

**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 REPLY BRIEF**

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**I. 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 AND THE POOL'S BRIEF PROVIDES CORROBORATION OF THAT FACT.**

**A. The Pool has been organized as a chapter 28E entity and The Pool's brief corroborates it.**

### **Cases:**

*Burrage v. Iowa Department of Inspections and Appeals*, 839 N.W.2d 676 (Table), 2013 WL 5229773 (Iowa App. 2013)

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

Iowa Code ch. 28E

Iowa Code § 28E.1

Iowa Code § 28E.4

Iowa Code § 28E.5

Iowa Code § 28E.5(2)

Iowa Code § 28E.5(4)

Iowa Code § 28E.8

Iowa Code § 613A.7

Iowa Code § 670.7

1965 Iowa Acts, ch. 83

1986 Iowa Acts, ch. 1211, § 34

**B. The question whether The Pool should be deemed a 28E entity for purposes of the Auditor’s jurisdiction has never been taken up and determined under Iowa law.**

**Cases:**

*Diercks v. City of Bettendorf*, 929 N.W.2d 273 (Table), 2019 WL 2871123, (Iowa App. 2019)

*First Sierra Equities, LLC v. Signature Partners-Des Moines, Ltd.*, 715 N.W.2d 768 (Table), 2006 WL 927749 (Iowa App. 2006)

*State, ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12 (Iowa 2013)

**Statutes and Other Authorities:**

Iowa Code § 11.1(1)(c)

Iowa Code ch. 22

Iowa Code ch. 28E

Iowa Code ch. 670

**C. Iowa law does support the recognition of a 28E entity *de facto*.**

**Cases:**

*City of Windsor Heights v. Spanos*, 572 N.W.2d 591 (Iowa 1997)

*Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600 (Iowa 2012)

**Statutes and Other Authorities:**

Iowa Code ch. 28E

Iowa Code § 28E.5

Iowa Code § 368.47 (1962)

Iowa Code § 670.7

1966 WL 155368 (Iowa A.G.) (January 18, 1966)

**D. The Pool's belated declaration it is an unincorporated non-profit association is immaterial.**

**Cases:**

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

**Statutes and Other Authorities:**

26 U.S.C. § 115  
Iowa Code § 11.1(1)(c)  
Iowa Code ch. 28E  
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Iowa Code § 28E.6  
Iowa Code § 670.7

**II. THE AUDITOR HAS PROBABLE CAUSE TO REAUDIT THE POOL BUT THE CONSIDERATION OF THAT QUESTION AT THIS STAGE IS PREMATURE SINCE THE PROPER SCOPE OF ANY REAUDIT WAS DEPENDENT UPON THE DOCUMENTS TO BE RECEIVED VIA SUBPOENA.**

**A. Probable cause to reaudit.**

**Cases:**

*Eaves v. Board of Medical Examiners*, 467 N.W.2d 234 (Iowa 1991)  
*Kisling v. Thierman*, 214 Iowa 911, 243 N.W. 552 (1932)  
*Miller v. Schuster*, 227 Iowa 1005, 289 N.W. 702 (1940)

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Iowa Code ch. 11  
Iowa Code § 11.1(1)(c)  
Iowa Code § 11.6(4)(a)(1)  
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81 IAC 21.1

**B. The question of whether there are criteria to support a reaudit is premature.**

**Cases:**

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

*State v. Hall*, 881 N.W. 2d 470, 2016 WL 541064 (Iowa App. 2016)

**Statutes and Other Authorities:**

Iowa Code § 11.51

**III. THE AUDITOR IS ENTITLED TO THE FULL ENFORCEMENT OF HIS SUBPOENA AS PROVIDED BY LAW IF THE POOL IS DETERMINED TO BE A GOVERNMENTAL SUBDIVISION UNDER IOWA CODE SECTION 11.1(1)(c) BUT QUESTIONS REGARDING THE SCOPE AND RELEVANCE OF MATTERS UNDER INVESTIGATION ARE BETTER LEFT FOR DETERMINATION BY THE DISTRICT COURT UPON REMAND.**

**Cases:**

*Wilson & Co. v. Oxberger*, 252 N.W.2d 687 (Iowa 1977)

**Statutes and Other Authorities:**

Iowa Code § 11.1(1)(c)

## ARGUMENT

### I.

**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 AND THE POOL'S BRIEF PROVIDES CORROBORATION OF THAT FACT.**

**A. The Pool has been organized as a chapter 28E entity and The Pool's brief corroborates it.**

The Pool's proof brief at pages 16-18 makes an interesting admission concerning how The Pool is organized. The Pool initially quotes the requirements for a 28E agreement as set out in Iowa Code section 28E.5. However, after doing so, The Pool on page 18 states: "The fact that the Risk Management Agreement *includes these terms* is, therefore, not surprising and it cannot mean that the Pool is intended to be formed as a 28E entity." (Emphasis added).

Let's fully absorb the meaning of The Pool's assertion. The Pool is admitting its Risk Management Agreement (formally the Iowa Risk Management Agreement ("IRMA")), in the record as Exhibits E and K, *see* Amended Appendix (App.) pp. 92-101 and 142-152, contains *all* the required elements one would find within a 28E agreement. If so, that is certainly consistent with the formation of The Pool as a 28E entity. The

Pool, apparently recognizing the hurtful nature of this reality to its position, seeks to downplay its admission by suggesting any contract would naturally contain the same terms as specified by Iowa Code section 28E.5. For instance, The Pool on page 18 of its brief suggests “a standard insurance agreement” with a municipality would “likely” include similar provisions.

First, when did The Pool ever offer evidence of any “standard insurance agreement” into this record? It did not. And the offering up of adverbs about something being “likely” cannot be a proper substitute for discrete proof admitted before an Iowa court. But putting that aside, does The Pool seriously suggest when insurance is obtained the “standard insurance agreement” *always* spells out within the policy how the insurance company’s organization is composed, including “any separate legal or administrative entity created together with the powers delegated thereto”? *See* Iowa Code § 28E.5(2). And apparently The Pool is suggesting the “standard insurance agreement” also contains “the manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget.” *See* Iowa Code § 28E.5(4).

The Pool’s argument is disingenuous. The IRMA looks like a chapter 28E agreement because that is what it is regardless of how it is characterized by The Pool. The IRMA represents, in the words of Iowa Code section

28E.1, the uniting of local governmental entities “to make efficient use of their powers by enabling them to provide joint services and facilities.” *See* Iowa Code § 28E.1. The IRMA is the essence of the “joint or cooperative” undertaking mentioned in Iowa Code section 28E.4, and those very words from the statute are found in the IRMA. *See* Article II of each IRMA, Exhibits E and K, under the heading “Purpose.” App. pp. 92 and 142.

The Pool entertains the notion it can transform its substantive nature through means of an alias. Accordingly, it refers to itself constantly as a “section 670.7” entity. But the law is not so artificial. It matters not what moniker an entity elects to refer to itself. As noted in the Auditor’s original brief, the law is concerned with substance and not form. The Iowa Court of Appeals perhaps said it best in *Burrage v. Iowa Department of Inspections and Appeals*, 839 N.W.2d 676 (Table), 2013 WL 5229773 at \*2 (Iowa App. 2013), when it observed: “A horse by any other name is still a horse.” The Court noted the Department of Inspections and Appeals could not circumvent prior case authority “by calling the horse a different name.” *Id.*<sup>1</sup>

To add to The Pool’s dilemma, as it is forced to concede on page 26 of its proof brief, The Pool did, in fact, refer to itself in 2002 as a “28E

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<sup>1</sup>The *Burrage* Court in footnote 3 also credited Mr. Shakespeare for likely originating the concept in *Romeo and Juliet* with this variant: “What’s in a name? That which we call a rose by any other name would smell as sweet.” (As spoken by Juliet Capulet, Act II – Scene II).

Agreement” in a filing with the secretary of state. *See* Auditor’s Exhibit F; App. p. 102. The Pool’s board chair, who had signed the filing in 2002 referring to The Pool as a “28E Agreement,” attempted to disavow the filing stating: “I should have caught that it said 28E. We are not 28E. 670.” *See* Transcript p. 60 lines 14-17. How did the words “28E Agreement” get into that filing? It’s not as if it was a typo. Someone at The Pool had Iowa Code chapter 28E on their mind when the filing was filled out. However, The Pool’s board chair had no explanation to offer why on behalf of The Pool he had referred to The Pool as a “28E Agreement” in the filing. Therefore, the board chair’s testimony is unconvincing in the absence of any meaningful explanation from him.

To further pour gas on the fire, The Pool at page 19 of its brief cites the requirements in chapter 28E calling for the filing with the secretary of state of (1) the 28E agreement and (2) initial and biennial reports. *See* Iowa Code §28E.8. The Pool states it never filed an agreement or reports “for the simple reason that it is not a 28E entity.” *See* The Pool’s proof brief, p. 19. In other words, The Pool is not a 28E entity because it never made the required filings, and the filings were never required because, so says The Pool, it is not a 28E entity. Under The Pool’s circular logic, the answer becomes the question, and the question becomes the answer. This torturous

formulation is not a valid substitute for directly looking at the substance of the IRMAs, Exhibits E and K, which clearly evidence the coming together of governmental entities through the means contemplated by Iowa Code chapter 28E.

The fact remains Iowa Code section 670.7 does not itself create any entity. When the Iowa Code was amended in 1986 to authorize localities to join local government risk pools, the passage of the amendment by itself did not create a single local government risk pool. The Pool only came about once there was an actual agreement consummated, and by necessity that agreement was the product of local governments banding together to achieve the joint and cooperative ends Iowa Code chapter 28E enables.

The Pool's proof brief on page 27 notes Iowa Code chapter 28E was first enacted in 1965. *See* 1965 Iowa Acts ch. 83. Therefore, all Iowa Code section 670.7 (originally section 613A.7) did through the 1986 amendment to the Municipal Tort Claims Act was authorize the joining of local government risk pools as an endpoint. *See* 1986 Iowa Acts ch. 1211 § 34. But the means to reach that end already existed in the Code courtesy of the legislature's preexisting adoption in 1965 of Iowa Code chapter 28E. Iowa Code chapter 28E provides the specifications which must be adhered to when local governments pursue joint action. No such detail is set out in

section 670.7 or its statutory predecessor; nor was that sort of detail required to be added to section 670.7 since the blueprint for how local governments agree to band together to effectuate joint or cooperative action was already on the books in chapter 28E.

Exhibits E and K, the IRMAs, are clearly and understandably patterned upon the statutory framework in Iowa Code chapter 28E. That is why, as admitted by The Pool in its brief, all the requirements for a 28E agreement as specified by Iowa Code section 28E.5 are found within the IRMA. That The Pool failed to adhere to the filing requirements of chapter 28E is not a defense if, as asserted by the Auditor, it *should have been* making the requisite chapter 28E filings with the secretary of state over the years.

**B. The question whether The Pool should be deemed a 28E entity for purposes of the Auditor’s jurisdiction has never been taken up and determined under Iowa law.**

The Pool at page 20 of its brief makes the unfounded and sweeping claim “Iowa courts have already recognized the Pool is a § 670.7 entity.” No controlling case authority in support of this proposition is set forth by The Pool. The Pool makes this assertion with the obvious intent of suggesting the issue raised by the Auditor has been settled. But this is misleading in the absence of any controlling case precedent. The question of

whether The Pool comes within the Auditor’s jurisdiction pursuant to Iowa Code section 11.1(1)(c) as an entity “organized under chapter 28E” has never been decided. This illustrates why this matter of first impression should be retained for review by the Iowa Supreme Court.

The Pool cites to *Diercks v. City of Bettendorf*, 929 N.W.2d 273 (Table), 2019 WL 2871123 (Iowa App. 2019) and *First Sierra Equities, LLC v. Signature Partners-Des Moines, Ltd.*, 715 N.W.2d 768 (Table), 2006 WL 927749 (Iowa App. 2006), for the notion The Pool cannot be deemed a 28E entity. But neither in *Diercks* nor in *First Sierra Equities* was the issue of chapter 28E in play. Therefore, it is not a particularly significant point to make by contending “in neither of the cases” did the Iowa Court of Appeals “describe the Pool as a 28E entity.” See The Pool’s proof brief at p. 20. In *Diercks*, the issue was whether Bettendorf and its counsel failed to provide documents pursuant to Iowa Code chapter 22. In *First Sierra Equities*, the issue in terms of a risk pool was whether participation in a pool waived municipal governmental immunity.

Far from offering aid and comfort to the position The Pool has taken, both *Diercks* and *First Sierra Equities* come down on the Auditor’s side of the ledger. In *Diercks*, Bettendorf had taken the position the fees charged by the counsel retained by the risk pool to provide the city’s defense were not

public records. The Iowa Court of Appeals rejected that notion noting if the risk pool was not providing the city's defense, the city would have to undertake the defense itself. Therefore, the Court of Appeals found the risk pool was "performing a government function" and it further declared the public "has an interest in knowing how public monies are being expended." 2019 WL 2871123 at \*9.

*Diercks*, therefore, sounds an awful lot like the issue in this matter. The Auditor issued a subpoena, in part, to check on expenditures made by The Pool's board for out-of-state travel. The fuel sustaining The Pool, it is undisputed, comes from The Pool's government members which pay taxpayer funds into The Pool. Doesn't the public have a similar right to know how The Pool is spending public monies just as in *Diercks*?

Similarly, in the *First Sierra Equities* case, the only risk-pool related issue concerned whether a city waives governmental immunity should it join a government risk pool. The Court noted the city in *First Sierra Equities* had consummated "an intergovernmental contract" with the risk pool in that case. 2006 WL 927749 at \*4. Intergovernmental contracts are what chapter 28E provides for. It was held joinder in a local government risk pool did not waive government immunity defenses available to the city in Iowa Code chapter 670. Thus, once again, the entirely governmental nature of

this dynamic is evidence consistent with the notion The Pool has been created of, by and for its governmental members using the processes the law affords in Iowa Code chapter 28E. The joining of a risk pool leaves intact available governmental immunities. Accordingly, where the issue is whether The Pool is a “governmental subdivision” as contemplated by Iowa Code section 11.1(1)(c), *First Sierra Equities* aids the position of the Auditor, not The Pool.

The Pool notes at page 21 of its brief it has been operating in the open since 1986 and “no court has ever concluded” it is operating unlawfully or as a *de facto* 28E entity. But again, this is the first time the issue has been raised. The Pool, as noted in the Auditor’s original brief, seems to be implying it has a laches defense to this Auditor’s effort vis-à-vis The Pool. But laches is not available as a defense to government action. *See State, ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 33 (Iowa 2013). Hence, there is no impediment to this Auditor’s pursuit of an investigation in the interest of Iowa taxpayers.

**C. Iowa law does support the recognition of a 28E entity *de facto*.**

At pages 21-28 of its proof brief, The Pool, without citation to any controlling authority, urges the proposition “Iowa law does not support the involuntary creation of a 28E entity.” But this formulation is nothing more

than The Pool claiming it cannot be a 28E entity because it does not want to be regarded as a 28E entity, and to avoid recognition as a 28E entity it has elected to refer to itself as a “section 670.7 entity.” This is, once more, the elevation of form over substance.

The Pool misconstrues the significance of *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600 (Iowa 2012) and *City of Windsor Heights v. Spanos*, 572 N.W.2d 591 (Iowa 1997). The simple principle to be extracted from those cases is if an entity has been formed *which is of the type* governed by Iowa Code chapter 28E, the law will extend 28E recognition to the entity even if the required filings with the secretary of state as a 28E entity have not been made. The notion floated by The Pool about being subjected to Iowa Code chapter 28E on an “involuntary” basis is a red herring. The substance of the IRMA and The Pool’s operation must be examined to determine whether The Pool is the type of entity governed by Iowa Code chapter 28E. If, as the Auditor asserts, it is, then this is not a matter of something being “involuntary” versus “voluntary”; rather, *it is the application of Iowa’s law.*

The Pool offers for consideration a 1966 opinion of the then Iowa Attorney General. *See* 1966 WL 155368 (Iowa A.G.) (January 18, 1966). That opinion merely recognized in respect to a municipal flood control

project Des Moines had the express authority under then Iowa Code section 368.47 (1962) to contract with the federal government for construction of the project. That scenario is quite different from what is presented here. In this matter, there is the joinder of hundreds of local governmental entities through means of an IRMA which has necessarily been patterned upon the requirements of Iowa Code section 28E.5, and which contains all the matter specified by section 28E.5 as admitted by The Pool in its brief.

Iowa Code section 670.7 permits a municipality through its governing body to “join” a local government risk pool. But how does a municipality “join” the pool? Under this record, it is clear the joinder was accomplished through the IRMA which is the type of agreement authorized by Iowa Code chapter 28E and which incorporated all the specifications required of a 28E agreement. Therefore, the Auditor has the requisite jurisdiction in respect to The Pool.

**D. The Pool’s belated declaration it is an unincorporated non-profit association is immaterial.**

At page 29 of its proof brief The Pool declares it is now an “unincorporated non-profit association.” This is not an argument that was asserted in the hearing before Judge Farrell. It is one, therefore, which has been waived. The Pool does not cite to any portion in the record below where this specific contention was first raised. *See Meier v. Senecaut*, 641

N.W.2d 532, 541 (Iowa 2002) (the issue is waived on appeal when an argument in the appellate brief was one not called to the attention of the trial court so it could first pass upon it).

This latest effort by The Pool in self-description is made in obvious reaction to the district court's expressed puzzlement concerning The Pool's status. Judge Farrell, though he ultimately ruled against the Auditor, noted the curious nature of The Pool's organizational status:

The auditor also rightly questions what type of organization [The Pool] is. It is not incorporated under 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 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.

Therefore, The Pool in its appellate brief is engaged in an after-the-fact effort to plug the gap noted by Judge Farrell by seeking to situate itself within "some traditional business classification" to quote Judge Farrell's words. This latest effort in nomenclature by The Pool is no more probative than repeatedly calling itself a "section 670.7 entity." The relevant issue before this Court is not how The Pool chooses to call itself, but whether the

record shows The Pool is the type of entity operating under an organizational scheme enabled by the processes in Iowa Code chapter 28E.

Therefore, even if The Pool is now to be considered as “an unincorporated non-profit association,” it does nothing to detract from it having been “organized” as a 28E entity within the meaning of Iowa Code section 11.1(1)(c). Iowa Code section 28E.4 expressly declares public agencies may “enter into agreement” with “one or more public or private agencies for joint or cooperative action” under Iowa Code chapter 28E. The provision even notes the ensuing amalgamation may result in “the creation of a separate entity.” Iowa Code section 670.7 authorizes the local government units to join a risk pool. Therefore, once again, call it whatever one wishes, but the substantive reality is the local governments have by agreement pooled their resources as part of their joinder to form a separate risk pool, and the organizational means of doing so are spelled out in Iowa Code chapter 28E to create the separate entity referenced in Iowa Code section 670.7.

The Pool references its Exhibit 16 which was a letter from the Internal Revenue Service (IRS) declaring The Pool’s income exempt from taxation. *See* The Pool’s proof brief at p. 30; *see also* App. pp. 347-350. The Pool apparently thinks the IRS document supports its position in this matter

when, as discussed below, it surely does not. The Pool even asserts the Auditor “seemingly would disregard without commentary the IRS’ long-ago recognition of the Pool’s status because it does not support the AOS’ newest argument.” The Pool’s proof brief at p. 30.

Far from ignoring the IRS communication, the Auditor hastens to note Exhibit 16 should be closely inspected by this Court. The IRS communication describes The Pool in detail, and in doing so lays out a description of those elements inherent with an agreement of the type contemplated by Iowa Code section 28E.5. For example, the IRS noted The Pool was “restricted to certain municipal corporations and certain state instrumentalities, agencies or other associated government entities.” App. p. 347. The IRS proceeded to describe (1) The Pool’s purpose, (2) its duration and the method by which it may be terminated, (3) how it is financed and (4) the way it is organized, including a description of The Pool’s board of directors. App. pp. 347-349. The description of these elements by IRS tracks what is included within a 28E agreement pursuant to Iowa Code section 28E.5.

Perhaps most significant, since the fighting issue in this matter concerns whether The Pool is a “governmental subdivision” for purposes of

Iowa Code section 11.1(1)(c), is this passage found within the IRS communication:

The provision of liability protection by the Pool is an enterprise that is desirable from the standpoint of these governmental entities because use of the Pool fulfills the need of the government to provide this type of liability protection coverage at a lower cost than could be obtained commercially. *The participation of these governmental entities in the Pool is an activity within the function of a sovereign to conduct* because these public entities must protect their financial security with liability protection (whether through self-insurance or otherwise). *Thus, the Pool is performing a governmental function* that is within the scope of section 115 of the Code.

App. p. 349; (emphasis added).

The IRS document, The Pool's Exhibit 16, even notes that under section 115 of the Internal Revenue Code, gross income "does not include income derived from the exercise of any essential governmental function and accruing to a state or political subdivision of a state." App. p. 348. *See also* 26 U.S.C. § 115. The letter ruling from the IRS concluded The Pool to be exempt from taxation because "The Pool's income accrues to the state or political subdivision of the state within the meaning of section 115 of the Code." App. p. 349.

Consequently, far from supporting The Pool's position, the IRS ruling is consistent with these conclusions: (1) The Pool has been formed by its government members, (2) the government members join The Pool through

agreement, (3) the organization of The Pool is consistent with those elements for a 28E agreement as provided for by Iowa Code section 28E.5 and (4) The Pool is performing an essential “government” function. Thus, The Pool was organized in accordance with the allotted chapter 28E procedures to create the risk pool referenced in Iowa Code section 670.7. Plus, as one might reasonably expect of a governmental entity, The Pool is free of taxation.

The processes of Iowa Code chapter 28E are essential to creating The Pool. In their absence, how are hundreds of disparate local governmental entities going to be authorized to join to achieve mutual liability benefits? What would such an amalgamation look like? Chapter 28E sets forth what is required in any agreement for the entities to act jointly in creating The Pool. *See, e.g.*, Iowa Code §§ 28E.3-28E.6. All members of The Pool are indisputably Iowa governmental subdivisions under the jurisdiction of the Auditor. It is preposterous to think, as The Pool would have this Court conclude, the governmental status of the initiative disappears once they join The Pool by agreement. The Pool has been organized using the chapter 28E procedures. The Auditor should be empowered to pursue his investigation aided by his subpoena authority.

## II.

**THE AUDITOR HAD PROBABLE CAUSE TO REAUDIT THE POOL BUT THE CONSIDERATION OF THAT QUESTION AT THIS STAGE IS PREMATURE SINCE THE PROPER SCOPE OF ANY REAUDIT WAS DEPENDENT UPON THE DOCUMENTS TO BE RECEIVED VIA SUBPOENA.**

### **A. Probable cause to reaudit.**

The Pool at pages 32-38 of its proof brief argues if the Court should deem it to be a “governmental subdivision” within the meaning of Iowa Code section 11.1(1)(c), there has been a failure to establish grounds for reaudit and enforcement of the subpoena should be denied. The question of whether support exists to justify a “reaudit” is not ripe for consideration at this stage of the case as explained below. Nonetheless, before addressing that latter point, let it be noted there is already obvious probable cause to justify reaudit if, in fact, The Pool is held to be a “governmental subdivision.”

The audits of governmental subdivisions performed by private auditors are to be filed 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 Iowa Administrative Code 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 admits since its inception in 1986 it has never filed its private audits with the Auditor. It claims grace for that omission by arguing (1) it was not a governmental subdivision and (2) it placed its audits up on a website. The first point is the question to be determined in this case. As to the second point, if in fact as the Auditor contends The Pool is a governmental subdivision, it needs to be filing its audits with the Auditor and not posting them on a web page at its discretion. Regarding the latter point, are all The Pool's audits going back to 1986 available on its website? And rather than file state income tax returns, can individual taxpayers create a website and post their returns on their website without need for filing them with the government? Obviously, if The Pool, as argued by the Auditor, is a "governmental subdivision," then it needs to be filing its audits with the Auditor as required by law.

The requirement for governmental subdivisions to file their audits with the Auditor is set forth by statute as referenced above. Iowa Code section 11.6(4)(a)(1) permits reaudit, partially or in whole, at any time when the Auditor:

[H]as probable cause to believe such an action is necessary in the public interest because of a material deficiency in an audit

of a governmental subdivision filed with the auditor or because of a substantial failure of the audit to comply with the standards and procedures established and published by the auditor of state.

It is undisputed The Pool never filed its audits with the Auditor. If, as the Auditor asserts, The Pool is a “governmental subdivision,” it has been derelict in failing to file its audits with the Auditor’s office for decades. That alone constitutes a “substantial failure” of the audit to comply with the procedures and standards established and published by the auditor. The requirement to file the audits is published in Iowa Code chapter 11 which, as its title confirms, pertains to the “Auditor of State.” Validly adopted regulatory statutes fix “standards and procedures.” *See, e.g., Eaves v. Board of Medical Examiners*, 467 N.W.2d 234, 237 (Iowa 1991) (noting minimal professional competency statutes set a “standard”); *Miller v. Schuster*, 227 Iowa 1005, 289 N.W. 702, 710 (1940) (referencing statutes under which there were “standards fixed” by the legislature pertaining to the State Banking Board); *Kisling v. Thierman*, 214 Iowa 911, 243 N.W. 552, 554 (1932) (holding statutes pertaining to motor vehicle operation validly fix “the standard of care”).

Therefore, should this Court declare The Pool to be a “governmental subdivision” within the meaning of Iowa Code section 11.1(1)(c), there is no doubt, given The Pool’s admission it *never* filed its audits with the Auditor,

there is probable cause for reaudit since such a failure would be a substantial failure of the audit to comply with the Auditor's "established and published standards and procedures." *See* Iowa Code § 11.6(4)(a)(1).

**B. The question of whether there are criteria to support a reaudit is premature.**

A fundamental component of our jurisprudence is courts will not normally take up issues which are not yet ripe for consideration. *See, e.g., State v. Hall*, 881 N.W. 2d 470, 2016 WL 541064 at \*2 (Iowa App. 2016) ("We find Hall's claims are not yet ripe for review ....").

With the above in mind, consider why the Auditor's subpoena was issued. The Pool admits in its proof brief at page 34 the Auditor's application for subpoena enforcement indicated the documents were needed by the Auditor to "determine the appropriate scope of reaudit as authorized in Iowa Code section 11.6(4)." *See also* application to enforce, paragraph 58; App. p. 21.

Consequently, the scope of any reaudit has yet to have been determined since the subpoena remains unenforced. And though the terms "audit" and "reaudit" have been utilized in relation to the subpoena, it bears noting a subpoena can also be issued for an "authorized audit *or examination*." *See* Iowa Code § 11.51 (emphasis added). It has been observed an "examination" is a somewhat different breed of cat from an

audit, and here, where the appropriate scope of any “reaudit” remains open, it may be the Auditor’s pursuit is presently more akin to an “examination.” *See Sand v. Doe*, 959 N.W.2d 99, 106-107 (Iowa 2021). In other words, examination of subpoenaed records needs to take place to determine the scope of any future reaudit.

Therefore, at this stage the better course in this case is for this Court to determine if The Pool is a “governmental subdivision.” If it is not, then the matter is ended. However, if The Pool is determined to be a “governmental subdivision,” it would be more prudent for this matter to be remanded to the district court so it can superintend the enforcement of the Auditor’s subpoena including, if need be, any enforcement provisions or any conditions or restrictions deemed necessary in the fulfillment of the Auditor’s subpoena. Whether a reaudit eventually goes forth and upon what terms is a question better left for another day. First, the Auditor is entitled to have his subpoena enforced as provided by law and not upon the terms as unilaterally set by The Pool.<sup>2</sup>

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<sup>2</sup>The district court elected to base its ruling entirely upon the question of whether The Pool fit the description of an entity organized under chapter 28E and, therefore, subject to the Auditor’s jurisdiction.

### III.

**THE AUDITOR IS ENTITLED TO THE FULL ENFORCEMENT OF HIS SUBPOENA AS PROVIDED BY LAW IF THE POOL IS DETERMINED TO BE A GOVERNMENTAL SUBDIVISION UNDER IOWA CODE SECTION 11.1(1)(c) BUT QUESTIONS REGARDING THE SCOPE AND RELEVANCE OF MATTERS UNDER INVESTIGATION ARE BETTER LEFT FOR DETERMINATION BY THE DISTRICT COURT UPON REMAND.**

The district court did not reach questions pertaining to the scope of the Auditor's subpoena. The district court concluded The Pool was not a "governmental subdivision" as defined in Iowa Code § 11.1(1)(c) and denied the enforcement of the subpoena on that basis alone.

Throughout this proceeding The Pool has taken the position it doled out sufficient documents voluntarily and the Auditor should be happy with what The Pool chose to offer. In addition, The Pool on page 39 of its proof brief erroneously claims the "only materials" it consistently refused to provide were documents involving settlement agreements and claims-related materials. This, however, is not true. The district court noted there were records reflecting "settlements over \$50,000, expenses paid by other individuals or entities, some travel documents, and some contracts" omitted by The Pool. Ruling, p. 3; App. p. 416. The Pool, as shown by the testimony before Judge Farrell, never provided sworn documentation to

support actual travel expenditures. Instead, there was merely offered a listing of certain payments for travel expenses. Transcript p. 28 lines 6-10.

The Pool's argument concerning the subpoena's request for production of claims material overlooks the fact The Pool had never filed its audits with the Auditor going back for more than three decades. The subpoena was seeking matter to assist the Auditor in determining the proper scope of any reaudit. The Auditor had received communication from a member of The Pool which opened the door to several avenues of inquiry. Indeed, during cross-examination by The Pool's counsel here's what was elicited concerning The Pool:

Q: Now, you just testified a moment ago that the auditor's office received a concern from a – somebody with a county?

A: It's member county. They're a member of [The Pool].

Q: Do you know whether the person expressing concern was a board member of [The Pool]?

A: I believe it was a board member.

Q: And was that person requesting a reaudit?

A: They were requesting that as part of our engagement we consider looking at other areas such as the – I don't know – competition is the best way, and some of the practices of [The Pool].

Transcript, p. 43 lines 3-14.<sup>3</sup>

Consequently, in view of the failure to file its audits with the Auditor, as well as the communication the Auditor had received expressing reservations about The Pool's practices coming from one of the members of The Pool, an examination by the Auditor of The Pool's procedures, controls and criteria in the administration of the public money it receives to pay settlements to third parties was relevant. Certainly, it should be presumed the subpoena could lead to discovery of relevant information and, therefore, at this stage it would be premature to deny the subpoena on relevance grounds. This, too, is consistent with the presumption by Iowa courts in favor of sustaining agency subpoenas. *See Wilson & Co. v. Oxberger*, 252 N.W.2d 687, 688 (Iowa 1977) (courts are reluctant to interfere with agency subpoena powers in the absence of constitutional concerns).

In addition, as noted in the prior argument in this brief, the more prudent approach at this stage is for this Court to determine if The Pool is a governmental subdivision subject to the Auditor's jurisdiction. If The Pool is subject to Auditor oversight, then this matter can be remanded to the

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<sup>3</sup> The testimony regarding the identity of the person was unclear. The Pool in its brief has asserted it believes the person referenced was not at the time of contact "a then current board member of the Pool" but may have been "a then current member of a county that is a member of the Pool." *See* footnote 2 in The Pool's brief. The Auditor is willing to accept this as true, but the distinction for purposes of the discussion here is immaterial.

district court and the district court can superintend the processing and the scope of the Auditor's subpoena, including addressing any relevance concerns The Pool may raise. The public interest first calls for a resolution of the issue regarding whether The Pool, as asserted by the Auditor, passes muster as a "governmental subdivision" thereby justifying the Auditor's examination of The Pool's use of the taxpayer money with which it has been entrusted. Questions concerning the metes and bounds of the subpoena are better left to the district court upon remand where, if need be, additional testimony on select subjects may be had as needed to aid in the subpoena's superintendence.

### **CONCLUSION**

The Auditor renews his request for this Court to declare The Pool a "governmental subdivision" for purposes of Iowa Code section 11.1(1)(c) because The Pool is an entity organized under Iowa Code chapter 28E.

Therefore, the district court should be reversed, and this matter should be remanded to the district court to provide the oversight and the necessary enforcement of the Auditor's subpoena.

## REQUEST FOR ORAL ARGUMENT

Appellant, Auditor of the State of Iowa, Rob Sand, hereby renews his request for oral argument upon submission of this case.

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

This Reply Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Reply Brief contains 5,815 words, excluding the parts of the Reply Brief exempted by Iowa R. App. p. 6.903(1)(g)(1).

This Reply 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 Reply Brief has been prepared in a proportionally spaced typeface using Word for Microsoft 365 in size 14 Times New Roman.

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

I, Matthew S. Rousseau, hereby certify that on April 7, 2022, a copy of Appellant's Reply 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:

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