IOWA RACING AND GAMING COMMISSION
6200 PARK AVENUE, SUITE 100
DES MOINES, IOWA 50321

PETITION BY RIVERSIDE CASINO AND GOLF RESORT, LLC AND WASHINGTON COUNTY RIVERBOAT FOUNDATION, INC. FOR DECLARATORY ORDER THAT THE IOWA RACING AND GAMING COMMISSION LACKS AUTHORITY TO ISSUE A GAMBLING GAMES LICENSE IN LINN COUNTY UNDER IOWA CODE SECTION 99F.7(11)	**BRIEF IN SUPPORT OF PETITION FOR INTERVENTION ARGUMENTS AND CITATIONS OF CEDAR RAPIDS DEVELOPMENT GROUP, LLC AND LINN COUNTY GAMING ASSOCIATION, INC.**

COME NOW, Cedar Rapids Development Group, LLC ("CRDG") and Linn County Gaming Association, Inc. ("LCGA") (collectively "Intervenor") and submit their Brief in Support of Petition for Intervention.

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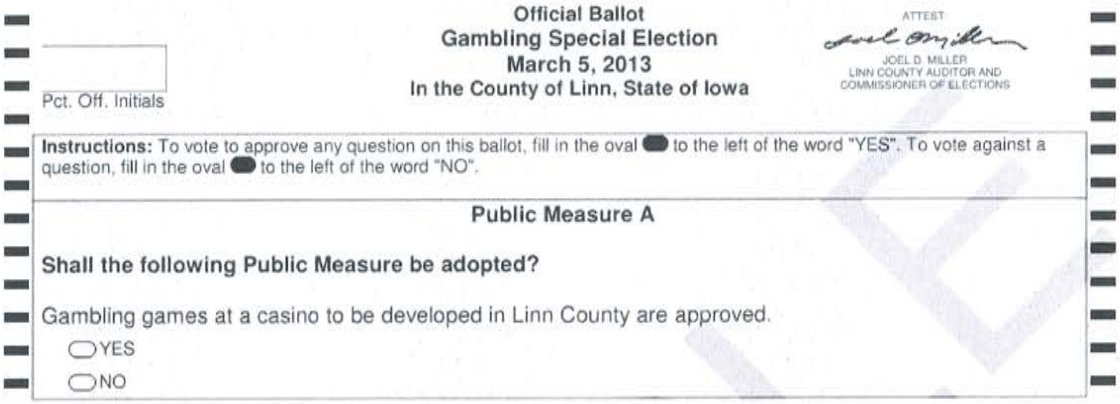
I. STATEMENT OF THE CASE

On March 5, 2013, the Linn County electorate voted to approve the development of gambling games at a casino through the passage of ballot referendum, Public Measure A. Public Measure A provided the following:



Official Ballot
Gambling Special Election
March 5, 2013
In the County of Linn, State of Iowa

ATTEST
JOEL D. MILLER
LINN COUNTY AUDITOR AND
COMMISSIONER OF ELECTIONS

Pct. Off. Initials

Instructions: To vote to approve any question on this ballot, fill in the oval ● to the left of the word "YES". To vote against a question, fill in the oval ● to the left of the word "NO".

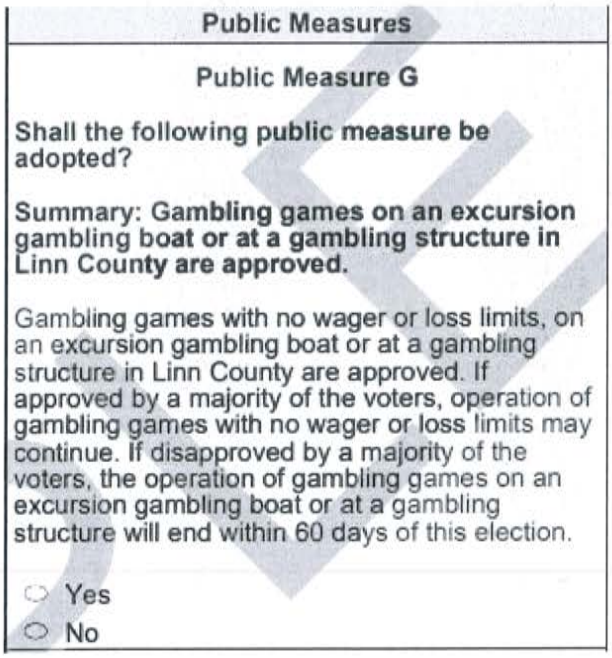
Public Measure A

Shall the following Public Measure be adopted?

Gambling games at a casino to be developed in Linn County are approved.

○ YES
○ NO

Eight years later, in accordance with Iowa Code § 99F.7(11) paragraphs "d" and "e," Linn County submitted a second ballot referendum, Public Measure G, for a vote on the November 2, 2021 election. Public Measure G ballot provided the following:



Public Measures

Public Measure G

Shall the following public measure be adopted?

Summary: Gambling games on an excursion gambling boat or at a gambling structure in Linn County are approved.

Gambling games with no wager or loss limits, on an excursion gambling boat or at a gambling structure in Linn County are approved. If approved by a majority of the voters, operation of gambling games with no wager or loss limits may continue. If disapproved by a majority of the voters, the operation of gambling games on an excursion gambling boat or at a gambling structure will end within 60 days of this election.

○ Yes
○ No

All of the parties agree that the Linn County voters properly voted on Public Measure G, the language of which was based on subsection 3 of Iowa Administrative Code 721-21.820, and that Public Measure G passed by a majority of the voters. The results were certified by the Linn County Board of Supervisors on November 9, 2021.[1] Upon expiration of the statutory deadline for contesting an election on November 29, 2021, the passage of Public Measure G became final.

Now, more than three years after voter approval and certification by Linn County Board of Supervisors of the passage of the Public Measure G referendum, Riverside Casino and Golf Resort, LLC and Washington County Riverboat Foundation, Inc. (collectively referred to as "Riverside") challenge the wording of the referendum to block the issuance of a casino license in Linn County. The question presented by Riverside in its Petition for Declaratory Order ("Petition") (and ultimately at issue in CRDG and LCGA's pending license application), is what authority Public Measure G gives to the Iowa Racing and Gaming Commission ("Commission") to grant a casino license in Linn County.

In bringing this Petition now, parallel to the pending CRDG and LCGA license application process, Riverside asks the Commission to declare it has *no* authority to grant a gambling games license in Linn County. Riverside's request is a corruption of the administrative process for declaratory orders and inappropriate for this Commission to grant.

The Commission should decline to issue any order pursuant to the Petition because the inquiry falls within several of the grounds for refusal to issue an order found in Iowa Administrative Rule 491–2.28. Moreover, the Commission is barred from issuing a declaratory order pursuant to Iowa Code § 17A.9(1)(b)(2) because neither the Linn County Board of

[1] *See* Abstract of Votes, Linn County, Iowa (November 9, 2021) (p. 46) at https://www.linncountyiowa.gov/DocumentCenter/View/17905/11022021-CitySchool-Election---Linn-County-Abstracts?bidId=

Supervisors nor Linn County have intervened in this action. And lastly, should the Commission reach the substance of this dispute, Public Measure G complied—substantially or strictly—with the requirements of § 99F.7(11). Riverside also lacks standing to bring this action, and its actions constitute a defective challenge to an election result. Riverside's action is a futile and defective effort to interfere with the authority of the Commission, nullify the will of the electorate, and delay substantial investment in the local economy, for the sole purpose of stopping potential competition to protect ongoing revenue for Riverside. For these reasons and more fully discussed herein, CRDG and LCGA urge the Commission refuse to issue the requested declaratory order of Riverside.

II. RESPONSES TO QUESTIONS PRESENTED

In the order granting intervention and setting the schedule for specified proceedings, the Commission asked the parties to address three questions: (1) Should the Commission decline to issue any order under Iowa Code section 17A.9(1)(b)(1) and one or more of the grounds set forth in Iowa Administrative Code rule 491–2.28? If not, why should the Commission exercise its discretion to reach the substantive questions?, (2) Does the lack of intervention from the Board or County mean the Commission is prohibited from issuing a declaratory order under Iowa Code section 17A.9(1)(b)(2)?, and (3) Is strict compliance with Iowa Code section 99F.7(11) required, or is substantial compliance sufficient? This brief will address each question in turn:

1. Should the Commission decline to issue any order under Iowa Code section 17A.9(l)(b)(l) and one or more of the grounds set forth in Iowa Administrative Code rule 491—2.28?

When the Commission receives a legitimate petition for declaratory judgment, it may issue a declaratory order unless it "determines that issuance of the order under the circumstances would be contrary to a rule adopted" by the agency permitting refusal. Iowa Code § 17A.9(1)(b)(1). The

Commission has full discretion whether to refuse to issue a ruling. Iowa Code § 17A.9(5)(d). The Commission may decline to issue a ruling if it "determines that issuance of the order under the circumstances would be contrary to a rule adopted" by the agency permitting refusal. Iowa Code § 17A.9(1)(b)(1). Under the rules adopted in IAC 491–2.28, there are ten grounds upon which the Commission may refuse to issue a declaratory order. While seven of those criteria are applicable here, any singular criterion is sufficient to garner refusal by the Commission to issue a ruling. Based on the present Petition for Declaratory Order, the Commission may refuse based on any of the following subsections:

> (2) The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the commission to issue an order.
>
> (3) The commission does not have jurisdiction over the questions presented in the petition.
>
> (4) The questions presented by the petition are also presented in a current rulemaking, contested case, or other commission or judicial proceeding, that may definitively resolve them.
>
> (5) The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
>
> (6) The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.
>
> (8) The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a commission decision already made.
>
> (9) The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

See IAC 491–2.28(1) (emphasis added).

IAC 491–2.28(1)(4) — *Questions Presented are Presented in a Current Commission Proceeding*

As an initial matter, the Commission may refuse to issue an order when the "questions presented by the petition are also presented in a current rulemaking, contested case, or other commission or judicial proceeding, that may definitely resolve them." IAC 491–2.28(1)(4). In addition to Riverside's asserted question for the Commission in this declaratory order proceeding, the question of whether the Commission has authority to issue a license in Linn County is presently pending before the Commission in CRDG and LCGA's license application proceeding. Moreover, Riverside initially requested that this application process for a casino in Linn County be stayed (now denied). Neither the Iowa Administrative Procedure Act, nor the Commission's declaratory rules, provide for relief in the form of a stay through declaratory order proceedings. Riverside's request for a stay demonstrates an admission that the questions presented in the Petition are also being presented to the Commission in a separate proceeding. Specifically, whether the Commission has authority to grant casino licenses in Linn County is actively being decided through the ongoing application process. Accordingly, the Commission should refuse to issue an order based upon rule IAC 491–2.28(1)(4).

IAC 491–2.28(1)(2) — *Petition Does Not Contain Facts Sufficient to Demonstrate the Petitioner Will be Aggrieved or Adversely Affected by the Failure of the Commission to Issue an Order*

As will be discussed in further detail below, Riverside lacks standing sufficient to assert an injury in this proceeding, and likewise the Commission should decline to issue a ruling because Riverside cannot show that it "will be aggrieved or adversely affected by the failure of the commission to issue an order." IAC 491–2.28(1)(2). The pending application for a casino license in Linn County has not yet been decided and will not be decided until after this declaratory order proceeding has concluded. As such, Riverside cannot be "aggrieved or adversely affected" by an

action that the Commission has yet to take. If the pending application is denied, Riverside will not be aggrieved because the status quo will remain until the Commission makes a determination on the pending license. A refusal to issue a ruling on Riverside's request is not the determining factor in any potential aggrievement towards them.

IAC 491–2.28(1)(6) and IAC 491–2.28(1)(8) — *Facts Presented Are an Inappropriate Basis Upon Which to Issue and Order, and Petition is Not Upon Facts Calculated to Aid in the Planning of the Future*

The Riverside Petition runs afoul of a foundational principle announced over 40 years ago in *Women Aware v. Reagan* that declaratory orders are intended only to address the effect of future transactions so that parties may take stock of their affairs going forward, as opposed to passing judgment on the legal propriety of past events. 331 N.W.2d 88, 92 (Iowa 1983) (citing A. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access To Agency Law, The Rulemaking Process*, 60 Iowa L. Rev. 731, 807 (1975)). This principle was incorporated into Iowa Code § 17A.9(2), which permits an agency to refuse to issue an order if the underlying request does not "facilitate and encourage agency issuance of reliable advice." Riverside is not seeking advice; it is seeking to strip the Commission of its statutory authority to act.

In a case on point, a labor union filed a declaratory order request under § 17A.9 claiming state agencies were failing to regulate workers' compensation claims as required by law. *Int'l Union, United Auto, Aerospace, Agric. & Implement Workers of Am. v. Iowa Dep't of Workforce Dev.*, No. 00-2112, 2002 WL 1285965 (Iowa June 12, 2002) (per curiam). Petitioner requested the agency to issue a declaratory order that they enforce compliance with their statutory responsibilities. *Id.* As the union's request was focused on a declaration of the illegitimacy of the agency's past conduct, as opposed to seeking enforcement of their future conduct, the Court

affirmed the dismissal of the union's 17A.9 petition. *Id.* Echoing the principle that state agencies are not charged with the authority to resolve consequences of past conduct, the Iowa Supreme Court stated:

> Declaratory actions differ from nearly all others, such as tort, contract, and most special actions. Typically, parties seek court judgments to resolve consequences of past acts or conduct. The view of most court proceedings is retrospective. The view for declaratory relief is prospective. These unique proceedings are designed to address the consequences of contemplated or imagined future conduct.

Id. at *2. This idea that an agency may advise petitioners as to their future conduct, as opposed to litigating past conduct, is the underpinning of agency declaratory authority that can be traced back to the Model State Administrative Act of 1981.

Nevertheless, the question proposed by Riverside is premised solely on past conduct, namely alleged improper action related to a 2021 election, specifically the actions of the Linn County Board of Supervisors leading up to the election, as well as the actions of Linn County voters in the election. The Petition asks the Commission to regulate the effect of an alleged "defective" ballot measure from 2021. In other words, the Commission is being asked to find the 2021 ballot measure does not provide it authority to grant licenses for gambling games in Linn County. This request is inapposite, as administrative declaratory relief is based upon aiding in the planning of future conduct, as opposed to the effect of past actions. *See Women Aware*, 331 N.W.2d at 92. A declaratory order is not the proper mechanism to seek review of a decision, finding, ruling, or determination of facts which have already occurred. *In the Matter of Monte Bowman*, Refusal to Issue Declaratory Order, 2020 WL 6158943 (Iowa Dept. Rev. July 10, 2020). The Commission should refuse to issue an order based on rules IAC 491–2.28(1)(8) and (6).

IAC 491–2.28(1)(3) — *The Commission Lacks Jurisdiction Over Question Presented*

With the passage of Iowa Code Chapter 99D, the Iowa Legislature created the Iowa Racing and Gaming Commission. Iowa Code § 99D.7 enumerates the powers vested in the Commission.

The threshold requirement to petition an agency is that the circumstance of a statute, rule, or order be "within the primary jurisdiction" of the commission asked to rule on the issue. Iowa Code § 17A.9(1)(a); IAC 491–2.20; *see also* IAC 491–2.28(1)(3).

Riverside asserts that "[t]he Linn County electorate has not approved of the conduct of gambling games as required by Iowa Code § 99F.7(11)(d) and (e)." (Petition, p. 11). In support of this conclusion, Riverside challenges the sufficiency and effect of the language contained in a 2021 Linn County referendum, specifically, Public Measure G. For Riverside's request to succeed, the Commission must determine that Public Measure G was "fatally defective," and therefore does not contain language which provides the Commission authority to grant a casino license in Linn County. To do so, the Commission would have to decide whether the referendum satisfied the requirements of Iowa law. These determinations are not within the powers or jurisdiction of the Commission as outlined in § 99D.7. Iowa Code § 17A.9 instructs, "[t]he commission shall not issue declaratory orders where prohibited by 17A.9(1)," specifically when not "within the primary jurisdiction of the agency." Iowa Code § 17A.9(1)(a) (emphasis added). Based on the foregoing, the Commission must refuse to issue a declaratory order.

IAC 491–2.28(1)(5) — *Question Presented is More Properly Suited to Another Body with Jurisdiction*

Furthermore, the Petition states that "a declaratory order is requested to uphold the voter approval requirements of Iowa law." (p. 12). Yet, Riverside acknowledges that voters in Linn County approved Public Measure G in 2021. (Petition, p. 7). Instead, Riverside seeks to have the Commission retroactively determine that the Linn County electorate did not, in fact, approve a public referendum. Resolution of these grievances are inherently beyond the scope of the Commission's authority and jurisdiction. Riverside's criticisms of Linn County's 2021 election

are misplaced before the Commission and could only be resolved by another body with jurisdiction if timely presented in strict compliance with the statutory requirements.

2. **Does the lack of intervention from the Board or County mean the Commission is prohibited from issuing a declaratory order under Iowa Code section 17A.9(1)(b)(2)?**

Iowa Code § 17A.9(1)(b)(2) provides that "an agency shall not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding." (emphasis added). Pursuant to Iowa Code § 99F.7(11), the Linn County Board of Supervisors submitted Public Measure G to the Linn County electorate for vote on November 2, 2021. Public Measure G was in compliance and substantial compliance with the law, and accordingly, the results of the vote were certified by the Linn County Board of Supervisors on November 9, 2021. The certification established Public Measure G passed by a majority vote. Upon the expiration of the statutory deadline for contesting an election on November 29, 2021, the passage of Public Measure G became final. Riverside now contests the sufficiency of the language of Public Measure G, directly challenging the legal effect of the ballot measure submitted by the Linn County Board of Supervisors as well as its certification of the election. It would be improper for this Commission to overturn the decisions made within the purview and jurisdiction of the Linn County Board of Supervisors and Linn County. Issuance of a declaratory order would substantially prejudice the Linn County Board of Supervisors and Linn County, non-parties to this action which have not consented in writing to the determination of the matter by declaratory order. Thus, the Commission must not issue a declaratory order. Iowa Code § 17A.9(1)(b)(2). Moreover, the Commission may refuse to issue a declaratory order based upon IAC 491–2.28(1)(9) as the legal rights, duties, or responsibilities of other persons who have not joined in the Petition will be affected.

3. Is strict compliance with Iowa Code section 99F.7(11) required, or is substantial compliance sufficient?

Notwithstanding the multiple procedural grounds upon which the Commission may rely to refuse to grant Riverside's request for a declaratory order, the substance of Riverside's arguments are not factually or legally supported. Riverside argues that Public Measure G failed to meet the requirements of Iowa Code § 99F.7(11), and therefore the Commission lacks the authority to issue a license to operate gambling games in Linn County. That assertion ignores the first sentence of the ballot and bold summary of the measure, critical to a comprehensive assessment of whether the ballot that was approved by the voters complied with the statutory requirements.

Iowa law provides that while strict compliance is required when adjudicating the language of a ballot measure prior to the election being held, after the votes have been cast, the standard shifts to substantial compliance in deference to the will of the electorate. Regardless of the standard, however, the language of Public Measure G complied with § 99F.7(11).

a. Substantial Compliance is the Correct Standard

In contrast to the strict compliance requirements imposed on attempts to contest an election, Iowa courts are tolerant of innocent or mere technical variances in the administration of elections that were unlikely to affect the result. Put differently, overturning the results of a facially valid election is strongly disfavored, except where it can be conclusively shown the initial count was incorrect or was the product of some intentional malfeasance.[2] Riverside claims strict compliance is mandated by Iowa law. There is no such mandate. The Iowa Supreme Court has never deviated from the principle it announced 60 years ago that substantial compliance is appropriate to adjudicate post-election challenges. *See Honohan v. United Cmty. Sch. Dist.*, 137

[2] Iowa Code § 57.1(2) provides a complete list of grounds for contesting an election, but subsections (a)–(f) concern instances of error or misconduct in the administration of the election that are not relevant to this matter.

N.W.2d 601, 602 (Iowa 1965) ("While the public measure need not always be set forth 'in haec verba' there must still be substantial compliance with the relevant statute.")

In a case concerning approval of a school bond issue, the Iowa Supreme Court quoted established blackletter law, stating:

> A substantial compliance with the law regulating the conduct of elections is sufficient, and when the election has been held and the will of the electors has been manifested thereby, the election should be upheld even though there may have been attendant informalities and in some respects a failure to comply with statutory requirements. . . . Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result. Elections should never be held void unless they are clearly illegal; it is the duty of the court to sustain an election authorized by law if it has been so conducted as to give a free and fair expression of the popular will, and the actual result thereof is clearly ascertained. It has even been held that gross irregularities not amounting to fraud may not vitiate an election.

Headington v. N. Winneshiek Cmty. Sch. Dist., 117 N.W.2d 831, 836 (Iowa 1962) (quoting 18 Am. Jur., Elections, section 225). In *Headington*, the Court upheld the election result, finding that any deviation was technical, rather than fraudulent, and constituted "nothing more than a possible failure of compliance with a directory rather than a mandatory statute." *Id.* And for well over a century, the Iowa Supreme Court has scrutinized challenges to ballot measures under a substantial compliance standard. *See e.g., Cook v. Fisher*, 69 N.W. 264, 266 (Iowa 1896) (quoting *Miller v. Pennoyer*, 31 P. 830, 831 (Or. 1893)) ("Unless the law is clearly mandatory, or in some way declares the consequences of a departure from its provisions, the court ought not to defeat the will of the people, when fairly expressed, because of some technical error or mistake in the form of the ballot."); *see also Calahan v. Handsaker*, 111 N.W. 22, 24 (Iowa 1907); *Younker v. Susong*, 156 N.W. 24, 27 (Iowa 1916); *Lahn v. Primghar*, 281 N.W. 214, 220 (Iowa 1938); *Faber v. Loveless*, 88 N.W.2d 112, 114 (Iowa 1958); *Turnis v. Bd. of Educ.*, 109 N.W.2d 198, 201 (Iowa 1961);

Widmer v. Reitzler, 182 N.W.2d 177, 180 (Iowa 1970). Moreover, the Iowa Supreme Court has held that the substantial compliance doctrine applies to the ballot measures like Public Measure G. *See Lahn*, 281 N.W. at 220.

The Iowa Supreme Court has applied the "substantial compliance" test in a number of cases, and it has been aptly summarized as follows:

> '[S]ubstantial compliance' with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Brown v. John Deere Waterloo Tractor Works, 423 N.W.2d 193, 194 (Iowa 1988); *see also Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988) ("Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute"); *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 462 (Iowa 2013) (parenthetically citing *Brown* for the proposition that "substantial compliance is a fact-specific inquiry depending on whether 'the purpose of the statute is shown to have been served'"). The doctrine of substantial compliance acknowledges that the administration of law is a human endeavor and provides flexibility to courts in determining whether statutory requirements are sufficiently met to reasonably meet the objectives of the law.

b. Public Measure G Substantially Complied with § 99F.7(11)

At a minimum, Public Measure G substantially complies with the requirements of § 99F.7(11). The case of *Johnson v. Remsen* demonstrates the commonsense utilization of the concept of compliance. 247 N.W. 552 (Iowa 1933). At issue was a claim that a ballot initiative to build an electric light and power plant was invalid because it contained a word alleged to have no

basis in fact. The language of the proposition was, "Shall the following public measure be adopted: Shall the incorporated town of Remsen, Plymouth County, Iowa, purchase, establish, erect and extend within or without its corporate limits, electric light or power plant?" *Id.* at 556. The intervenor claimed that inclusion of the word "extend" invalidated the ballot measure, because that was a matter that needed to be voted on separately. *Id.* The city first needed to "establish" and "erect." *Id.* The Court found that because there was no such power plant yet, "[t]he inclusion of the word 'extend' could have misled no one. There was nothing to extend." *Id.* Therefore, the ballot complied with the applicable statute. *Id.*

In applying the substantial compliance test to Public Measure G, one need look no further for validation than the Commission's own actions following a Public Measure in Lyon County, Iowa. Approved on November 2, 2010, Lyon County Public Measure B took its wording verbatim from Rule 721-21.820(7)—detailed below—and asked voters to respond "yes" or "no" to the following:

Lyon County Public Measure B

Lyon County Casino

Shall the following public measure be adopted?

Summary: The continued operation of gambling games on an excursion gambling boat or at a gambling structure in Lyon County is approved.

The continued operation of gambling games on an excursion gambling boat or at a gambling structure in Lyon County is approved. If approved by a majority of the voters, operation of gambling games may continue on an excursion gambling boat or at a gambling structure in Lyon County until the question is voted on again at the general election in eight years. If disapproved by a majority of voters, gambling games on an excursion gambling boat or at a gambling structure in Lyon County will end nine years from the date of the original issue of the license to the current licensee.

Yes

No

Although the operators of Grand Falls Casino & Golf Resort had already been granted a gaming license in Lyon County by the Commission after a successful 2008 public measure, and construction of the casino was underway when the 2010 referendum was passed, there were no gambling structures in operation in Lyon County on November 2, 2010. It would take another eight months—until June 11, 2011—before Grand Falls opened the doors of its casino to the public and began gambling operations. The three separate references to the continued operation of gambling games on Lyon County Public Measure B were inconsequential to the purpose of complying with the legislative mandate of 99F.7(11) then existing.[3] If the standard proposed by Riverside in their Petition were applied to the Lyon County ballot measure, Grand Falls Casino would have been operating illegally these 14 years.

The same common-sense approach to compliance applies here. Linn County reasonably relied on IAC 721-21.820 to aid them in drafting Public Measure G to comply with the law, the voters approved the measure, and no legal opposition to the language or the outcome has been levied until now. Inclusion of the words "may continue" a single time misled no one as there was nothing to continue. Public Measure G satisfied the purpose for which § 99F.7(11) was designed, asking Linn County voters whether "[g]ambling games on an excursion boat or at a gambling structure [should be] approved." And as the Court noted in *Thorson v. Board of Supervisors,* after finding that a board had substantially complied with a statutory requirement, "the requirements

[3] It is hardly inconsequential, however, that the same corporate entity behind the Grand Falls Casino also operates the Riverside Casino. Two equitable doctrines—judicial estoppel and estoppel by acquiescence—further serve to bar Riverside from the legal remedy they now seek. Judicial estoppel prevents a party from changing its position after it has successfully urged a different position to obtain a certain legal outcome. *Chicoine v. Wellmark, Inc.*, 2 N.W.3d 276, 286 (Iowa 2024). The doctrine applies to administrative proceedings as well. *Winnebago Industries v. Haverly*, 727 N.W.2d 567, 574 (Iowa 2007). Estoppel by acquiescence applies "where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon the right." *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005) (quoting *Anthony v. Anthony*, 204 N.W.2d 829, 834 (Iowa 1973)).

imposed by statute upon an inferior tribunal should not be too technically construed, lest its efficiency be wholly paralyzed." 90 N.W.2d 730, 735 (Iowa 1958).

Finally, the primary principle of applying substantial compliance to post-election challenges is to avoid prejudicing the will of the voters. No prejudice will incur to Riverside as the competitive disadvantage interest it has invoked has been and will be a part of the Commission's decision-making process in whether to grant a Linn County license. IAC 471-1.7(3)(a). By contrast, Linn County voters would suffer substantial prejudice—a point also emphasized in the Public Comments submitted by Linn County and the Linn County Board of Supervisors ("Public Comments"): "seeking to now overturn that result . . . is deeply unfair, unjust, and injurious to the will of the voters of Linn County, who approved gambling games for Linn County." CRDG and LCGA concur with these Public Comments, specifically the good faith historical efforts to lawfully bring this matter to a vote on the merits. Just as Lyon County voters were not confused in the § 99F.7 process using a Secretary of State ballot template (IAC 721-21.820(7)) that used the phrase "continue gambling operations" where none existed, neither were the voters of Linn County using a similar template: IAC 721-21.820(3). As noted in the Public Comments, there is no evidence that any Linn County voters ever raised a challenge to the ballot language or expressed any confusion as to the meaning of the referendum they were approving. The form language used for Public Measure G in Linn County was even more definitive than Public Measure B in Lyon County as it advised the voters twice about the central purpose of the ballot, that is, whether gambling should be approved. No matter what adjective is employed—substantial, actual, or strict—Public Measure G complied with 99F.7(11).[4]

[4] Riverside makes one other argument regarding the statutory compliance of Public Measure G that must be briefly addressed. It claims that because Public Measure G included the language "gambling games with no wager or loss limits" in its body text, that its passage would only have approved a subset of gambling games, and therefore did not meet the requirements of § 99F.7(11), which requires "approval or defeat of gambling games." (both emphases by

c. Public Measure G Meets Strict Compliance Standard

Here, Public Measure G strictly complies with all of the necessary elements of § 99F.7(11). Regardless of the precise language used in Public Measure G, at a minimum, it is a proposition that allowed the Linn County electorate to approve (or disapprove) of "the conduct of gambling games in the county." Moreover, the express words of Public Measure G provide that "[g]ambling games on an excursion gambling boat or at a gambling structure in Linn County are approved." Linn County therefore strictly complied with the terms of § 99F.7(11)(a) through the wording of Public Measure G.

Next, the majority of the electorate in Linn County approved the proposition by a majority of the vote on two consecutive occasions. Thus, the Commission *may* issue one or more licenses in Linn County. The underlying actions in Linn County likewise complied with subsection (11)(d)'s requirement that the Linn County Board of Supervisors submit the proposition to the county electorate when Public Measure G was added to the November 2021 ballot. Given that the November 2021 election was held eight years after Linn County's electorate approved Public Measure A in 2013, the Linn County Board of Supervisor's actions were also in compliance with subsection (11)(e).

Citing Iowa Code § 99F.7(11), Riverside argues that the "IRGC may issue a license to conduct gambling games '*only* if the county electorate approves the conduct of gambling games as provided in this subsection.'" (Petition, p. 1) (emphasis by Riverside). Riverside further asserts that "[b]y its plain language, however, Public Measure G did not do what the statute required –

Riverside). This is an extraordinary contortion of the language, the plain meaning of which is that it does not impose a limit. Virtually all casino operations conduct games both with and without limits. To authorize "gambling games without wager or loss limits" is simply to authorize gambling games of any type otherwise allowed by law. Furthermore, a thorough review of the sources Riverside cites reveals no indication that gambling games are, or were in 2021, legally divided into those with wager or loss limits, and those without. The assertion is not only a false dichotomy, but a distortion of the statutory sources that Riverside cite in support of it.

that is, it did not require 'the approval or defeat of gambling games.'" (Petition, p. 2). To make this argument seem plausible, Riverside focuses on the presence of two words "may continue" in the body text of the referendum. Because the Commission has not yet issued a license to operate gambling games in Linn County, Riverside argues, "there were no games that the voters could authorize to 'continue.'" (Petition, p. 2). According to Riverside, "[a] proposition requiring the approval or defeat of the *continuation* of gambling games is not a proposition that authorizes the *origination* of gambling games in the county." (Petition, p. 2) (emphasis by Riverside).

The fundamental flaw in Riverside's argument is also its most glaring omission. The Petition focuses exclusively on the body text of Public Measure G, claiming that it would have confused voters into thinking there was already a casino in Linn County, and that would have influenced voters of Linn County to vote "yes" for the measure thinking that a "no" vote could result in a loss of jobs in the community. Setting aside the inconsistency of this argument when the actual outcome that Riverside seeks is to prevent an enormous act of job creation in Linn County, there is a more straightforward deficiency. Riverside's argument conveniently ignores the "Summary" boldly printed immediately below the question (and above the body text), which plainly states: "Gambling games on an excursion gambling boat or at a gambling structure in Linn County are approved."[5] As pointed out in the Public Comments, this language is clear, unambiguous, and prominently displayed on the ballot. It directly puts the question of "the approval or defeat of gambling games" to the voters. Public Measure G asked the electorate of

[5] The only references in the Petition for Declaratory Order to this language are contained in the reproduced images of Public Measure G, marked as Exhibits B and C on page 6 of Riverside's Petition, which it could not in good faith present. Otherwise, this important aspect of the ballot is never addressed in Riverside's argument, despite being material to the substance of that argument. Indicative of Riverside's effort to avoid acknowledgment of this critical "Summary" language, footnote 2 on page 5 of the Petition claims to state subsection 3 of Rule 721-21.820 in full, yet that quotation omits the Summary which, like the rest of the language of Public Measure G, comes directly from 721-21.820(3), as well as the instructions for the form ballot's use, addressed further below.

Linn County if gambling games in their county were approved, and they responded with a resounding "yes."

Finally, it is important to appreciate the context of the process by which the language of Public Measure G came to be on the ballot. It is undisputed that citizens of Linn County successfully petitioned to have a public measure put on the ballot in 2013 to approve the operation of gambling games in their county (Public Measure A) and it successfully passed. The Commission nonetheless declined to issue any gambling licenses for Linn County between 2013 and the subsequent passage of Public Measure G in 2021. The drafters of the form ballot language found in IAC 721-21.820(3) presumably did not contemplate such a scenario. Still, it is obvious from the context that they intended the form ballot in subsection (3) to be used for the second referendum that is required by § 99F.7(11) paragraphs "d" and "e", which unlike "a" are not directly triggered by a successful petition of citizens of the county. Paragraphs "d" and "e" mandate that, upon the successful petition for and passage of an initial measure "to approve or disapprove the conduct of gambling games," a second proposition "requiring the approval or defeat of gambling games" be put to the voters eight years later. Rule 721-21.820(2) of the Iowa Administrative Code begins as follows: "Form of ballot for election called by petition. Ballots shall be in substantially the following form." The parallel introductory language of 721-21.820(3) reads: "Form of ballot for elections to continue gambling games on an excursion gambling boat or at a gambling structure."

Apart from the obvious presence of the word "continue" in the introduction for subsection (3), there are two critical differences between these two instructions that bear on the matter at hand. First, subsection (2) indicates that its purpose is for a ballot measure "for an election called by petition." That suggests that it is appropriate language for a referendum such as Public Measure A in 2013 and suggests that it is not appropriate for Public Measure G in 2021, which was placed on

the ballot to satisfy a statutory requirement and not the product of a petition. Second, subsection (2) contains a second clause directing that such "[b]allots shall be in substantially the following form." The substantive text of subsection (2) reads: "Gambling games on an excursion gambling boat or at a gambling structure in County are approved." Whereas the substantive text of Public Measure A read: "Gambling games at a casino to be developed in Linn County are approved."

Subsection (3) of Rule 721-21.820, however, contains neither the language indicating it is appropriate for measures "called by petition," nor any language indicating that such ballot "be in substantially the following form." In light of this more complete context, the language of Public Measure G makes good sense. Linn County had already passed a referendum to approve the operation of gambling games that substantially complied with the form language provided for an initial ballot measure initiated by a petition. Thus, given the context detailed above, that for the mandatory second referendum in in 2021 the text for Public Measure G was copied from Rule 721-21.820(3), under the assumption that doing so would best ensure compliance with the requirements of § 99F.7(11).

It certainly would not have been better to use any of the other form ballots provided by Rule 721-21.820, two of which refer explicitly to pari-mutuel racetracks, which are not at issue here, and the third, subsection (7), read as follows:

> Summary: The continued operation of gambling games on an excursion gambling boat or at a gambling structure in County is approved.
>
> The continued operation of gambling games on an excursion gambling boat or at a gambling structure in County is approved. If approved by a majority of the voters, operation of gambling games may continue on an excursion gambling boat or at a gambling structure in County until the question is voted on again at the general election in eight years. If disapproved by a majority of voters, gambling games on an excursion gambling boat or at a gambling structure in

> County will end nine years from the date of the original issue of the license to the current licensee.[6]

The form language of subsection (7) more heavily emphasizes "[t]he continued operation of gambling games" than any of the other options provided by Rule 721-21.820. Linn County was faced with five form ballots provided by Rule 721-21.820, one of which (subsection 2) is explicitly directed for use in an election called by petition, and two others (subsections 4 and 6) which concern pari-mutuel racetracks. In choosing between the remaining two, subsection (3) would clearly be the more appropriate choice, as compared to subsection (7). That the language of subsection (7) is more appropriate for a county referendum to authorize the continued operation of an already extant casino is corroborated by the fact that other counties, such as Greene County's Public Measure II in 2021, and Washington County's own Public Measure B in 2010, relied on language from subsection (7) for their ballots.

The foregoing is corroborated by the Public Comment submitted on January 3, 2025. While drafting the ballot language, "the Board turned to a set of pre-written ballot templates published in Iowa's administrative rules. The purpose of these templates is to assist local governments when drafting ballot questions to ensure they comply with the law." As the Public Comment makes clear, the language taken from Rule 721-21.820(3) "made sense and [was] appropriate in context. . . . Public Measure G acted as a follow-up to ensure the voters 'continued' to support gambling games and a casino in Linn County." Linn County complied with the law as expressed by Rule 721-21.820, and Riverside's claims to the contrary are a distortion of the boundaries of reasonable interpretation. Given the totality of circumstances, Public Measure G complied with the statutory

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[6] This is the *current* language of that subsection, despite the fact that, as Petitioners point out, the requirement for repeat referendums every eight years to permit continued gambling operations in a county was eliminated by the 2011 amendments to § 99F.7. *See* Act Relating to Certain Forms of Gambling, Iowa Legis. Serv. Ch. 111, S.F. 526, § 11 (May 26, 2011).

requirements under the circumstances. Riverside's arguments of purported consequential flaws in the ballot language are without merit.

III. RIVERSIDE LACKS STANDING TO SEEK A DECLARATORY ORDER

Riverside cannot establish standing for its declaratory order Petition. Standing to pursue legal action requires a party to have sufficient stake in a justiciable controversy to obtain resolution. *Birkhofer ex rel. Johannsen v. Birkhofer*, 610 N.W.2d 844, 847 (Iowa 2000). A complaining party must have (1) a specific legal interest in the controversy and (2) be injuriously affected. *Id.* In declaratory actions brought under § 17A.9, agencies have the power to craft their own rules of standing. Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 37-38 (1998) ("[A]n agency may include in its rules reasonable standing, ripeness, and other requirements for obtaining a declaratory order"). The fundamental and specific rule of standing the Commission has adopted for the issuance of a declaratory order provides that a petitioner "must have a real and direct interest in a specific fact situation that may affect their legal rights, duties, or responsibilities under statutes or regulations administered by the commission." IAC 491–2.19.

Without such a right, a petitioner has no standing to seek declaratory relief from the Commission. The Iowa Supreme Court has ruled: "Standing 'must exist at the commencement of the litigation.'" *Klein v. Iowa Pub. Info. Bd.*, 968 N.W.2d 220, 234 (Iowa 2021) (quoting *Baker v. City of Iowa City*, 750 N.W.2d 93, 97 (Iowa 2008)). A determination that a party has standing must occur before the merits of the claim may be considered. *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 864 (Iowa 2005). "Even if the claim could be meritorious, the court will not hear the claim if the party bringing it lacks standing." *Id.*

Riverside, in an ill-conceived attempt to establish standing, asserts that they have a direct interest in the outcome, in the form of a potential business disadvantage if a license for a gambling games operation is issued in Linn County; expressly stating that another licensed gambling operation "would cannibalize the operations and gaming revenue of the Riverside Casino and Golf Resort" and cause "a reduction in the contributions to the Washington County Riverboat Foundation. . . ." (Petition, p. 14). A competitive disadvantage, however, hypothesized by Riverside is not a legal right recognized under any Iowa authority.[7] Nowhere in Iowa Code Chapter 99F, or the administrative rules promulgated thereunder, can a legal right of anti-competitive protection be found, recognized, or enforced.

Here, Riverside's interest in the outcome of the declaratory order is no more than an economic interest in a continuation of the status quo. Iowa's gaming laws, however, are not set to prevent competition, or protect the competitive advantage of an existing casino. To the contrary, Iowa Code § 99F.7 explicitly authorizes the expansion of gaming competition through the licensing of new operations, and the Commission's role in locating a gambling structure and in selecting an applicant for a gaming license is to serve the best interests of the citizens of Iowa, not protect existing casinos. Iowa Code § 99F.4(1). Of the 27 Commission powers listed in § 99F.4, not one pertains to competitor protection. A petitioner's financial or economic interest is not a "legal right" sufficient to establish standing under this agency's rules.

Moreover, Riverside's claim that they will be injured by cannibalization of gaming revenue is a hypothetical injury that might occur at some point in the future—if the Commission decides to grant CRDG and LCGA's application for a casino in Linn County. Unlike a case in which a

[7] Indeed, this proposition has been expressly rejected as a cognizable "legal interest" by other jurisdictions. *See MT & M Gaming, Inc. v. City of Portland*, 383 P.3d 800 (Or. 2016); *see also Finger Lakes Racing Ass'n, Inc. v. New York State Gaming Facility Location Bd.*, 25 N.Y.S. 3d 790 (N.Y. Sup. Ct. 2015).

corporate petitioner is itself a focus of a declaratory action, this case involves an alleged injury stemming from the conduct of a third party in selecting ballot language. As such, any challenge carries with it a heightened standard of scrutiny. Specifically, a petitioner must establish a causal connection between the alleged injury and the conduct complained of, and that the injury is likely. *Godfrey v. State of Iowa,* 752 N.W.2d 413, 421 (Iowa 2008). Riverside cannot satisfy this test because the competitive injury they are claiming flows not from the language of the ballot or the Linn County certification of Public Measure G, but from the construction of a Cedar Rapids casino which has yet to be approved or denied. *See Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004) (Allegation that bonds issued in violation of Iowa law to finance a public improvement project did not confer standing on renters or owners of the land affected because the injury flowed not from the bond issuance but from the project itself). Riverside asserts no authority for the proposition that some speculative competitive disadvantage would be sufficient to confer standing under IAC 491–2.19.[8]

Furthermore, "[a] declaratory order only determines the legal rights of the particular parties to the proceeding in which it was issued." Arthur Earl Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 Iowa L. Rev. 731, 731 (1975) (emphasis added); *see also Sierra Club Iowa Chapter v. Iowa Dept. of Transp.*, 832 N.W.2d 636, 647 (Iowa 2013). Nevertheless, Riverside seeks a declaratory order asking the Commission to issue an order on itself, namely, that it lacks

[8] The requirements for establishing standing to petition an agency for a declaratory order and those for requesting judicial review of an agency decision are distinct standards. The former is set out by statute in rule IAC 491-2.19, that petitioners for a declaratory order must establish a legal right, duty, or responsibility that will be affected. To establish standing for judicial review, courts rely on a two-part test "First, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the decision . . . Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision." *City of Des Moines v. Pub. Empl. Rel. Bd.*, 275 N.W.2d 753, 759 (Iowa 1979) (citation omitted).

legal authority to issue a gambling games license in Linn County due to what Riverside alleges is an inadequate public referendum. The declaratory order process of § 17A.9 does not contemplate such, nor does IAC 491–2.19. Riverside's lack of standing forecloses any consideration of its attempt to strip the Commission of the authority to make a decision on February 6, 2025.

IV. RIVERSIDE'S CHALLENGE TO ELECTION RESULTS IS DEFECTIVE

Under Iowa law "[t]he right to contest an election did not exist at common law." *Bauman v. Maple Valley Cmty. Sch. Dist.*, 649 N.W.2d 9, 13 (Iowa 2002) (citing *De Koning v. Mellema*, 534 N.W.2d 391, 394 (Iowa 1995)). Thus, "[b]ecause any right to contest an election is acquired by statute, contestants must strictly comply with the statutory provisions necessary to confer jurisdiction." *Id.* "When a statute prescribes a procedure for review, that procedure must be strictly followed to confer jurisdiction." *Id.* (citing *Lau v. City of Oelwein*, 336 N.W.2d 202, 203 (Iowa 1983)). Therefore, whether a challenge is timely made is a jurisdictional question. *Id.*

The procedure to contest the outcome of a public measure is governed by Iowa Code Chapters 57 and 62. *De Koning*, 534 N.W.2d at 394. Iowa courts have mandated that challenges strictly adhere to statutory prescriptions. *See id.; Bauman*, 649 N.W.2d at 13; *Lau*, 336 N.W.2d at 203. Those requirements include establishing legal standing to contest the election, initiating the contest within the narrow 20-day window prescribed by law, and adjudicating the contest in a specially convened court unlike any other provided for under Iowa law. Iowa Code Ch. 57 governs contesting elections in this state, and § 57.1(1)(b) defines the requirements for standing to bring such a contest against the outcome of a public measure:

> The outcome of the election on a public measure may be contested by petition of the greater of ten eligible electors or a number of eligible electors equaling one percent of the total number of votes cast upon the public measure; each petitioner must be a person who was entitled to vote on the public measure in question or would have been so entitled if registered to vote.

A total of 44,311 votes were cast on Public Measure G, which was approved with 55% voting "yes" and 45% voting "no."[9] According to § 57.1(1)(b), a minimum of 443 potentially eligible voters would have had to petition the Linn County Auditor to contest the election.[10] There is no evidence such petition was ever attempted, much less filed with the appropriate office.

Furthermore, the time limit for contesting the result of a county ballot measure is twenty (20) days following the announcement of the results, as controlled by Iowa Code § 62.5, via the provision in § 57.6. Those sections state, in pertinent part:

> § 57.6 – Other contests: All the provisions of chapter 62 relating to contested elections of county officers shall be applicable, as near as may be . . . for public measures. . .
>
> § 62.5(1) – Statement of intent to contest: Within twenty days after the board of supervisors declares a winner from the canvass of an election, the contestant shall file with the commissioner a written statement of intention to contest the election.

Public Measure G was voted on by the citizens of Linn County on November 2, 2021, and the result was certified on November 9, 2021. By law, any challenge to the results of the referendum must have been initiated by the filing of a written statement with the Linn County Auditor no later than November 29, 2021. No such statement has ever been filed.

Finally, Iowa Code § 57.7 prescribes that a specialty court—unlike any other ordained by the laws of this state—be convened solely for the purpose of ruling on a challenge to a public measure:

> The court for the trial of a contested election on a public measure shall consist of one person designated by the petitioners who are contesting the election, who shall be designated in writing by the petitioners at the time the contest is filed, one person designated by the county commissioner of elections to represent the

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[9] The Linn County Abstract of Votes reported 24,232 votes in favor, and 20,079 votes against. *See* Abstract of Votes, Linn County, Iowa (November 9, 2021) (p. 46) at https://www.linncountyiowa.gov/DocumentCenter/View/17905/11022021-CitySchool-Election---Linn-County-Abstracts?bidId=

[10] Iowa Code § 47.2 designates the county auditor as the county commissioner of elections in each county.

> interests adverse to those of the petitioners, and a third person who shall be chosen jointly by the designees of the petitioners and of the commissioner. If the persons selected by the petitioners and the county commissioner of elections cannot agree on a third person, the chief judge of the judicial district in which the contest is filed shall appoint a third person to serve.

This contest court is mandated by the Iowa Code and is unique to adjudication of election contests. The Iowa Legislature deemed challenges to elections to be so important as to warrant establishing a special court procedure for the sole purpose of ruling on them. Riverside's attempt to sidestep these procedures entirely under the guise of an administrative action underscores the impropriety of its Petition.

V. CONCLUSION

The Commission can rely on multiple grounds to refuse to issue the declaratory order under Iowa Administrative Code 491–2.28(1), including:

IAC 491–2.28(1)(4) — *Questions Presented are Presented in a Current Commission Proceeding*

IAC 491–2.28(1)(2) — *Petition Does Not Contain Facts Sufficient to Demonstrate That the Petitioner Will be Aggrieved or Adversely Affected by the Failure of the Commission to Issue an Order*

IAC 491–2.28(1)(6) and IAC 491–2.28(1)(8) — *Facts Presented Are an Inappropriate Basis Upon Which to Issue and Order, and Petition is Not Based Upon Facts Calculated to Aid in the Planning of the Future*

IAC 491–2.28(1)(3) — *The Commission Lacks Jurisdiction Over Question Presented*

IAC 491–2.28(1)(5) — *Question Presented is More Properly Suited to Another Body with Jurisdiction*

IAC 491–2.28(1)(9) — *Petition Will Determine the Legal Rights, Duties, and Responsibilities of Persons Not Joined in Petition*

But if the Commission reaches the substantive questions of the Petition, the language of the ballot complied with the statutory requirements regardless of the applicable standard because

Public Measure G asked voters directly whether "[g]ambling games on an excursion gambling boat or at a gambling structure in Linn County are approved." This language meets the requirements of § 99F.7(11). The Iowa Legislature has set forth precise statutory procedures for contesting an election or challenging the legitimacy of a ballot measure. Neither Riverside nor any eligible voter of Linn County ever contested the approval of Public Measure G in compliance with the strict statutory process and timeline.

And finally, petitions for an administrative agency to issue a declaratory order are properly for the purpose of ensuring that the requesting party acts within the law, rather than attacking the legal authority of the body itself. Declaratory orders are intended to be used as a legal shield for the petitioning party in the future, not as a legal sword against their competitors. Riverside's grievances relate to an election that was certified as final more than three years ago. For the Commission to rule in favor of Riverside, it must determine that it lacks authority to grant licenses in Linn County. Any such determination violates the purpose of a declaratory order in the retrospective nature of such a decision.

For the reasons stated herein, Intervenor, CRDG and LCGA request the Commission refuse to issue a declaratory order in response to Riverside's Petition.

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Respectfully submitted,

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