

**IN THE SUPREME COURT OF IOWA**

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**NO. 21-1765**

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**AUDITOR OF THE STATE OF IOWA,  
ROB SAND,**

**Plaintiff-Appellant,**

**vs.**

**AN UNNAMED LOCAL GOVERNMENT  
RISK POOL,**

**Defendant-Appellee.**

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**APPEAL FROM THE IOWA DISTRICT  
COURT FOR POLK COUNTY  
THE HONORABLE JEFFREY FARRELL, JUDGE**

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**APPELLANT'S BRIEF**

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**THOMAS J. MILLER  
Attorney General of Iowa**

**MATTHEW S. ROUSSEAU  
Assistant Attorney General  
Iowa Attorney General's Office  
800 Lincoln Way, Ames, Iowa 50010  
(515) 239-1636 / FAX (515) 239-1609  
matthew.rousseau@iowadot.us**

**ATTORNEYS FOR PLAINTIFF-APPELLANT**

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**IS THE POOL A GOVERNMENTAL SUBDIVISION WITHIN THE MEANING OF THE TERM AS USED IN IOWA CODE SECTION 11.1(1)(c) BECAUSE IT HAS BEEN DE FACTO ORGANIZED AS A CHAPTER 28E ENTITY?**

### **A. Error of preservation, scope of review and standard of review**

#### **Cases:**

*Sand v. Doe*, 959 N.W.2d 99 (Iowa 2021)

#### **Statutes and Other Authorities:**

Iowa Code § 11.1(1)(c)

Iowa Code ch. 28E

### **B. The Auditor's subpoena power**

#### **Cases:**

*Sand v. Doe*, 959 N.W.2d 99 (Iowa 2021)

#### **Statutes and Other Authorities:**

Iowa Code § 11.1(1)(c)

Iowa Code § 11.51

Iowa Code § 11.52

Iowa Code ch. 28E

Iowa Code § 670.7

Iowa Const. article IV, § 22

### **C. The Pool's substantive status as a chapter 28E entity**

#### **Cases:**

*Allis-Chalmers v. Emmet County Council of Governments*,  
355 N.W.2d 586 (Iowa 1984)

*American Soil Processing, Inc. v. Iowa Comprehensive Petroleum  
Underground Storage Tank Fund Board*, 586 N.W.2d 325  
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*Diercks v. City of Bettendorf*, 929 N.W.2d 273 (Table) (Iowa App.  
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*Goodell v. Humboldt County*, 575 N.W.2d 486 (Iowa 1998)  
*Konrardy v. Vincent Angerer Trust, Dated March 27, 1998*,  
925 N.W.2d 620 (Iowa 2019)  
*State v. Webster*, 865 N.W.2d 223 (Iowa 2015)

**Statutes and Other Authorities:**

Iowa Code ch. 28E  
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1986 Iowa Acts ch. 1211 § 34

**D. The Pool's failure to comply with the law is not evidence its conduct is lawful**

**Cases:**

*Bailiff v. Adams County Conference Bd.*, 650 N.W.2d 621  
(Iowa 2002)  
*City of Windsor Heights v. Spanos*, 572 N.W.2d 591 (Iowa 1997)  
*Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*,  
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*State, ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12 (Iowa 2013)

**Statutes and Other Authorities:**

Iowa Code § 11.1(1)(c)  
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Iowa Code § 670.7  
81 IAC 21.1

**E. If the pool is not a chapter 28E entity, what is it?**

**Statutes and Other Authorities:**

Iowa Code ch. 28E  
Iowa Code ch. 670  
Iowa Code § 670.7  
Iowa Code § 670.7(1)

**F. The Auditor's subpoena should be enforced**

**Cases:**

*Citizens' Aide/Ombudsman v. Grossheim*, 498 N.W.2d 405  
(Iowa 1993)  
*Davis v. Rudolph*, 243 Iowa 744, 52 N.W.2d 15 (1952)  
*Diercks v. City of Bettendorf*, 929 N.W.2d 273 (Table)  
(Iowa App. 2019), 2019 WL 2871123  
*Iowa City Human Rights Commission v. Roadway Express, Inc.*,  
397 N.W.2d 508 (Iowa 1986)  
*Millwright v. Romer*, 322 N.W.2d 30 (Iowa 1982)  
*Sand v. Doe*, 959 N.W.2d 99 (Iowa 2021)  
*Wilson & Co. v. Oxberger*, 252 N.W.2d 687 (Iowa 1977)

**Statutes and Other Authorities:**

Iowa Code ch. 11  
Iowa Code § 11.6(4)(a)(1)  
Iowa Code § 11.6(4)(a)(2)  
Iowa Code § 11.6(10)  
Iowa Code § 11.14(1)  
Iowa Code § 11.42  
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Iowa Code ch. 22  
81 IAC 21.1



## **ROUTING STATEMENT**

This case presents a substantial issue of first impression regarding whether a fully-publicly-funded government risk pool constitutes an Iowa Code chapter 28E entity and, therefore, a “governmental subdivision” subject to the Auditor’s jurisdiction within the meaning of Iowa Code section 11.1(1)(c). Additionally, because the life blood for operating the government risk pool consists exclusively of Iowa taxpayer monies contributed into the pool by its government members, a matter of broad public importance for determination by the Iowa Supreme Court is presented.

Therefore, this is a case which should be retained by the Iowa Supreme Court. It meets the criteria for retention. *See* Iowa R. App. P. 6.1101(2)(c) and (d).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This appeal concerns an action brought to enforce a subpoena issued by the Auditor to An Unnamed Local Government Risk Pool (hereafter referred to as “The Pool”). The Auditor is authorized under Iowa Code section 11.52 to seek the assistance of the Iowa district court in enforcing the Auditor’s subpoenas.

### **Course of Proceedings and Disposition of Case in District Court.**

A brief discussion of a prior action The Pool had brought is deserving. The Auditor in December 2019 had issued The Pool a subpoena. *See* Exhibit 10; Amended Appendix (App.) pp. 201-203. That initial subpoena prompted The Pool’s attempt to block the subpoena when The Pool filed an action for a writ of certiorari and declaratory judgment on December 30, 2019. *See* Judge Nelmark Order, p. 1; App. p. 392. The Pool’s action was later dismissed without prejudice by Judge Nelmark on February 27, 2020. *See* Order, pp. 1-7; App. pp. 392-398. Judge Nelmark concluded The Pool had not exhausted its administrative remedy under Iowa Code section 17A.9(1)(a) (allowing agencies to issue declaratory orders regarding statutes within the agency’s primary jurisdiction). Order, pp. 3-6; App. pp. 394-397.

The Pool had contended in previous correspondence it was not a “governmental subdivision” as defined in Iowa Code section 11.1(1)(c) and was, therefore, not subject to the jurisdiction of the Auditor. *See* Exhibit 7; App. pp. 195-196. Judge Nelmark noted (1) The Pool needed to either file a petition for declaratory order under Iowa Code section 17A.9(1)(a) to address the issue of the Auditor’s authority or (2) the Auditor needed to seek enforcement of the subpoena. Regarding the latter, Judge Nelmark held:

If the Auditor seeks enforcement of the subpoena pursuant to Iowa Code § 11.52, *the matter will be squarely before the Court, which will need to consider the Auditor's authority to issue the subpoena.*

Order, p. 5 (emphasis added); App. p. 396. Judge Nelmark further noted: “The parties agreed at the hearing that the Court cannot rule on the subpoena without first determining whether the Auditor has the authority to audit [The Pool].” *Id.*

A new subpoena, which is the subject of this action, was issued by the Auditor to The Pool on January 14, 2021. *See* Auditor's Exhibits A and B; App. pp. 83-85. The Pool, as shown by Exhibit C, App. pp. 86-90, again objected to the Auditor's authority to issue the subpoena contending it was not a “governmental subdivision” within the meaning of Iowa Code section 11.1(1)(c). Moreover, The Pool claimed entitlement to unilaterally set the terms upon which it might respond to the Auditor stating the Auditor would be required to (1) pay The Pool's document retrieval costs under Iowa Code section 22.3 and (2) The Pool would determine what information would be identified and redacted as confidential (presumably under Iowa Code section 22.7). *Id.*

In addition, The Pool contended it was willing to supply material which, according to The Pool, “addresses the bulk, if not all of the Auditor of State's requests for materials.” Exhibit C, p. 1; App. p. 86. However, as

shown by a reading of Exhibit C in its entirety, App. pp. 86-90, the Auditor was not getting all that was asked for under the subpoena. The Pool, instead, was taking the position it could lay down the conditions upon which it might reply to the Auditor because, in the view of The Pool, it was not subject to the Auditor's jurisdiction in the first place. Of course, any entity funded by taxpayers must not be allowed to unilaterally set the boundaries of its own oversight.

Consequently, because the Auditor determined it necessary for public integrity *for the Auditor, and not The Pool*, to determine the proper scope of an Auditor's subpoena issued in the public interest, this action for the enforcement of the Auditor's subpoena was filed by the Auditor on March 16, 2021. Application, pp. 1-17 and Exhibits A-J in support of the application; App. pp. 7-82. This process (the Auditor's filing of an enforcement action pursuant to Iowa Code section 11.52) was entirely consistent with what Judge Nelmark had envisioned in his ruling in the prior action.

The Auditor's enforcement application in this matter was taken up in an evidentiary hearing on September 3, 2021. The crux of the issue before the district court focused upon whether The Pool was organized as a chapter 28E entity and, therefore, a "governmental subdivision" within the meaning

of Iowa Code section 11.1(1)(c). Judge Farrell, after receiving post-hearing briefs from the parties, entered his ruling on October 22, 2021, denying the Auditor’s application to enforce the subpoena because he concluded The Pool was not a chapter 28E entity. Ruling, pp. 1-12; App. pp. 414-425. The Auditor filed a timely appeal on November 18, 2021. Notice of Appeal; App. pp. 426-428.

### **STATEMENT OF THE FACTS**

In September 2019, the Auditor learned of excessive travel from out-of-state trips undertaken by officials of The Pool. This information came to the attention of the Auditor through various Associated Press (AP) news articles. Transcript, p. 12 line 17 – p. 13 line 11; Exhibit 6; App. p. 194. The Auditor, believing The Pool to be an entity organized as provided for in Iowa Code chapter 28E (and, therefore, a governmental subdivision), determined review was needed to make sure The Pool’s expenses were incurred for a proper public purpose. Transcript, p. 13 lines 3-11. To add to the concern, it was discovered The Pool had never filed its audit reports with the Auditor as would normally be required of a governmental entity. Transcript, p. 13 lines 12-25 – p. 14 lines 1-6.

The Pool, as a local “government” risk pool, is composed entirely of governmental entities whose payments from taxpayer monies fund The

Pool's activities in managing liability risks for its governmental members. Judge Farrell, for example, expressly found The Pool "is funded solely by public money through its member political subdivisions." Ruling, p. 9; App. p. 422.

The Pool, as shown by the agreement creating the entity, commenced operations in 1986. *See* Exhibits E and K ("Whereas" clauses); App. pp. 92 and 142. By 2002, The Pool's board chairman had even filed on his oath documents with the Iowa Secretary of State certifying The Pool as a "28E Agreement." Exhibit F; App. p. 102. The Pool's members band together cooperatively to obtain mutual advantages in the realm of liability protection. *See* transcript, p. 53 lines 12-19. At the hearing before Judge Farrell, The Pool's board chairman affirmed The Pool affords liability protection to nearly 800 Iowa public entities, including many of Iowa's 99 counties, cities, townships, 28E organizations, emergency management agencies, empowerment boards, county fairs, transit authorities and other public organizations. *See* transcript, p. 52 lines 4-11 and 19-25.

To join The Pool, a governmental subdivision must execute The Pool's Iowa Risk Management Agreement (IRMA). *See* transcript, p. 53 lines 20-25; Exhibits E and K; App. pp. 92-101 and 142-152. There can be no membership in The Pool unless the IRMA is signed. The IRMA details

how The Pool's operations will be carried out. It spells out the sort of detail one must include in a 28E agreement. *See* Iowa Code § 28E.5. The IRMA, just like a chapter 28E agreement, sets forth provisions governing The Pool's duration, its purpose, the composition and organizational scheme including the creation of The Pool's board and the board's powers, the means by which The Pool is financed including the shares allocated to members, the creation of casualty and budgetary funds, together with a cumulative reserve fund, and the means under which The Pool may be terminated with the return of remaining funds to members. *See* Exhibits E and K; App. pp. 92-101 and 142-152.<sup>1</sup>

The Pool, therefore, has operated as a de facto 28E entity for decades. It is not a private entity. It does not provide risk protection for those outside the government sector. The Pool's chairman of the board testified:

Q: Well, let me ask you – and again from [The Pool] web page, I believe there's an indication that the membership includes Iowa cities, counties, townships, 28E organizations, emergency management agencies, empowerment boards, county fairs, transit authorities, and more. Is that accurate?

A: That is accurate.

Q: It's a diverse membership, isn't it?

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<sup>1</sup>The IRMAs have been essentially the same over time. Exhibit E was the version from 2011 going forward until a revision, Exhibit K, was issued in 2021. Transcript, p. 50 lines 4-25 – p. 51 lines 1-7; App. pp. 92-101 and 142-152.

A: Correct.

Q: Now, you don't – well strike that.

I can't go to [The Pool] and get liability protection for the car I own, can I?

A: You as an individual?

Q: Correct.

A: Correct.

Q: It's only open to the members of [the Pool]; correct?

A: It's only open to the entities that you just recited.

Transcript, p. 52 lines 19-25 – p. 53 lines 1-11.

Judge Farrell also corroborated the purely governmental-related nature of The Pool's operations with his own questioning of The Pool's board chairman:

Q: I just want to be clear about one thing. I'm going to ask the question a little bit differently. There's not any materially private entities that are a member of [The Pool]; is that correct?

A: No, there's not.

Q: And the reason I ask the question is because you're a little, I would say, reticent when asked a question about is it all public entities, because we know a county is a public entity. We know a city is a public entity. But there is also some other entities described like the county fair boards, and that would seem to be where your hesitation was; would that be fair to say?

A: That is fair.



Q: Okay. But there's no private entities that are members of [The Pool] –

A: There are no individual members as –

Q: – or private businesses,

A: Correct.

Q: Or churches or things like that.

A: Correct.

Transcript, p. 96, lines 4-24.

Therefore, there is no doubt as to The Pool's status. *It is of, by, and for its government members.* The Pool has been audited by private auditing firms, but even those audits are done in accordance with Government Auditing Standards which are normally only applied in the audit of governmental entities. Transcript, p. 11 lines 3-13; Exhibit J, p. 1; App. p. 114. The Pool is created through the amalgamation of its governmental subdivision members and their entry into The Pool through the execution of an agreement (the IRMA) for joint and cooperative action concerning liability protection and loss prevention. *See* Iowa Code § 28E.4 (authorizing and laying out the purpose of chapter 28E). Consequently, The Pool is organized utilizing the procedures authorized for Iowa political subdivisions by Iowa Code chapter 28E regardless of whether The Pool directly refers to

the chapter 28E process. The Pool is a “governmental subdivision” subject to Auditor review.

## **ARGUMENT**

### **THE POOL IS A GOVERNMENTAL SUBDIVISION WITHIN THE MEANING OF THE TERM AS USED IN IOWA CODE SECTION 11.1(1)(c) BECAUSE IT HAS BEEN DE FACTO ORGANIZED AS A CHAPTER 28E ENTITY.**

#### **A. Error preservation, scope of review and standard of review.**

The Auditor preserved error on the arguments being made in this appeal. The issue of whether the Auditor’s subpoena was authorized because The Pool was a governmental subdivision organized under Iowa Code chapter 28E was argued in detail in the court below. *See, e.g.*, ruling of Judge Farrell, p. 4, App. p. 417 (“The auditor argues that it had authority to audit and to subpoena records from [The Pool] because it is an entity organized under chapter 28E.”).

In addition, testimony from the Auditor’s office established the Auditor was proceeding because it was believed The Pool was organized consistent with the procedures set forth in Iowa Code chapter 28E, thereby rendering The Pool a governmental subdivision under Iowa Code section 11.1(1)(c). *See, e.g.*, Transcript, p. 10 lines 24-25 – p. 11 lines 1-13; *see also* Auditor’s post-hearing brief filed October 4, 2021; App. pp. 351-391.

The district court's ruling on statutory construction is reviewed for correction of errors at law. *See Sand v. Doe*, 959 N.W.2d 99, 104 (Iowa 2021).

**B. The Auditor's subpoena power.**

The Auditor is a constitutional officer. *See* Iowa Constitution, Article IV, § 22; *see also Sand v. Doe*, 959 N.W.2d at 105. To carry out the important functions of the office, the Auditor has been accorded broad subpoena power pursuant to Iowa Code section 11.51 which states:

The auditor of state shall, in all matters pertaining to an authorized audit or examination, have power to issue subpoenas of all kinds, administer oaths and examine witnesses, either orally or in writing, and the expense of attending the same, including the expense of taking oral examinations, shall be paid as other expenses of the auditor.

Iowa Code section 11.52 authorizes the Auditor to apply to the district court for subpoena enforcement as was done here:

In case any witness duly subpoenaed refuses to attend, or refuses to produce documents, books, and papers, or attends and refuses to make oath or affirmation, or, being sworn, or affirmed, refuses to testify, the auditor of state or the auditor's designee may apply to the district court, or any judge of said district having jurisdiction thereof, for the enforcement of attendance and answers to questions as provided by law in the matter of taking depositions.

Iowa Code section 11.52 has been described as putting the "teeth" into the Auditor's subpoena authority. *Sand v. Doe*, 959 N.W.2d at 106.

Iowa Code section 11.1(1)(c) sets forth entities which constitute a “Governmental subdivision” subject to the Auditor’s jurisdiction and oversight:

*“Governmental subdivision”* means cities and administrative agencies established by cities, hospitals or health care facilities established by a city, counties, county hospitals organized under chapters 347 and 347A, memorial hospitals organized under chapter 37, *entities organized under chapter 28E*, community colleges, area education agencies, and school districts.

(Emphasis added).

Therefore, if The Pool is deemed an entity organized under chapter 28E, it comes within the jurisdiction of the Auditor. The Pool refers to itself as a “670.7 entity.” Exhibit 1, p. 2; App. p. 154. And the district court embraced the peculiar notion The Pool could not be deemed a chapter 28E entity because it “has not made the required filings under chapter 28E.” But the Auditor submits the law should not be rendered an artificial, and essentially impotent construct, without the means to assess the substance of what it is confronted with. In other words, how an entity refers to itself should not be controlling. Nor, if an entity *was supposed* to by law make certain filings of record, its failure to do so is not a defense. Holding that to be the law means that being a chapter 28E entity is not a question of law, but a simple choice.

If it walks like a duck and it quacks like a duck, it's a duck and not a chicken. The Pool has been *substantively* set up and operating as a chapter 28E entity for decades. Once, in 2002, it even slipped and referred to itself as a "28E Agreement" in a filing with the secretary of state. *See* Auditor's Exhibit F; App. p. 102. It is The Pool's *substantive* status as an entity established under the procedures allotted to local governmental entities by Iowa Code chapter 28E which confers jurisdiction upon the Auditor to examine the reported excessive travel expenditures to out-of-state locations, as well as other transactions and operations of The Pool. Upon substantive examination as discussed in greater detail below, The Pool is clearly an entity organized under chapter 28E procedures within the meaning of Iowa Code section 11.1(1)(c).

**C. The Pool's substantive status as a chapter 28E entity.**

What does Iowa Code chapter 28E authorize? Simply put, the provision affords the method by which Iowa public entities may join by agreement to achieve a mutually advantageous purpose. For example, Iowa Code section 28E.4, quoted in relevant part, provides:

Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or cooperative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement.

Section 28E.4 describes exactly what the governmental members of The Pool have done. They have, as noted in this brief’s statement of facts, acted in concert by entering into an Iowa Risk Management Agreement (IRMA) which has, in turn, created The Pool for purposes of liability protection. *See* Exhibits E and K; App. pp. 92-101 and 142-152. Indeed, by doing so the members of The Pool have achieved the stated purpose underlying Iowa Code chapter 28E which is to permit governmental entities “to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to cooperate in other ways of mutual advantage.” *See* Iowa Code § 28E.1.

Interestingly, it appears the scribe drafting the IRMAs which create The Pool took a cue from Iowa Code chapter 28E. The language in the IRMA, Exhibits E and K, at points tracks the statutory language found in Iowa Code chapter 28E. For instance, in Article II of each IRMA under the heading of “Purpose,” the provisions speak of undertaking the agreement in order to “provide for joint or cooperative action.” App. pp. 92 and 142. The language in the IRMA utilizing the words “joint or cooperative action” are the same words found in Iowa Code section 28E.4 quoted above.

Similarly, any chapter 28E entity must by agreement specify a duration for the entity, itemize its organization and composition along with

the nature of any separate administrative entity created, describe its purpose, set out its manner of financing the joint undertaking and the means by which its partial or complete termination may be completed together with the disposition of its property. *See* Iowa Code § 28E.5, which provides:

Any such agreement shall specify the following:

1. Its duration.
2. The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created. However, if the agreement establishes a separate legal or administrative entity, the entity shall, when investing funds, comply with the provisions of sections 12B.10 and 12B.10A through 12B.10C and other applicable law.
3. Its purpose or purposes.
4. The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor.
5. The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.
6. Any other necessary and proper matters.

The IRMA agreements each member of The Pool must execute contain all the above-referenced elements called for by Iowa Code section 28E.5. Each IRMA specifies The Pool's duration as "perpetual" and "shall

continue until terminated pursuant to this Agreement.” *See* Article I – Name and Duration (Auditor’s Exhibits E and K); App. pp. 92 and 142. The purpose of The Pool is described as well. *See* Article II – Purpose (Exhibits E and K); *Id.* The agreements lay out The Pool’s composition and the organizational scheme utilized to create The Pool. For instance, Articles IV, V and VI detail respectively how the governmental members join The Pool, as well as providing for the creation of The Pool’s Board of Directors with the powers invested by the members in The Pool’s board. *See* Article IV - Membership, Article V – Board of Directors, Article VI – Board Powers and Duties (Exhibits E and K); App. pp. 93-95 and 143-146.

Likewise, the method of financing The Pool, including the shares allocated to members, are detailed in Articles IX, X and XI, respectively the establishment of the Casualty Budgetary Fund, Property Budgetary Fund and Cumulative Reserve Fund (Exhibits E and K); App. pp. 96-98 and 146-148. And finally, the IRMA agreements spell out the method for terminating The Pool with the return of remaining funds to members. *See, e.g.,* Article XII (Member Withdrawal, Cancellation or Termination of Casualty Coverage) and Article XIV (Termination) (Exhibits E and K); App. pp. 98-100 and 148-150.



So, it absolutely appears the scrivener who drafted The Pool’s IRMA agreements patterned them upon Iowa Code chapter 28E. And why not? Chapter 28E is the statutory mechanism through which governmental entities may band together for a joint purpose. *See, e.g., Allis-Chalmers v. Emmet County Council of Governments*, 355 N.W.2d 586, 588 (Iowa 1984) (emphasis supplied):

Chapter 28E *permits* state and local governments in Iowa to combine for the stated purposes of “[making] efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage.” § 28E.1. Political subdivisions are authorized to exercise their powers jointly. § 28E.3.

In the absence of the statutory authorization afforded by Iowa Code chapter 28E, the government members lack the authority to act jointly. The Pool refers to itself as a “section 670.7” entity as if that affords some form of meaningful distinguishment from the governmental entities acting in concert to form The Pool using the methods offered under Iowa Code chapter 28E. The district court embraced this errant formulation as well. *See, e.g.,* ruling, p. 10 (“The auditor has not shown that it is impermissible for a risk pool to organize under section 670.7”). App. p. 423.

The district court and The Pool are simply wrong in suggesting Iowa Code chapter 28E has no applicability and The Pool came about solely because of Iowa Code section 670.7. The legislature first authorized local

governments to join and pay funds into “a local government risk pool” in 1986. *See* 1986 Iowa Acts ch. 1211 § 34. Back in 1986, the enactment was placed into the Code as Iowa Code section 613A.7 (1986). Today the government risk pool language is found in Iowa Code section 670.7.

But all Iowa Code section 670.7 and its statutory predecessor did was to permit political subdivisions embraced by the Municipal Tort Claims Act (Iowa Code chapter 670) to join and pay into a pool. That’s it. Section 670.7 does not itself create any pool. Indeed, did The Pool come into being because the legislature authorized localities to join and pay into local government risk pools in then section 613A.7, today’s section 670.7? Of course not. The provisions in the Municipal Tort Claims Act do not create any legally viable pool. It does not create the rules for doing so. It does not create limitations for doing so. It merely utters the words, “local government risk pool.” The Pool came about *only* when the local governmental entities came together through mutual agreement to create and join The Pool. The method by which public agencies are authorized to engage in joint and cooperative action to achieve a lawful end is what Iowa Code chapter 28E is all about.

Section 670.7 only specifies an end point, or a purpose for such joint effort. The statute does not mandate the existence of any risk pool. Instead,

government entities must come together through agreement to create a pool. If that sort of joint undertaking does not occur, then regardless of section 670.7 (or its predecessor section 613A.7) being on the books, there is no pool. Indeed, as shown by the testimony of the Auditor's staff CPA, the only way for the members to form The Pool was "by a 28E agreement." Transcript of hearing, p.11 lines 7-13.

Therefore, The Pool's IRMA agreements contain all the elements for agreement specified in Iowa Code section 28E.5. Plus, as noted before, The Pool's long-time board chair at one point in 2002 made a filing with the Iowa Secretary of State describing The Pool as operating under a "28E Agreement." *See* Exhibit F; App. p. 102. The district court minimized this as being "technically an admission" but also calling the filing "a completely ancillary filing." Ruling, p. 10; App. p. 423. The Auditor does not believe any filing made under oath should be so easily minimized.

The Pool's posturing begs a question: Why is it so determined to eschew any notion it could be deemed a governmental subdivision? It admits it engages in activities serving governmental functions. Exhibit 7; App. p. 195. *See also Diercks v. City of Bettendorf*, 929 N.W.2d 273 (Table) (Iowa App. 2019), 2019 WL 2871123 at \*9 (noting a risk pool by agreement performs a government function which endows the public with an interest in

knowing how public monies are expended). The conclusion, unfortunately, becomes almost inescapable The Pool has acted with the goal of freeing itself from the Auditor's oversight which other governmental subdivisions are subject to.

The Pool has utilized the authorized procedures in Iowa Code chapter 28E to achieve its creation. It is an entity organized under Iowa Code chapter 28E regardless of how it refers to itself. The law normally elevates substance over form. *See, e.g., Konrardy v. Vincent Angerer Trust, Dated March 27, 1998*, 925 N.W.2d 620, 623 fn. 1 (Iowa 2019) (“We look to the substance of Konrardy’s and Burmeister’s claim, and not the label they attach, to determine its legal significance.”); *State v. Webster*, 865 N.W.2d 223, 232 (Iowa 2015) (“[T]he substance of the claim, rather than its label controls.”); *American Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Fund Board*, 586 N.W.2d 325, 332 (Iowa 1998), quoting Restatement (Second) of Contracts § 356 cmt. c, at 159 (“[A] court will look to the substance of the agreement ....”); *Goodell v. Humboldt County*, 575 N.W.2d 486, 506 (Iowa 1998) (“We look to the substance of the ordinance, not its label, to determine whether it conflicts with a state statute or regulation.”).

But what about the fact, as noted by Judge Farrell, The Pool has never been filing the required reports with the secretary of state as called for from 28E entities, and what about the fact this issue has not come up before even though The Pool has been in existence since 1986? *See, e.g.*, ruling, p. 10; App. p. 423. Those issues are red herrings easily resolved against The Pool as discussed below.

**D. The Pool’s failure to comply with the law is not evidence its conduct is lawful.**

The subtitle as phrased above would appear at first blush to be nothing more than a truism. But it is apropos The Pool’s position in this case, as well as the ruling issued in the court below. Somehow, the notion has been unleashed that because The Pool calls itself a “section 670.7 entity” and has never filed the requisite reports as a chapter 28E organization with the secretary of state, it must mean The Pool cannot, therefore, be a de facto chapter 28E entity. Moreover, the district court observed The Pool has never been reviewed by the Auditor and noted it “seems a little unusual that this issue has only arisen now.” Ruling, p. 10; App. p. 423.

Thus, what is being relied upon as a response to the Auditor’s subpoena is the bizarre notion that if, in fact, the means by which The Pool was formed meant its members had to resort to the authority in Iowa Code chapter 28E, The Pool can nonetheless evade being viewed as an entity

organized under chapter 28E vis-à-vis the Auditor, regardless of what the facts show, simply because The Pool otherwise declined to file legally-required reports with a government authority. The Pool, under this circular construct, gets to escape Auditor oversight regarding how public monies are spent by simply asserting it doesn't call itself a chapter 28E entity. Or, similarly, since it never filed a 28E agreement or the required biennial reports of a 28E entity with the secretary of state, *see* Iowa Code § 28E.8, that alone must mean The Pool cannot be regarded as a 28E entity.

The law is not so superficial. The proper analysis is not dependent upon how one side to a dispute refers to itself. Nor is something lawful simply because an organization has proceeded in the wrong manner for many years. What has been conjured up is essentially a laches argument against the Auditor. Laches is inapplicable against the government. *See State, ex rel., Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 33 (Iowa 2013) (“Laches, however, does not apply against the government.”).

What's more, if estoppel is being suggested as a defense, that doctrine faces the steepest of hurdles against the government as well. It is inapplicable to the government in all but the most exceptional instances. *See Bailiff v. Adams County Conference Bd.*, 650 N.W.2d 621, 627 (Iowa 2002):

The general rule is that estoppel does not lie against government agencies except in exceptional circumstances. *In re Marriage of Griffey*, 629 N.W.2d 832, 834 (Iowa 2001) (estoppel doctrine inapplicable to Iowa child support recovery unit); *City of Lamoni v. Livingston*, 392 N.W.2d 506, 511-12 (Iowa 1986) (doctrine inapplicable to city); 28 Am. Jur.2d *Estoppel & Waiver* § 138, at 557-58 (2000). A party seeking to invoke the doctrine of estoppel against a public body “bears a heavy burden, particularly when the government acts in a sovereign or governmental role rather than a proprietary role.” *Id.* § 139, at 558. Here, the conference board was clearly acting in its government role in compliance with the statutory duties assigned to it, and we find no exceptional circumstances that would justify an exception to the general rule.

The Auditor is likewise acting in his government role in seeking the enforcement of a subpoena as authorized by Iowa Code section 11.52. Specifically, this matter involves the Auditor in his uniquely government role for the public’s benefit in seeking to determine several questions, including whether public monies maintained by The Pool are being properly spent. There is nothing exceptional here to allow for application of any estoppel doctrine. Besides, the same Auditor has not been in office all through the years of The Pool’s existence. Even if it had been, it is hard to imagine a method of finding new governmental subdivisions like 28Es, if they do not report themselves as required. If allowed to form and operate quietly, the legally required oversight cannot be performed. In addition, what happened here is press accounts came to the Auditor’s attention questioning the legitimacy of out-of-state travel expenses by The Pool’s

officials. Clearly, the Auditor should be permitted to act upon this new information.

It is also very important to note The Pool had never filed its audits with the Auditor. If, as the Auditor argues, The Pool is a chapter 28E entity and, therefore, a governmental subdivision, it should have been filing its audits with the Auditor. *See* Iowa Code § 11.14(1) (“A written report of an audit or examination shall be provided to the governmental subdivision and filed with the auditor of state.”); *see also* Iowa Code § 11.6(10) (the Auditor adopts rules to establish and collect a filing fee for each audit conducted); 81 IAC 21.1 (setting forth the filing fees to be paid by each governmental subdivision for the filing of audits with the Auditor). *See also* App. p. 429.

The Pool’s failure to file the audits performed for it is a glaring deficiency allowing The Pool to sail below the Auditor’s radar to the detriment of the public interest. The Auditor’s staff CPA testified he found this deficiency significant:

Q: Was the fact that [The Pool] had not previously filed with the Auditor of State its audit reports by its private auditor significant?

A: Yes, it is.

Q: Why is that?

A: As a governmental entity, they would have been required to file with our office. And by filing with our office, it gives us



an opportunity to review those reports. As part of our oversight responsibility, we review those reports for any issues regarding significant controls, noncompliance with standards, or any other significant items. If we have them on file for multiple years, we're able to do analysis when requested. We can look for financial statements, see if the information seems comparable from year to year, which would help us, if engaged – or if an engagement is decided to be done by our office, to scope the engagement a little bit.

Q: And has [The Pool] filed its auditor reports with the auditor's office annually?

A: Not at this point.

Transcript, p. 13 lines 12-25 – p. 14 lines 1-6.

Iowa case law upholds the principal courts will look at the substance of what the court is confronted with in determining whether chapter 28E status exists in respect to an entity. In *City of Windsor Heights v. Spanos*, 572 N.W.2d 591 (Iowa 1997), a city attorney reached agreement with the county attorney allowing the city attorney to prosecute charges, including state charges, occurring on 63<sup>rd</sup> Street. No such written agreement could be found, including the existence of one filed with the Secretary of State as required by chapter 28E. Nonetheless the Court held:

The city attorney's lack of legal authority as to these charges arose not from an unauthorized usurpation of that power from the county attorney, but from an apparent defect in the process by which that power was delegated by the county attorney to the city attorney. Consequently, the city attorney has de facto authority to prosecute charges within the scope of the alleged

28E agreement, and such authority may not be collaterally attacked in this proceeding.

572 N.W.2d at 594.

Consequently, chapter 28E status will be recognized on a de facto basis. That is the significant point behind the *Spanos* ruling. Courts will look at the substance of what has been produced. The district court tried to isolate the decision in *Spanos* by contending *Spanos* should be distinguished since there was no dispute by the parties a chapter 28E agreement had been made. Second, the district court noted in *Spanos* the parties “had to characterize” the agreement as a 28E agreement; otherwise, the city would not have the means to prosecute the crimes. Ruling, pp. 7-8; App. pp. 420-421.

With all respect, the district court’s analysis of *Spanos* is wanting. Clearly, the driver charged with the traffic offense in *Spanos* was not in agreement about chapter 28E authority. Also, presumably the Iowa Supreme Court did not assess the scenario in *Spanos* solely with an eye toward legitimizing a traffic charge prosecution because otherwise the charge would have to be dropped. Rather than employ that sort of result-oriented analysis, the Auditor presumes the Court in *Spanos* looked at the record and believed there had been evidence offered which supported the notion a 28E agreement had been reached between the city and the county

attorney. The Court concluded just because chapter 28E filings had not been made with the secretary of state, it was not precluded from finding the existence of a chapter 28E agreement on a de facto basis.

Likewise, simply because The Pool refers to itself as an entity other than one organized under chapter 28E and has not made the filings with the secretary of state called for in regard to 28E entities, this Court is free to conclude there is substantial evidence The Pool's IRMA agreements are, in fact, chapter 28E agreements thereby subjecting The Pool to Auditor oversight as a "governmental subdivision" under Iowa Code section 11.1(1)(c).

The Pool's errant notion it was "created" by Iowa Code section 670.7 has already been discussed. But it is noteworthy to point out that though the district court decided it would rely upon Iowa Code section 670.7 as a basis for denying the enforcement of the Auditor's subpoena, Judge Farrell's conclusion was not without reservation. He noted he entertained "some concern that section 670.7 contains no structural requirements for risk pools to be created under that section." Ruling, p. 9; App. p. 422. Well, the reason section 670.7 contains "no structural requirements" is (1) the structure of any pool is dependent upon the substance of the 28E agreement entered by the pool members and (2) section 670.7 does not create a pool.

Section 670.7 merely permits a local government to join and pay into a pool once it is created under the procedures authorized for local governments by Iowa Code chapter 28E.<sup>2</sup>

Judge Farrell also noted *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600 (Iowa 2012), stands for the principle an agreement can be deemed a chapter 28E agreement even if chapter 28E is not referenced as its legal basis. Ruling, p. 8; App. p. 421. Once again, the substance of what has been undertaken governs as opposed to whether one side or the other explicitly calls the agreement one consummated in accordance with the procedures chapter 28E authorizes.

*Hawkeye Foodservice* makes this clear:

It is undisputed that the AEAs did not comply with chapter 28E when they formed IEC. *The issue is whether the entity formed as a result of the cooperation among the AEAs is the type of entity that still must be governed by a 28E agreement.* Hawkeye has alleged IEC is such an entity and that chapter 28E is the exclusive mechanism for such action, without conceding a 28E entity is even authorized. If Hawkeye is able to establish the facts contained in the petition, then it has established a violation of chapter 28E. Accordingly, it was improper to

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<sup>2</sup>Nothing in Iowa Code chapter 670 (and specifically Iowa Code section 670.7) brings into existence a legal entity such as is done with Iowa Code chapters 488, 489 and 490 (“Uniform Limited Partnership Act,” “Revised Uniform Limited Liability Company Act” and “Iowa Business Corporation Act,” respectively). Iowa Code section 670.7 merely allows a governing body of a municipality to join or pay funds into a local government risk pool if, in fact, a pool has been created.

dismiss Hawkeye's petition for failure to state a claim upon which relief can be granted.

812 N.W.2d at 612 (emphasis supplied).

But, unfortunately, the district court misapprehended the Auditor's citation to the *Hawkeye Foodservice* case. The trial court noted in *Hawkeye Foodservice* one party was challenging whether chapter 28E had been violated whereas, according to the trial court, in this instance it is not being claimed The Pool is performing an illegal function. Ruling, pp. 8-9; App. pp. 421-422. Indeed, Judge Farrell, in attempting to distinguish *Hawkeye Foodservice*, went so far as to say the Auditor was challenging "the means by which [The Pool] was created for the ancillary purpose to draw it into one of the classifications of entities it can audit." Ruling, p. 9; App. p. 422. Nothing could be further from the truth. The Auditor does not challenge the use of chapter 28E to form a government risk pool. Indeed, it is the Auditor's position that in order to create a government risk pool which members are permitted to pay into and join under Iowa Code section 670.7, the tools for joint action allowed by Iowa Code chapter 28E must be resorted to by the government members.

There is nothing "ancillary" about the Auditor's invocation of chapter 28E. The core of the Auditor's position is The Pool was formed in accordance with the process permitted under chapter 28E thereby rendering

The Pool an entity organized under Iowa Code chapter 28E. In the words of *Hawkeye Foodservice*, The Pool “is the type of entity that still must be governed by a 28E agreement.” 812 N.W.2d at 612.

Therefore, both *Spanos* and *Hawkeye Foodservice* stand for the proposition courts will look at the substance of the agreement to determine whether the provisions of Iowa Code chapter 28E are implicated. Substantial evidence supports the IRMA agreements being deemed chapter 28E agreements regardless of how The Pool chooses to refer to them.

**E. If the pool is not a chapter 28E entity, what is it?**

Perhaps the most basic, probative question to be answered is if The Pool is not a chapter 28E entity, then what sort of critter is it? Even the district court appeared troubled by this question:

The auditor does raise some valid points. [The Pool] is funded solely by public money through its member political subdivisions. Thus, there is a public interest in allowing the auditor to conduct an audit under the circumstances permitted in the statute. The auditor also rightly questions what type of organization [The Pool] is. It is not incorporated under any provision of Iowa law. It maintains it is not a chapter 28E organization. If so, what is it? It is not a corporation or LLC, and it did not claim to be a partnership. The fact that [The Pool] has not identified itself as an entity under some traditional business classification invites the argument that it is, in reality, a chapter 28E entity that is disguising itself to avoid the obligations that might result from that classification.

Ruling, p. 9; App. p. 422.

The only refrain The Pool repeats is it is a “670.7 entity.” One official of The Pool offered an affidavit which self-servingly averred:

For as long as I can recall, I have consistently described [The Pool’s] formation as enabled under Iowa Code Section 670.7. Over my many years of marketing [The Pool], I was never instructed or otherwise advised [The Pool] was anything other than a 670.7 entity.

Exhibit 1, para. 9; App. p. 154.

The above quote is all fine and good, but it doesn’t disclaim The Pool’s substantive status as an entity which came about through local governments joining to achieve an agreement as permitted by Iowa Code chapter 28E. Moreover, as alluded to before, how does referring to The Pool as “a 670.7 entity” deny its status as an entity organized utilizing the processes enabled by chapter 28E? And, after all, Iowa Code chapter 670, the Municipal Tort Claims Act, *pertains to government*. That chapter has nothing to do with private sector entities. Governmental entities are the entities coming together to form by their agreement the “local *government* risk pool.” *See* Iowa Code § 670.7(1) (emphasis supplied). Frankly, calling itself “a 670.7 entity” is consistent with The Pool’s governmental purpose. It is precisely what one would reasonably expect from a “governmental subdivision.” Thus, The Pool’s affiant, perhaps inadvertently, offers support for the Auditor’s position.

Therefore, Judge Farrell initially had the right instinct concerning The Pool. The Pool does not identify itself “under some traditional business classification.” Ruling, p. 9; App. p. 422. And Iowa Code section 670.7 contains “no structural requirements for risk pools to be created under that section.” *Id.* How did The Pool come about then? It was in answering that question where the district court erred. The Pool clearly came about utilizing the statutory mechanism available in Iowa Code chapter 28E under which governmental subdivisions may by agreement achieve joint services for their mutual advantage. Chapter 28E provides the blueprint through which separate governmental entities may act with other governmental entities jointly and cooperatively to create a risk pool. It lays out the specifications to be contained in the agreement among the entities who are acting jointly to achieve the efficiencies and mutual advantages an organization of this sort makes possible. The Pool, therefore, is a “governmental subdivision” for purposes of the Auditor’s jurisdiction.

**F. The Auditor’s subpoena should be enforced.**

Iowa Code section 11.51 confers upon the Auditor the authority to “issue subpoenas of all kinds.” The Iowa Supreme Court has recognized: “The Iowa Code grants the auditor of state broad access to all information when conducting an audit ....” *Sand v. Doe*, 959 N.W.2d at 106. The



Auditor's subpoena authority should be broadly construed to promote the public interest consistent with Iowa's long-held tipping of the scale in favor of enforcing agency subpoenas. "Enforcement is the rule, not the exception...." *Citizens' Aide/Ombudsman v. Grossheim*, 498 N.W.2d 405, 407 (Iowa 1993).

Agency subpoenas are to be enforced if they are (1) within the statutory authority conferred, (2) reasonably specific, (3) not unduly burdensome and (4) reasonably relevant to the matter being investigated. *Iowa City Human Rights Commission v. Roadway Express, Inc.*, 397 N.W.2d 508, 510 (Iowa 1986). Hence, there is a presumption by the Iowa courts in favor of sustaining subpoenas. *See also Wilson & Co. v. Oxberger*, 252 N.W.2d 687, 688 (Iowa 1977) (Courts have been cautious to interfere with agency subpoena powers except to preserve due process rights).

Here it is undisputed The Pool did not respond to the Auditor's subpoena in full. The district court found this to be the case as well:

The record reflects that [The Pool] provided some information. The auditor sought other documents through public records requests. The parties engaged in further discussions about documents after that. The auditor did not receive all documents it deemed necessary to conduct an audit. The missing records include settlements over \$50,000, expenses paid by other individuals or entities, some travel documents, and some contracts.

Ruling, p. 3; App. p. 416. *See also* transcript, p. 15 lines 13-25 and p. 16 lines 1-3.

The Pool provided a listing of certain payments for travel expenses, but no sworn documentation to support the actual expenditures. Transcript, p. 28 lines 6-10. Additionally, The Pool voiced concerns of confidentiality concerning settlement-payment-related information, but the subpoena cover letter and subpoena itself both properly noted information obtained pursuant to subpoena would be treated as confidential work papers pursuant to Iowa Code section 11.42 (all audit or examination papers to be maintained as confidential, notwithstanding Iowa Code chapter 22) rendering The Pool's concern baseless. *See* Exhibits A and B; App. pp. 83-85.<sup>3</sup>

The Pool's approach to this matter has been most unfortunate. The fuel upon which The Pool runs its operations all comes from taxpayer funds. And yet, The Pool appears to reject the transparency which should attend to publicly-funded operations. The Pool's audit, done by an outside private auditing firm, was obtained during this action. The private auditor's (Crowe LLP) audit letter states the audit was conducted pursuant to *Government*

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<sup>3</sup>The Pool also claimed a need to redact certain requested information such as its board meeting packets, again citing confidentiality concerns. The Auditor's representative testified this was not an adequate reply to the Auditor's subpoena, especially given the protection afforded by Iowa Code section 11.42. Transcript of hearing, p. 18 line 1 – p. 19 line 12.

*Auditing Standards*. Exhibit J, pp. 1-2; App. pp. 114-115. *Government Auditing Standards* are a dedicated set of government auditing criteria put forth by United States Government Accountability Office. *See, e.g., Sand v. Doe*, 959 N.W.2d at 107-108. These standards are directed toward governmental programs and services. *Id.* It is what one would expect in the audit of a *governmental subdivision*, and it is entirely consistent with the conclusion The Pool is organized as a chapter 28E entity. *See* transcript, p.10 lines 24-25 – p. 11 lines 1-13; p. 20 lines 9-22.

Nonetheless, The Pool brazenly admits it never filed its audits with the Auditor. Its position is not one of good faith, but instead appears calculated to delay and thwart investigation of its transactions. Its failure to comply with the law by not filing its audits with the Auditor is bizarrely asserted by The Pool as a defense to the Auditor’s subpoena.<sup>4</sup>

If, as the Auditor asserts, The Pool has been organized using the processes of Iowa Code chapter 28E, it is a “governmental subdivision”, and

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<sup>4</sup>The Pool’s response to its failure to file its private audits was to blithely claim: “Didn’t know we were required to.” Transcript, p. 83 lines 5-6. Just because The Pool may have gotten by in the past without filing its audits, even when it referred to itself as operating pursuant to a “28E Agreement,” *see* Exhibit F, App. p. 102, is no excuse. Nor is ignorance of the law a sustainable defense. *See Millwright v. Romer*, 322 N.W.2d 30, 33 (Iowa 1982) (everyone is assumed to know the law and is charged with knowledge of the provisions of statutes).

its audits *should* have been filed with the Auditor. The requirement for filing the audits is found in Iowa Code section 11.14(1), as well as being referenced in Iowa Code section 11.6(10) and the Auditor’s administrative rule published at 81 IAC 21.1. App. p. 429. Filing the audit with the Auditor is, therefore, a legal requirement published as part of the law. The failure to file the audit with the Auditor constitutes “a substantial failure of the audit to comply with the standards and procedures established and published by the auditor of state.” *See* Iowa Code § 11.6(4)(a)(1).

Indeed, for purposes of exercising his reaudit role, how could any deficiency be more material than The Pool’s failure to file the audit as required with the Auditor? The Auditor cannot reaudit what he has not been supplied in the first place. Based on this deficiency alone, the Auditor was authorized to pursue his subpoena. The Auditor need only have “probable cause” to believe there has been a substantial failure of the governmental subdivision’s audit to comply with the Auditor’s standards. *See* Iowa Code § 11.6(4)(a)(1). “Probable cause” is, of course, a very low proof threshold. For civil law, Iowa deems there to be “probable cause” whenever there is the existence of facts sufficient to justify reasonable grounds to formulate a belief. *See, e.g., Davis v. Rudolph*, 243 Iowa 744, 749-750, 52 N.W.2d 15, 17-18 (1952). Here, The Pool flat out admits it has never filed its audits

with the Auditor. Therefore, there is not the slightest doubt The Pool has failed to comply with the Auditor's standards as fixed by law.

Nor was the Auditor acting on some vendetta directed against The Pool. During the cross-examination of the Auditor's CPA by The Pool's counsel, testimony was elicited indicating the Auditor had been contacted by a board member of The Pool expressing misgivings about The Pool's "practices" and its approach toward its "competition." Transcript, p. 43 lines 3-14. This testimony was a follow-up to testimony on direct examination where the Auditor's CPA referenced contact from a county member of The Pool expressing concerns described as follows: "But it was how [The Pool] was operating and also how they were dealing with competition and the ability for them to go out and look at other options." *See also* transcript, p. 41 lines 14-25 – p. 42 lines 1-4. Contacts of this sort to the State Auditor lend themselves to a finding of authority on the part of the Auditor to review matters pertaining to the subpoena. *See also* Iowa Code § 11.6(4)(a)(2) (authorizing a complete or partial reaudit when the auditor of state receives from an elected official or employee of the governmental subdivision a written request for a complete or partial reaudit of the governmental subdivision).

The Pool's board chair emphasized The Pool did not exactly operate as an insurance company. Instead, The Pool members (all governmental entities) can make the call on settlement. It was noted "if the member doesn't want a claim settled *there is a way* that the member prevails and says that we don't want to settle." *See, e.g.*, transcript, p. 76 lines 13-25 – p. 77 lines 1-3 (emphasis added). That's fine, but in view of the failure to file its audits with the Auditor, as well as the communication to the Auditor expressing reservations about The Pool's practices from a member of The Pool's board, the "way" The Pool's claim resolution process works, including a review of pertinent internal controls, procedures and criteria in the administration of the public money it receives to pay settlements to third parties, is certainly within the Auditor's purview as well.

Similarly, once The Pool's audit was ultimately obtained during these proceedings, *see* Exhibit J, App. pp. 112-141, it did not appear the private audit addressed the propriety of the costs incurred for alleged travel to out-of-state destinations by The Pool's board. There is no statement in that audit of the policy governing how The Pool's board determines the propriety of its out-of-state trips. This is a deficiency which is material. It means the private audit fails to address whether The Pool's travel expenses were necessary and properly incurred for a public purpose. It calls to mind, yet

again, the language from *Diercks* concerning government risk pools: “The public has an interest in knowing how public monies are being expended.” 2019 WL 2871123 at \*9.

The Auditor’s subpoena, therefore, should be sustained by this Court. The Auditor should be permitted to gather all the materials sought by his subpoena, particularly considering the reports concerning the travel practices of The Pool’s board. The Pool’s expenditure of the public’s money is a subject ripe for the Auditor’s review. Agency subpoenas are akin to the discovery process in civil litigation. *See, e.g., Citizens’ Aide/Ombudsman v. Grossheim*, 498 N.W.2d at 407 (referring to the agency subpoena power as a “discovery tool”). And consistent with the precepts undergirding discovery in general, wide latitude should be extended by this Court to sustain the Auditor’s subpoena by permitting discovery of all matter which may be reasonably calculated to lead to probative evidence. To do otherwise is to allow public funds to be paid into The Pool while permitting those same monies to escape any public review as to the legitimacy of their expenditure or, at most, to allow public review *but only* on such terms as prescribed by The Pool. Iowans are entitled to greater accountability of their funds. Iowans are entitled to the full protection afforded by Iowa Code chapter 11.

In the final analysis, the Auditor does not have to supply The Pool with an outline rigidly prescribing the metes and bounds of the Auditor's investigation. Investigation is a form of discovery and, to protect the public interest, a public enforcement arm such as the Auditor must be accorded a wide range in carrying out the review and examination of governmental subdivisions within the Auditor's jurisdiction. If, as the Auditor asserts, The Pool is, in fact, a 28E entity, and has, therefore, materially breached Iowa law by failing through the years to file its private audit reports with the Auditor, the Auditor is empowered to pursue an investigation regardless of The Pool's efforts to stymie the inquiry by claiming it will proceed only under Iowa Code chapter 22, or otherwise render the Auditor subordinate to The Pool's redactions, expense assessments and determinations concerning the scope of the documents it chooses to supply.

### **CONCLUSION**

All members of The Pool are indisputably government entities under the jurisdiction of the Auditor. The government status of these entities does not magically disappear from Auditor oversight simply because they join a "government" risk pool. The "government" risk pool in this matter (The Pool) was organized using the processes afforded by Iowa Code chapter



28E. It is, as such, a “Governmental subdivision” within the meaning of Iowa Code section 11.1(1)(c).

The district court should be reversed, and this matter should be remanded with directions to the district court to sustain and order the enforcement of the Auditor’s subpoena in relation to The Pool.

**REQUEST FOR ORAL ARGUMENT**

Appellant, Auditor of the State of Iowa, Rob Sand, hereby requests oral argument upon submission of this case.

THOMAS J. MILLER  
Attorney General of Iowa

/s/ Matthew S. Rousseau  
MATTHEW S. ROUSSEAU AT0012976  
Iowa Department of Transportation  
800 Lincoln Way, Ames, IA 50010  
(515) 239-1636 / FAX (515) 239-1609  
matthew.rousseau@iowadot.us  
ATTORNEYS FOR PLAINTIFF-APPELLANT

**CERTIFICATE OF COMPLIANCE WITH  
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,  
AND TYPE-STYLE REQUIREMENTS**

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 9,307 words, excluding the parts of the Brief exempted by Iowa R. App. p. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Word for Microsoft 365 in size 14 Times New Roman.

THOMAS J. MILLER  
Attorney General of Iowa

/s/ Matthew S. Rousseau  
MATTHEW S. ROUSSEAU AT0012976  
Iowa Department of Transportation  
800 Lincoln Way, Ames, IA 50010  
(515) 239-1636 / FAX (515) 239-1609  
matthew.rousseau@iowadot.us  
ATTORNEYS FOR PLAINTIFF-APPELLANT

## **CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE**

I, Matthew S. Rousseau, hereby certify that on April 7, 2022, a copy of Appellant's Brief was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access and service to the brief on that same date to:

Kristine R. Stone  
Andrew T. Tice  
100 Court Avenue, Suite 600  
Des Moines, IA 50309

THOMAS J. MILLER  
Attorney General of Iowa

/s/ Matthew S. Rousseau  
MATTHEW S. ROUSSEAU AT0012976  
Iowa Department of Transportation  
800 Lincoln Way, Ames, IA 50010  
(515) 239-1636 / FAX (515) 239-1609  
matthew.rousseau@iowadot.us  
ATTORNEYS FOR PLAINTIFF-APPELLANT