on a motion to compel discovery is reviewed for abuse of discretion. *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009). Petitioners cite no applicable authority for their contention that standard of review is de novo merely because this case also involves constitutional issues.

[9] Furthermore, the cases cited in this section by Petitioners are not persuasive. Due to space constraints, the School District cannot distinguish each individual case. However, each case is either distinguishable from the present action or does not stand for the proposition for which Petitioners cite it. This includes Petitioners' reliance on *Blessum v. Howard County*, 295 N.W.2d 836, 849 (Iowa 1980).

C. Analysis

Petitioners do not specifically address how the District Court erred in ruling on their motion to compel, but state that "no attorney-client privilege exists regarding the evidence which was sought." Petitioners Brief at 55. However, the District Court based its ruling on Petitioners' failure to certify under Iowa Rule of Civil Procedure 1.517 that the parties had engaged in a good faith effort to resolve their discovery dispute. The District Court denied Petitioners' Motion to Compel, citing the Iowa Rules of Civil Procedure and explaining "[t]he Court is not convinced that the parties have made a good faith effort to resolve the discovery issues in this matter, particularly with regard to the attorney-client privilege and work product matters." App. 820. The District Court also noted that Plaintiffs did not raise their argument that no attorney-client privilege exists in the Motion to Compel but instead waited until filing the reply in support of the Motion, and that Petitioners had failed to offer any authority in support of their allegation that the crime fraud exception applied in conjunction with an Iowa vote fraud statute. App. 820.

Petitioners do not cite to anything in the record or applicable law to justify their request that the Court reverse the District Court's discovery ruling. Petitioners do not even reference the fact that the District Court's ruling was made in recognition of their failure to satisfactorily comply with the Iowa Rules of Civil Procedure. Because there is nothing in the record that supports a finding

the District Court abused its discretion in ruling on Petitioners' Motion to Compel, the Court should affirm the decision of the District Court.

V. The District Court Correctly Ruled Petitioners are Not Entitled to Attorney Fees

A. Preservation of Errors

The School District agrees that Petitioners have preserved error on the issue of attorney fees.

B. Scope and Standard of Review

The Court reviews the District Court's award of attorney fees for an abuse of discretion. *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009).

C. Analysis

The District Court denied Petitioners' request for fees. First, the District Court ruled the request was untimely as a Rule 1.904 motion. Second, the District Court ruled the action did not change the status quo between the parties and that Petitioners had not succeeded on their Sections 1983 and 1985 claims. App. 982.

Petitioners argue that the District Court "was inconsistent on the fee issue." Petitioners Brief at 57. In support of their argument, Petitioners argue the District Court "implicitly found" their constitutional rights had been violated. As previously explained, the District Court made no such ruling, and in fact explicitly ruled that "there has been no violation of [Petitioners'] constitutional

rights." App. 930. Therefore, the Court should reject Petitioners argument they are entitled to attorney's fees based on a violation of their constitutional rights.

VI. The District Court Correctly Ruled that a "No" Vote on the Proposed Referendum Question Would Not Direct the District to Preserve the Elementary School

A. Preservation of Error

The School District disagrees that error has been preserved on the specific issue identified by Petitioners in their Proof Brief. As noted by the District Court, Petitioners did not timely file a motion under Rule 1.904 to ask for clarification of the effect of a possible "no" vote on the ballot petition. The Court denied Petitioners' request because it was not timely filed. App. 981. Accordingly, this issue has not been preserved for appeal and the Court should decline to consider it.

B. Scope and Standard of Review

The scope and standard of review for this issue is correction of errors at law. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 692 (Iowa 1999). Petitioners cite no applicable authority for their contention the standard of review is de novo merely because this case also involves constitutional issues.

C. Analysis

Even if the Court determines error was preserved on this issue, Petitioners' argument fails. In their Report to the Court following summary judgment, Petitioners asked the District Court to rule that "if the vote at the

upcoming election is 'no' on the issue of Hoover's demolition that the ICCSD is prohibited from demolishing Hoover." App. 935. Although the District Court declined to expand on the prior ruling, stating that "the binding nature and effect of any eventual vote is not ripe for consideration; that such issue would be ripe only after a vote has been taken," the District Court's ruling on summary judgment also sufficiently answered the question of the specific issue posed in the ballot proposition.

The ballot proposition states:

> 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 2018-2019 school year, with the proceeds of any resulting salvage to be applied as specified in Iowa Code section 297.22(b)?

(emphasis added). The ballot proposition does not address preservation because the language of § 278 would not allow such a petition. *See* § 278.1(1)(b) ("The voters at the regular election shall have power to . . . **direct the sale, lease, or other disposition** of any schoolhouse or school site . . . **and the application to be made of the proceeds thereof**." (emphasis added)). Nothing in the statute references preservation and nothing in the language of the ballot proposition itself references preservation.

If the voters in the general election vote "yes" on the ballot proposition, the result of that vote is to direct the demolition of the Hoover building. If the proposition fails, the result is not somehow the inverse of that direction. Instead,

the result is merely that the proposition fails and there is no specific direction from the voters to demolish the Hoover building. Nothing about a no vote would direct any specific action whatsoever, much less an order to preserve the building. Therefore, Petitioners' request that the Court issue a ruling "that a determination by the voters that the Hoover building not be demolished would be binding on the [District]" does more than the petition or the Code would allow.

The School District agrees that if the ballot proposition is voted on and passes, such a vote would result in the District having an obligation to demolish Hoover. If the proposition fails, the Board can exercise its independent authority under Section 297.25.

As the District Court correctly ruled, the Iowa Code:

> explicitly and unambiguously grants a school board the independent power to dispose of, in whole or in part, a schoolhouse, school site, or other property belonging to a school district. . . . While 297.25 grants certain powers to a school board, the Court also concludes these powers are in addition to the powers of voters under § 278.1. If the voters in the next regular election vote 'yes' on the ballot proposition, they are answering in the affirmative to the following ballot petition proposition:
>
> > 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 2019-2019 school year, with the proceeds of any resulting salvage to be applied as specified in Iowa Code section 297.22(b)?
>
> Put another way, if a sufficient number of voters in the next regular election vote "yes" on the ballot proposition, voters would be directing ICCSD to proceed with the demolition of the Hoover building. However,

> if the ballot proposition does not prevail, the Court finds nothing in the Demolition Petition language or the statutory scheme applicable to this case that would require preservation of the Hoover building; rather such a vote would mean only that the building need not be demolished. Plaintiffs are entitled to receive from the voting population only that relief they specifically requested pursuant to the phrasing of their ballot question. Plaintiffs chose to get the view of the electorate on the issue of "demolition," not "preservation." The Board, consisting of whatever individuals are members thereof following the election, continues to possess the powers and responsibilities delegated under § 278.1, such as to proceed with the sale, lease, exchange, gift, or grant and acceptance of any interest in the Hoover building, although the Board's actions cannot take place until after the vote has occurred."

App. 928-29 (emphasis added).

To the extent Petitioners are asking the Court to direct the District Court to reconsider its position on issuing an advisory opinion regarding the effect of a "no" vote, the School District contends that the answer to this question was already sufficiently and correctly answered by the District Court in the April 26 Ruling, as well as by the District Court's refusal to expand on that ruling. Therefore, the Court should affirm the ruling of the District Court and deny Petitioners' request.

VII. The District Court Incorrectly Ruled a Demolition Constitutes a "Disposition" Under Section 278.1

A. Preservation of Error

The School District raised this issue in its brief resisting the motion for injunction, the brief in support of summary judgment, and it was argued at both

hearings. The District Court addressed this issue in its ruling granting the temporary injunction and the summary judgment ruling.

B. Scope and Standard of Review

The standard of review is for correction of errors at law. *Hagen v. Texaco Refining & Mktg., Inc.*, 526 N.W.2d 531, 534 (Iowa 1995).

C. Analysis

The District Court ruled that a "demolition" constitutes a "disposition" under Iowa Code Sections 278.1 and 297.22. For the following reasons, the District Court erred.

Neither Iowa Code Section 278.1 or 297.22 defines "disposition." In 2008, the Iowa Legislature added a definition of "disposition" to both statutes, providing that "dispose" or "disposition" included demolition of school property. However, that definition was removed by the Legislature the following session and struck from the statutes, effective immediately, March 13, 2009. By amending the statutory language to remove "demolition," it is clear that the Legislature did not intend for demolition of school buildings to be subject to the provisions in Iowa Code Section 278.1 or Section 297.22. *See Summerhays v. Clark*, 509 N.W.2d 748, 751 (Iowa 1993) (finding that an amendment removing a word from a statute "expressed a legislative 'intent to narrow'" the scope of a statute's reach).

Moreover, the ordinary meaning of "disposition" does not include demolition. "Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute." *State v. Gonzalez*, 718 N.W.2d 304, 307-08 (Iowa 2006). Courts "look for a reasonable interpretation that best achieves the statute's purpose and avoids absurd results." *Id.* at 308. A dictionary may be consulted in order to determine the ordinary meanings of words used in a statute. *Id.*

The central characteristic of the dictionary definition of "disposition" and "dispose of" is the transfer of an ownership interest in property from one person or entity to another. *See, e.g.,* Merriam Webster Law Dictionary (2017) (defining "disposition" as "transfer to the care or possession of another" and "dispose of" as "to transfer to the control or ownership of another"); Black's Law Dictionary (2017) (defining "disposition" as "act of disposing; transferring to the care or possession of another" and "dispose of" as "to alienate or direct the ownership of property, as disposition by will. . . . to exercise finally, in any manner, one's power of control over; to pass into control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away"). It is thus clear that

the legislative intent underlying the term "disposition," as used in Iowa Code Sections 278.1 and 297.22, is that those provisions apply when a school district transfers ownership or control of its property to another.

There is no "disposition," and the statutes do not apply, when—as here—a school district seeks to demolish a structure on a site that the district will continue to own and retain for school use. Indeed, if carried to an extreme, the District Court's decision would block even a school remodeling project involving demolition of a wall or a wing of a building. Under that interpretation, such a project would amount to a "disposition" of the demolition rubble. This Court should be leery of any interpretation of the statute which could lead to such an untenable conclusion.

The correct interpretation, that demolition is not a disposition, is further underscored by the remaining language in Section 278.1(b) stating that the electors directing the disposition of school property also have the power to direct "the application to be made of the proceeds thereof." This provision indicates that "disposition" means a transfer of property for some monetary gain. However, razing a structure on a school site that is retained by the school district does not result in any proceeds, thus reinforcing the notion that such circumstances are not covered by the statute.

Further, Iowa law is clear that it is the prerogative of a school board to determine the location and organizational structure of the schools in its district. Iowa Code Section 279.11 empowers the Board to:

> . . . . determine the number of schools to be taught, divide the corporation into such wards or other divisions for school purposes as may be proper and determine the particular school each child shall attend.

Additionally, Iowa Code Section 297.1 provides:

> The board of each school district may fix the site for each schoolhouse . . . . In fixing such site, the board shall take into consideration the number of scholars residing in the various portions of the school district and the geographic location and convenience of any proposed site.

Following this statutory scheme, the Iowa Attorney General has determined that the inclusion of a schoolhouse site location within a petition for a school bond election is not binding on the receiving school board. 1993 Opinion Attorney General 193-2-3(L). Rather, the Attorney General has opined that Iowa law "vests authority and discretion to determine the location of schools solely in the local school board" and that responsibility cannot "be properly delegated or assumed by the voters of a school district." *Id.*; *see also Kinney v. Howard*, 110 N.W. 282 (Iowa 1907) (holding that school board could not delegate its duty to select school site to a committee); *Carpenter v. Ind. District No. 5 of Columbia Twsp., Tama County*, 63 N.W. 708 (Iowa 1895)

(holding that school board erred in bowing to wishes of the majority of legal voters in changing proposed school site).

Here, the proposed ballot question not only directs demolition of the Hoover Elementary School building, but also directs when the building should be closed as a school, i.e., following "the completion of the 2018-19 school year." It is very clear that the determination of if, and when, to close a school is a decision to be made by the Board. *Wallace v. Des Moines Independent Community School Dist. Bd. of Directors,* 754 N.W.2d 854, 859 (Iowa 2008). The cessation of using a building as a school and demolition of the former school structure is exclusively the prerogative of the Board, and does not constitute a disposition of property.

Because the District Court erred in determining a "demolition" constitutes a "disposition" under the Iowa Code, the School District respectfully requests this Court reverse the decision of the District Court on this issue.

VIII. The District Court Erred in Ruling the School Board Exceeded Its Authority in Determining Whether the Referendum Petition was "Authorized by Law"

A. Preservation of Error

The School District raised this issue in its brief resisting the motion for injunction, the brief in support of summary judgment, and it was argued at both

hearings. The District Court addressed this issue in its ruling granting the temporary injunction and the summary judgment ruling.

B. Scope and Standard of Review

The standard of review is for correction of errors at law. *Hagen v. Texaco Refining & Mktg., Inc.*, 526 N.W.2d 531, 534 (Iowa 1995).

C. Analysis

The District Court ruled that the School Board exceeded its authority by considering whether the referendum petition contained a proposition "authorized by law." App. 260-62. In making this determination, the District Court relied heavily on *Berent v. City of Iowa City*, 738 N.W.2d 193 (Iowa 2007).

On its face, *Berent* appears to present a factually similar situation. However, upon closer inspection of the statutes at issue, it is clear that *Berent* should not control. The statutes at issue in *Berent*, Iowa Code §§ 362.4 and 372.11, do not contain the phrase "authorized by law." Section 362.4 states that "[i]f a petition of the voters is authorized by the city code, the petition is valid if signed by eligible electors . . . ." The City did not argue the petition was not "authorized by the city code" (presumably, the city code provided for such petitions) and the *Berent* Court did not address that issue. *Id.* Instead, *Berent* considered whether a City could reject a proposal for "legal insufficiency." *Id.* ("Legal sufficiency, according to the City, includes authority to reject a proposal, like the retention proposal, which is 'misleading' in nature. The City further asserts that the

objections committee is authorized to reject as 'legally insufficient' charter amendments that do not deal with 'form of government,' but only with the manner in which government power is exercised. The City argues that because the . . . proposal[s] do not deal with 'form of government,' the objections committee acted lawfully in rejecting the proposals as legally insufficient.").

The Court has recognized the importance of the statutory text in ballot petition cases. *See Honohan v. United Comm. Sch. Dist. of Boone and Story Ctys.*, 137 N.W.2d 601, 604 (Iowa 1965) ("[S]ince the legislature saw fit to require the 'purpose' of the petition for election, and the notice of election of such 'purpose', be declared, this legislative mandate cannot be construed to be directory. We conclude these legislative requirements have meaning and purpose, and are mandatory." (citations omitted)). Section 278.2 states that a school board shall direct the county commissioner to provide in the notice of election "for the submission of any proposition authorized by law to the voters." The District Court's conclusion that the Board must forward all petitions with sufficient signatures to the county commissioner of elections regardless of whether the proposition is "authorized by law" renders the explicit text of § 278.2 meaningless.

Because the School District properly followed the clear language of the governing statute by considering whether the petition was "authorized by law"

prior to forwarding it to the County Auditor for inclusion on the election ballot, the Court should reverse the decision of the District Court on this issue.

IX. The District Court Erred in Ruling a Private Right of Action Exists Under Section 278

A. The Preservation of Error

The School District raised this issue in its brief resisting the motion for injunction, the brief in support of summary judgment, and it was argued at both hearings. The District Court addressed this issue in its ruling granting the temporary injunction and the summary judgment ruling.

B. Scope and Standard of Review

The standard of review is for correction of errors at law. *Hagen v. Texaco Refining & Mktg., Inc.*, 526 N.W.2d 531, 534 (Iowa 1995).

C. Analysis

The District Court found that a private right of action exists under Iowa Code Sections 278.1 and 278.2. Neither of these statutes contain any express or implied private right of action as a matter of law. If a law does not contain an express private right of action, courts look to whether any cause of action for money damages is implied. *Shumate v. Drake Univ.*, 846 N.W.2d 503, 508 (Iowa 2014). An implied cause of action exists only if the following elements are met:

1. Is the plaintiff a member of the class for whose benefit the statute was enacted?

> 2. Is there any indication of legislative intent, explicit or implicit, to either create or deny such a remedy?
> 3. Would allowing such a cause of action be consistent with the underlying purpose of the legislation?
> 4. Would the private cause of action intrude into an area over which the federal government or a state administrative agency holds exclusive jurisdiction?

See King v. State, 818 N.W.2d 1, 34-36 (Iowa 2012).

In this case, none of the factors listed above support a private right of action under any of the above-referenced statutes. First, it is clear that the statutes serve to provide uniform directions to local school boards with respect to petitioning for elections on public measures and disposition of school property in a school district. Neither of these statutes was enacted for the benefit of Petitioners as resident taxpayers or parents of school children.

In addition, the language of the statutes does not indicate a legislative intent to create a remedy for Petitioners. And, allowing a private cause of action under the statutes would be inconsistent with their purpose of delineating the authority granted to local school boards and members of the public.[10]

Finally, because the Iowa Department of Education has jurisdiction to act in a policymaking capacity and provide statewide supervision of education,

[10] Furthermore, a private right of action for money damages would essentially involve voters suing themselves, seeking to collect money damages from a public entity that can levy taxes to fund the payment of a judgment from those very voters. *See* Iowa Code Section 298.4(1)(b).

see §§ Iowa Code 256.1, 290.1, and the Iowa Secretary of State is designated to supervise local election activities, *see* Iowa Code §§ 9.1, 47.1, a private cause of action here would intrude into an area in which those state agencies and others already have exclusive jurisdiction.

The statutes at issue are "regulatory measures" that require schools to implement certain policies and procedures. However, they do not envision private lawsuits—or private actions for money damages—in the event of a failure to follow those policies and procedure. *See V.H. v. Hampton-Dumont Comm. Sch. Dist.*, 2009 WL 5126111 (Iowa App. 2009). Therefore, Petitioners' claims must fail as a matter of law. *See King*, 818 N.W.2d at 34-36.

CONCLUSION

For the foregoing reasons, the School District respectfully requests the Court affirm the District Court's ruling on the issues raised in Petitioners' appeal and reverse the District Court only with respect to the following:

(1) Demolition does not constitute a disposition under Iowa Code Section 278.1;

(2) The School Board correctly determined the ballot petition proposition was not authorized by law; and

(3) Iowa Code Sections 278.1 and 278.2 do not create a private right of action for money damages.

REQUEST FOR ORAL ARGUMENT

The School District requests oral argument on this appeal.

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 30, 2019, the foregoing Proof Brief was electronically filed with the Iowa Supreme Court by using the EDMS system. I further certify that all parties or their counsel of record are registered as EDMS filers and will be served by the EDMS system.

/s/ Andrew J. Bracken

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOUME LIMITATION

This proof brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this proof brief has been prepared in a proportionally spaced typeface using Microsoft Word Garamond in size 14 font, and contains 13,761 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Andrew J. Bracken

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