IN THE SUPREME COURT OF IOWA

No. 19-1598
JOHNSON COUNTY NO. CVCV080344

STATE ex rel. GARY DICKEY,

Applicant-Appellant,

vs.

HON. JASON BESLER,

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY, IOWA
THE HONORABLE ROBERT B. HANSON

BRIEF OF DEFENDANT-APPELLEE

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY THOMPSON
Solicitor General

EMILY WILLITS
Assistant Attorney General
Department of Justice
Hoover State Office Building, 2nd Fl.
1305 E. Walnut St.
Des Moines, Iowa 50319
Ph: (515) 281-6403
E-mail: emily.willits@ag.iowa.gov
ATTORNEYS FOR DEFENDANT-APPELLEE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Constitutional Provisions

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. DICKEY'S APPLICATION FOR LEAVE TO FILE A QUO WARRANTO ACTION AS A MATTER OF LAW.

Authorities

Iowa R. Civ. P. 1.1302(1)
Iowa R. Civ. P. 1.1302(2)
State ex rel. Fullerton et al. v. Des Moines City Ry. Co. et al., 109 N.W. 867 (Iowa 1906)
State ex rel. Cairy v. Iowa Co-op. Ass'n, 95 N.W.2d 441 (Iowa 1959) (*Cairy II*)
S*tate ex rel. Turner v. Scott*, 269 N.W.2d 828, 829 (Iowa 1978)
State ex rel. Maley v. Civic Action Comm., 28 N.W.2d. 467 (Iowa 1947)
State ex rel. Robbins v. Shellsburg Grain & Lumber Co., 53 N.W.2d 143 (Iowa 1952)
Iowa Code ch. 660
State ex rel. Cairy v. Iowa Co-op Ass'n, 79 N.W.2d 775, 777 (Iowa 1956) ("*Cairy I*")
Iowa Constitution art. V, section 15
Iowa Code § 46.15
Godfrey v. State, 752 N.W.2d 413 (Iowa 2008)

II. WHETHER MR. DICKEY HAS STANDING TO FILE A PETITION FOR WRIT OF QUO WARRANTO AGAINST JUDGE BESLER.

Authorities

DuTrac Cmty. Credit Union v. Hefel, 893 N.W.2d 282 (Iowa 2017)
Godfrey v. State, 752 N.W.2d 413 (Iowa 2008)
State ex rel. West v. City of Des Moines, 65 N.W. 818 (Iowa 1896)
State v. Barker, 89 N.W. 204, 205 (Iowa 1902)
State ex rel. Adams v. Murray, 252 N.W. 556 (Iowa 1934)
State ex rel. Fullerton et al. v. Des Moines City Ry. Co. et al., 109 N.W. 867 (Iowa 1906)
State v. Winneshiek Co-Op Burial Ass'n, 15 N.W.2d 367 (Iowa 1944)
Iowa Code 12420

Rush, et al. v. Reynolds, et al., 2020 WL 825953, at *4 (Iowa Ct. App. Feb. 19, 2020)
United States v. Students Challenge Regulatory Agency Procedures, 412 U.S. 669, n. 14 (1973)
Hurd v. Odgaard, 297 N.W.2d 355, 358 (Iowa 1980)
Alons v. Iowa Dist. Ct. for Woodbury Cty., 698 N.W.2d 858 (Iowa 2005)
Polk County, et al. v. District Ct. of Polk County, 110 N.W. 1054 (1907)

ROUTING STATEMENT

This case presents a substantial question involving legal principles that have evolved since the Court last ruled on similar questions. The Court should retain the case pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(f).

STATEMENT OF THE CASE

A. Nature of the Case.

The appellant, a private attorney, appeals the district court's order denying his application ("Application") for leave to file a quo warranto action as a relator on behalf of the State of Iowa pursuant to Iowa Rule of Civil Procedure 1.1302(2). The appellant seeks to remove a district court judge from office based on news reports that the judge was not appointed within the time frame required by article V, section 15 of the Iowa Constitution and Iowa Code § 46.15.

B. Statement of Facts and Procedural Background.

On April 20, 2018, the sixth judicial district posted a notice of vacancy for a district court judge position. Notice of Vacancy (App. 47-49). Fifteen candidates applied, including Jason Besler, the defendant in this action. Applicant List (App. 51-52). In accordance with article V, section 15 of the Iowa Constitution and Iowa Code § 46.14 (2018), the district nominating commission considered the applications and interviewed the candidates on May 21, 2018. Applicant List (App. 51). The nominating commission submitted two nominees to Governor Reynolds for consideration, one of whom was Judge Besler. Application ¶ 4; Notice of Nominees (App. 54). The governor's office received the names via electronic mail on May 22, 2018. Application ¶ 4; Notice of Nominees (App. 55). The governor and

senior members of her staff interviewed the two nominees on June 11, 2018, and the governor made her decision to appoint Judge Besler on June 21. Application ¶ 19 (App. 9). Governor Reynolds notified Judge Besler of the appointment in a phone call on Monday, June 25, 2018. Application ¶ 7; Koopmans Aff. ¶ 5 (App. 2, 5).

On July 6, 2018, following communications between the governor's office and Chief Justice Cady's office, the chief justice's legal counsel sent the governor's chief of staff a formal letter regarding the appointment. Kottmeyer Letter (App. 60-61). The letter sought to capture Chief Justice Cady's "true thoughts and feelings" regarding the appointment process for the sixth judicial district. *Id*. (App. 60). The letter observed, "[i]t is up to the governor to give meaning to the constitutional directive for judicial appointments to be made within thirty days." *Id*. (App. 60). The letter explained that judicial appointments could be made in more than one way:

> In practice, the chief justice has always considered a judicial appointment was made when it was communicated to the nominee. This communication from the governor to the nominee is a time-honored practice that every judge in this state has experienced, and an honor no judge has ever forgotten. To my knowledge, it is a practice that has always occurred within thirty days of the nomination by the judicial nominating commission. Nevertheless, this long-standing practice does not mean judicial appointments cannot be made in other ways." *Id*. (App. 60-61).

The letter concluded, "Although the appointment was not communicated to Besler or made public until Monday, June 25, Governor Reynolds determined that the appointment was made on June 21 when she made the decision to select Besler. Consequently, the chief justice respectfully defers to and accepts the decision by Governor Reynolds that the appointment was made on June 21." *Id*. (App. 61). Judge Besler signed his oath of office on June 28, 2018, and began work as a district court judge the following month. Oath of Office (App. 59).

On October 9, 2018, the appellant in this case, Gary Dickey, wrote a letter to Johnson County Attorney Janet Lyness demanding that she file a petition for writ of quo warranto against Judge Besler. Dickey to Lyness Letter (App. 43-45). Ms. Lyness declined to file the petition. Id. (App. 46). Mr. Dickey then communicated with the attorney general's office, which also declined to file a petition for writ of quo warranto. Application ¶ 11 (App. 7). On November 1, 2018, Mr. Dickey filed an application for leave to file a petition for writ of quo warranto in the district court for Johnson County. (App. 6-9). Citing a blog post, Mr. Dickey alleged, "all public information indicates that Governor Reynolds failed to appoint Mr. Besler to the court within thirty days of his nomination by the judicial nominating commission." Application ¶ 2 (App. 6). Judge Besler, represented by the Iowa attorney

general's office, filed a resistance. (App. 12-20). Following briefing and a hearing, the district court denied Mr. Dickey's Application. 4/23/19 Ruling (App. 23-25). Mr. Dickey filed a motion to reconsider, which the district court denied following briefing and oral argument. Mr. Dickey appeals the district court's order denying his Application for leave to bring a quo warranto action.

STANDARD OF REVIEW

Whether to grant leave to a private relator to bring a quo warranto action is a question left to the discretion of the district court. *State ex rel. Fullerton et al. v. Des Moines City Ry. Co. et al*., 109 N.W. 867, 875 (Iowa 1906); *see also State ex rel. West v. City of Des Moines*, 65 N.W. 818, 819 (Iowa 1896) (observing that whether a relator has demonstrated sufficient interest to bring a quo warranto action is a question "confided to the court to which application is made."). The Court should therefore review the district court's order denying the application for abuse of discretion. "A district court abuses its discretion when the grounds underlying . . . [the] order are clearly untenable or unreasonable." *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 227 (Iowa 2019) (internal citations and quotations omitted).

Should the Court decide to employ a less deferential standard of review, the standard of review of a district court's ruling on a motion to dismiss is for errors at law. *Turner v. Iowa State Bank & Trust Co. of Fairfield,* 743 N.W.2d

1, 2-3 (Iowa 2007). The Court reviews claims based on a violation of the Iowa Constitution de novo. *Godfrey v. State*, 752 N.W.2d 413, 417 (Iowa 2008).

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY EXERCISED ITS DISCRETION WHEN IT DENIED THE APPLICATION ON ITS MERITS.

A. Preservation of Error.

The Defendant agrees that Mr. Dickey preserved this issue for appeal.

B. The District Court Appropriately Decided the Question as a Matter of Law.

Quo warranto actions are governed by division XIII of the Iowa Rules of Civil Procedure.[1] The county attorney in the district where the action lies has discretion to bring the action, unless the county attorney is the defendant, in which case the attorney general may bring the action. Iowa R. Civ. P. 1.1302(1). If the governor, general assembly, or the supreme or district court directs the county attorney to bring a quo warranto action, the county attorney must do so. *Id*. Private citizens may bring quo warranto actions, but only after the district court in its discretion grants leave to do so: "If on demand of any citizen of the state, the county attorney fails to bring the action, the

[1] In addition to the procedural rules, Iowa has a quo warranto statute, which addresses the remedies following a quo warranto judgment. Iowa Code ch. 660.

attorney general may do so, or such citizen may apply to the court where the action lies for leave to bring it." Iowa R. Civ. P. 1.1302(2); *see also State ex rel. Fullerton*, 109 N.W. at 875. "On leave so granted, and after filing bond for costs in an amount fixed by the court, with sureties approved by the clerk, the citizen may bring the action and prosecute it to completion." *Id*.

The facts in this case are undisputed. Mr. Dickey's initial letter to the county attorney and his Application asserted, as a legal matter, that the judicial appointment could have been made in any of the following ways: notifying Judge Besler of the appointment; notifying the Chief Justice of the appointment; announcing the appointment via a press release; or contemporaneously memorializing the appointment in writing. Dickey to Lyness Letter (App. 44); Application ¶ 17 (App. 8). Mr. Dickey further asserted that the governor did not choose any of these methods: "Instead, [the governor] merely 'told the chief of staff' of her decision to appoint Mr. Besler." Application ¶ 19 (App. 9). Mr. Dickey never alleged this was untrue, stating only, "Assuming her statement is true, simply informing her chief of staff of her decision is insufficient to constitute the official act of filling a district court vacancy." Application ¶ 20 (App. 9). Judge Besler does not dispute any of Mr. Dickey's factual allegations; rather, Judge Besler

disputes Mr. Dickey's legal conclusion that the appointment was not effective when the governor made her decision.

The district court viewed Judge Besler's resistance to the Application as the procedural equivalent of a motion to dismiss, and decided, as a matter of law, that the governor's decision to appoint Judge Besler was sufficient to effectuate the appointment. 9/2/2019 Order on Mot. to Reconsider (App. 38). The district court relied on *State ex rel. Cairy v. Iowa Co-op. Ass'n*, 95 N.W.2d 441, 442 (Iowa 1959) (*Cairy II*).[2] The *Cairy II* Court explained its decision in *Cairy I* as follows: "We indicated the proper procedure to assail the standing or right of the citizen to maintain the suit as relators was a motion to dismiss after general appearance." *Cairy II*, 95 N.W.2d at 442. Notably, the quo warranto doctrine evolved, in part, to facilitate "a speedy and effective means of settling a class of disputes affecting public interests. . . ." *State ex rel. Fullerton*, 109 N.W. at 874.

---

[2] In *Cairy I*, the defendant's objections on standing grounds were dismissed where the relator had already obtained permission to bring the action ex parte and the defendant filed a special appearance. The court held that a general appearance was the appropriate way to raise the standing objection. *State ex rel. Cairy v. Iowa Co-op Ass'n*, 79 N.W.2d 775, 777 (Iowa 1956) ("*Cairy I*").

Mr. Dickey contends there is a factual dispute in this case, and that he should be allowed to conduct discovery because he "does not accept at face value" the claim that Governor Reynolds communicated her appointment to her chief of staff in a manner that satisfies the Constitution. Appellant Br. at 23. But if there was ever the potential for a factual dispute regarding the appointment, that dispute was between the chief justice and the governor. Once the chief justice's office issued a letter stating that he "respectfully defers to and accepts the decision by Governor Reynolds that this appointment was made on June 21," that potential dispute was settled. A private citizen, purporting to represent the state, cannot subsequently step into a role the Constitution has delegated to the chief justice and assert that a factual dispute exists. *See State ex rel. Turner v. Scott*, 269 N.W.2d 828, 829 (Iowa 1978).

In addition, a private citizen who has already made a demand on the county attorney and attorney general cannot change the factual basis for the action after conducting discovery. To pursue a quo warranto action on a factual or legal claim that has not been presented to the county attorney or attorney general would deprive those officials of their right to have the first opportunity to file. It would likewise deprive the district court of its gatekeeping role in deciding whether to grant leave to file an action. In this case, Mr. Dickey very specifically set forth his factual and legal allegations in

his initial letter to the Johnson county attorney. Dickey to Lyness Letter (App. 43-45). He repeated the same allegations in his Application. (App. 6-9). Accordingly, the district court appropriately applied the motion to dismiss standard and denied the Application as a matter of law. *See Cairy II*, 95 N.W.2d at 445 (observing the court would pass on the "academic questions" relating to standing and decide the merits).

C. The Public Interest Would not be Served by Allowing a Quo Warranto Action to Proceed Against Judge Besler.

The "paramount purpose" of a quo warranto action is to protect the public interest, regardless of whether it is invoked by a public prosecutor or private citizen. *State ex rel. Fullerton*, 109 N.W. at 873. "Quo warranto can ordinarily be invoked only where the act complained of does injury to the public and not for the redress of mere private grievances or the vindication of private rights." *State ex rel. Maley v. Civic Action Comm.*, 28 N.W.2d. 467, 471 (Iowa 1947); *see also Cairy I*, 95 N.W.2d at 444; *State ex rel. Robbins v. Shellsburg Grain & Lumber Co*., 53 N.W.2d 143, 144 (Iowa 1952).

Mr. Dickey argues that he need only show that he is a citizen of the state and the county attorney has declined to bring the action in order to satisfy the criteria in Rule 1.1302. Appellant Br. at 20. This argument misses the fundamental requirement that a quo warranto action must serve the public interest. *State ex rel. Fullerton*, 109 N.W. at 873. A district court exercising

its discretion to grant or deny a private citizen's application to bring a quo warranto action must consider whether doing so would serve the public interest. *Id.*

In this case, the public interest considerations are closely intertwined with the substantive legal issues in the case. Article V, section 15 of the Iowa Constitution and Iowa Code § 46.15 serve two important policy goals. First, they require the governor to select a judge from the list of nominees provided by the nominating commission. Second, the thirty-day requirement prevents the governor from leaving judicial positions open indefinitely, thereby weakening the judicial branch. Judge Besler was one of the two nominees forwarded by the district nominating commission. There are no allegations suggesting that the Governor intentionally delayed the appointment. *See Godfrey*, 752 N.W.2d at 427 ("The absence of any allegation or claim … that implicates fraud, surprise, personal and private gain, or other such evils inconsistent with the democratic legislative process diminishes our need to intervene to determine if the legislature has violated a constitutional mandate."). Nor are there any allegations suggesting that the delay in notifying Judge Besler of his appointment postponed his start date or otherwise impacted the delivery of court services in the sixth judicial district. And, even if Mr. Dickey were to prevail in this action and succeed in removing

Judge Besler from office, the district court could not force the chief justice to make an appointment, creating the possibility the position could be left open indefinitely. This is precisely the situation the framers of the Iowa Constitution sought to avoid with the thirty-day requirement.

Also notable is the fact that public officials who considered the question declined to initiate quo warranto proceedings. Both the county attorney and the attorney general's office considered requests from Mr. Dickey to initiate a quo warranto proceeding. Application ¶¶ 9, 11 (App. 7). The county attorney and attorney general are authorized to prosecute proceedings in which the county and state, respectively, are "interested," and both declined to do so here. *See* Iowa Code §§ 331.756(6); 13.2(1)(b). Likewise, if either the chief justice or the chief judge in the sixth judicial district had lingering concerns about the appointment, either of them could have directed the county attorney to bring a quo warranto action. Iowa R. Civ. P. 1.1302(1). That did not happen here.

Mr. Dickey argues that an application for leave is simply a "preliminary step" that ensures the county attorney gets the first opportunity to file. Appellant Br. at 22. But this interpretation would render meaningless the requirement in Rule 1.1302 for a relator to obtain leave from the district court. It also would require a district court to ignore concerns about frivolousness

and grant leave no matter how lacking in legal merit an application is on its face. Contrary to Mr. Dickey's interpretation, the rules of civil procedure set up a clear gatekeeping role for the district court in cases involving a request from a private citizen whose demand has already been declined by the county attorney and attorney general's office. In many cases, including this one, a district court exercising its discretion to grant or deny leave will be required consider the nature of the allegations in order to determine whether allowing a case to proceed is in the public interest.

The public interest would not be served by incentivizing citizens to search for irregularities in the judicial nominating or appointment process with the goal of removing judges from office. Iowa's judges should be insulated from collateral attacks to their rulings, as well as from personal or political attacks. Allowing the case to proceed based on the facts alleged in Mr. Dickey's application could open the door to future quo warranto actions against judges based on alleged irregularities in the nominating or appointment process, which could have a destabilizing effect on Iowa's judicial system and would not serve the public interest.

D. The Constitution Establishes a Clear Remedy for an Untimely Judicial Appointment, and no Further Remedy is Available.

The Iowa Constitution provides a clear remedy if the governor fails to make an appointment within the thirty days allotted: "the appointment shall be made from [the] nominees by the chief justice of the supreme court." Iowa Const. art. V, § 15; *see also* Iowa Code § 46.15(2). The Constitution does not provide a further remedy allowing the state—much less a private individual purporting to represent the state—to seek to remove the judge from office after the chief justice has considered the timeliness of the appointment and declined to intervene.

Absent an allegation that the appointment deprives someone of his or her constitutional rights, the courts should not interfere with a decision the Constitution has assigned to the chief justice. In *State ex rel. Turner*, this Court considered a quo warranto action in which the state sought to remove a senator on the basis that the senator did not meet the inhabitancy requirement of the Iowa Constitution at the time he was elected. *State ex rel. Turner*, 269 N.W.2d at 829. A committee of the Iowa Senate had already considered the question and determined the senator could serve. *Id*. This Court held that, absent a showing of deprivation of substantial constitutional rights, the

judicial branch should not interfere with a decision that properly resided in the legislative branch:

> This action in quo warranto must eventually rest on a judicial determination that the defendant was not qualified for the office to which he was elected. The Iowa Constitution clearly leaves to the Senate the determination as to whether a member is qualified. We therefore find the controversy to be nonjusticiable and improper for judicial resolution . . .”

Id. at 832. Similarly, in this case, the Iowa Constitution clearly leaves to the chief justice the determination whether a judicial appointment is timely made. Chief Justice Cady carefully considered the question and explained his conclusion in a public letter from his counsel. Under the plain language of the Constitution and Iowa Code § 46.15, once the chief justice has declined to make the appointment, no further remedy is available, and the question is nonjusticiable.

Perhaps the absence of a remedy in this matter is best illustrated by Mr. Dickey’s own comments at the district court’s hearing on Judge Besler’s resistance to the Application. Mr. Dickey stated, “If they want to know the remedy that I intend to seek if the appointment was not an appointment as a matter of law and Chief Justice Cady declines to make the appointment, then, yes, I will file a writ of mandamus.” 2/18/2019 Hearing Transcript, p. 15 (App. 76). Considering that the “extraordinary” writ of mandamus can compel only an *inferior* tribunal to act, it is not clear that any court could order the chief

justice to make the appointment, particularly after the chief justice carefully considered the question. *See Reed v. Gaylord*, 216 N.W.2d 327, 331 (Iowa 1974) (discussing standard for mandamus actions generally); *see also McLaughlin v. Bd. of Supervisors of Clinton Cty.*, 288 N.W. 74, 76 (Iowa 1939); *Bender v. Iowa City*, 269 N.W. 779, 783 (Iowa 1936) ("Only when the appointing power declines to investigate, declines to apply the law, or proceeds with manifest arbitrariness, or something equivalent thereto, can relief be had by mandamus."). Because there is no plausible remedy in this case that would benefit the public, the Court should affirm the dismissal.[3]

E. Iowa Law does not Prescribe how an Appointment is Effectuated.

Iowa law does not specify how a judicial appointment must be made in order to be effective within the thirty days allotted by the Constitution. While the modern tradition has been for the governor to place a telephone call to the appointee, "this long-standing practice does not mean judicial appointments cannot be made in other ways." Kottmeyer letter (App. 61).

---

[3] It is also worth noting that nearly two years have passed since Judge Besler's appointment. Assuming for the sake of argument that Mr. Dickey were to successfully prosecute the case and prevail on the merits, the Constitution requires the chief justice to make the appointment from the two nominees forwarded by the district nominating commission. Iowa Const. Art. V. § 15. Given the time that has passed, it is possible that the second nominee may no longer be interested in, or available for, the position.

Iowa Code section 69.10 requires appointments to be in writing, but the writing need not be completed within thirty days in order for a judicial appointment to be effective. In *State ex rel. Halbach v. Claussen*, the Court considered a quo warranto case in which two presumptive supreme court justices claimed the right to a single judicial position. *State ex rel. Halbach v. Claussen*, 250 N.W. 195, 201 (Iowa 1933). The court concluded the appellee in the case was validly appointed even though the justice did not file his commission in the office of the secretary of state, as required by Iowa Code section 1154 (now Iowa Code section 69.10), observing, "Noncompliance with section 1154 would be an irregularity only which could be complied with at any time and which would not affect the validity of the commission." *Claussen*, 250 N.W. at 201 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).[4] Similarly, an Iowa attorney general opinion considering the meaning of "appointment" in Iowa Code section 46.16 concluded that an appointment does not require formal action: "[I]t is our opinion that

[4] The "commission" referred to in *Claussen* and codified in section 69.10 derives from article IV, section 21 of the Iowa Constitution, which states, "All grants and commissions shall be in the name and by the authority of the people of the state of Iowa, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state." The practice in modern times has been for the official commission to be signed, sealed and filed *after* the appointment has been made.

'appointment for the purposes of § 46.16 is the act of the governor in designating, choosing or selecting an individual from those nominated to fill a judicial vacancy." *The Hon. Robert L. Larson*, 1969 WL 181659, at *4 (Iowa A.G. 1969). Governor Reynolds' decision to appoint Judge Besler, made within the required thirty days, satisfies that standard.

Chief Justice Cady's decision to respect the Besler appointment turned on his belief that "respect and comity from within government is as essential to achieving greater public trust and confidence in government, as are the checks and balances built into government." Kottmeyer Letter (App. 60); *see also Godfrey*, 752 N.W.2d at 427 ("We have the greatest respect for the other two branches of government and exercise our power with caution.") (Cady, J., writing for the majority). The Iowa Constitution vests the authority to appoint judges with the governor. Iowa Const. art. V, § 15. This is an important responsibility and, as Chief Justice Cady recognized, one the courts should not disturb lightly.

F. Judge Besler is not Usurping the Public Interest by Serving as a District Court Judge.

The purpose of a quo warranto action brought in the name of the state is to vindicate public rights and public interests against usurpation. *State ex rel. Fullerton*, 109 N.W. at 871. Under the express language of Rule 1.1301(1), a quo warranto action is available against a defendant who is

"[u]nlawfully holding or exercising any public office or franchise in Iowa . . ." Iowa R. Civ. P. 1.1301(1). Judge Besler is neither usurping public rights nor unlawfully holding a public office. He lawfully applied for the position of district court judge, successfully got through the nominating process, and was appointed by the governor. Moreover, Chief Justice Cady, having reviewed the appointment, accepted the governor's determination that the appointment was made on June 21. Kottmeyer letter (App. 61). Having been appointed by the governor with the chief justice's subsequent acceptance, Judge Besler cannot fairly be accused of unlawfully exercising the office or usurping the public interest.

The history of the quo warranto writ illustrates the inappropriateness of the writ in this case. At common law, a quo warranto action "took the character of criminal proceedings" and implied wrongdoing on the part of the officeholder. *State ex rel. Fullerton*, 109 N.W. at 871 (observing that, at common law, the verdict following trial in a quo warranto action was "guilty" or "not guilty," and upon a guilty verdict the defendant was liable for ouster and a fine for his wrongful act). The officeholder—in this case, Judge Besler—is the named defendant in the case. In the absence of any wrongdoing on the officeholder's part, the proposed remedy, removal from office, is extreme and would be unjust. *Cf. State v. Watkins*, 914 N.W.2d 827, 839

(Iowa 2018) (construing Iowa Code § 66.1A and concluding that a county attorney could not be removed from office even in the face of egregious conduct).

II. MR. DICKEY LACKS STANDING.

A. Preservation of Error.

Although the district court did not address standing, the Defendant agrees that Mr. Dickey preserved this issue in his motion to reconsider. (App. 29-30), *DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 293 (Iowa 2017).

B. A Quo Warranto Relator Should be Required to Demonstrate Standing.

The standing doctrine ensures that courts do not decide disputes presented in a lawsuit "when the party asserting an issue is not properly situated to seek an adjudication." *Godfrey*, 752 N.W.2d at 427. Standing is rooted in the separation-of-powers doctrine and the concept that courts, which have the responsibility to decide the constitutionality of the actions of the other two branches of government, should "exercise that power sparingly and in a manner that does not unnecessarily interfere with the policy and executory functions of the two other properly elected branches of government." *Godfrey*, 752 N.W.2d at 425. "We become especially hesitant to act when

asked to resolve disputes that require us to decide whether an act taken by one of the other branches of government was unconstitutional." *Id*. at 427.

Since the nineteenth century, this Court's quo warranto jurisprudence has incorporated principles of standing. In *State ex rel. West v. City of Des Moines*, this Court considered an argument that the relator did not have sufficient interest to authorize him to bring a quo warranto action. The Court observed, "The law does not define what the interest shall be, and, conceding that it must be a substantial one, it was a question for the district court. It was a question to be settled before the suit was commenced." *State ex rel. West*, 65 N.W. at 819. In another early case discussing what interest a relator must have, the Court held that a taxpayer had standing to challenge the appointment of trustees to the waterworks board because the trustees had authority to levy taxes, but observed, "if this were a contest over the right to hold office, relator should have shown that he was elected or appointed to that office." *State v. Barker*, 89 N.W. 204, 205 (Iowa 1902). In a 1934 case, the Court explained that the applicable statutes allowed two forms of actions to test the right to an office. "One, for and on behalf of the state, and in some instances by a private person in his relation to the state. The other form is to try the right to office between the two contesting parties," essentially a personal action. *State ex rel. Adams v. Murray*, 252 N.W. 556, 558 (Iowa 1934).

The case law in Iowa has not always been consistent regarding what interest a relator must demonstrate. In *State ex rel. Fullerton*, this Court acknowledged the difficulty in establishing a clear rule on the subject: "What will be considered a sufficient interest in the relator in such cases has often been considered by the courts, and it must be admitted it is very difficult to deduce from the various holdings any well-defined rule or standard by which the inquiry may be satisfactorily answered." *State ex rel. Fullerton*, 109 N.W. at 874. Although the Court ultimately concluded the interest a relator must demonstrate was "slight," the Court acknowledged the relator must show some interest "to guard the courts and persons who do have an interest against being burdened with litigation at the instance of a mere intermeddler." *Id.*

Nearly thirty years later, the Court again grappled with what interest a relator must demonstrate in *State v. Winneshiek Co-Op Burial Association*. In that case, a majority of the justices, emphasizing the public interest requirement, concluded that a private relator need not have a special interest to make a demand upon the county attorney to file a quo warranto action. *State v. Winneshiek Co-Op Burial Ass'n*, 15 N.W.2d 367, 369 (Iowa 1944) (Mantz, C.J., concurring). The majority did not squarely address whether a private citizen must demonstrate a special interest to prosecute a quo warranto case to completion because the relator was an assistant attorney general and

proceeded in that capacity. *See id*. at 371 (Bliss, J., dissenting). In dissent, Justice Bliss observed that when the Court promulgated its quo warranto rule, it omitted language that had previously been present in the statute, which stated, "any citizen of the state *having an interest in the question* may apply to the court in which the action is to be commenced . . ." *Id*. (quoting Iowa Code 12420) (italics in original). Justice Bliss contended that a private interest should be required, observing, "leave should be granted with caution, and with a view to all the circumstances of the case." *Id.*

This Court's standing jurisprudence has evolved considerably since the *State ex rel. Fullerton* and *Winneshiek* cases were decided. Imposing a standing requirement is both consistent with the Court's modern case law and with the policy considerations underpinning the standing doctrine, as articulated by the Court in *Godfrey*. It is also consistent with the gatekeeping function of the district court in a quo warranto action. This Court should affirm its precedents recognizing that a quo warranto relator must demonstrate standing.

C. Mr. Dickey Lacks Standing.

To establish standing a plaintiff must have (1) a personal or legal interest in the case, and (2) be "injured in fact." *Godfrey*, 752 N.W.2d at 419. The first element is "aligned with the general concept of standing that a party

who advances a legal claim must have a special interest in the challenged action, as distinguished from a general interest." *Id*. (internal citations and quotations omitted). The "injury in fact" requirement "'serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.'" *Rush, et al. v. Reynolds, et al.*, 2020 WL 825953, at *4 (Iowa Ct. App. Feb. 19, 2020) (quoting *United States v. Students Challenge Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14 (1973)). "Litigants who share intangible interests 'in common with all other citizens' must also identify some individual connection with the affected subject matter to satisfy the injury-in-fact requirement." *Godfrey*, 752 N.W.2d at 420 (quoting *Hurd v. Odgaard*, 297 N.W.2d 355, 358 (Iowa 1980)). "A general interest shared by all citizens in making sure government acts legally is normally insufficient to support standing" without an individual connection. *Id*. at 423.

Mr. Dickey asserts that the quo warranto rule confers "any citizen of the state" with the right to bring a quo warranto action. Appellant Br. at 27. This broad interpretation would undercut the district court's gatekeeping function in quo warranto cases. Mr. Dickey's argument overlooks that the citizenship requirement functions to restrict, rather than expand, who can bring a quo warranto action. It would also be problematic in cases involving

corporations, which comprise the bulk of the quo warranto cases in Iowa and for which the court has historically imposed a standing requirement. *See, e.g.*, *State ex rel. Fullerton*, 109 N.W. at 875. There may be instances where a non-citizen would otherwise have standing to pursue a quo warranto action against an Iowa corporation, but the rule ensures that a non-citizen cannot step into the shoes of the state.

Rather than asserting an individual injury, it is apparent that Mr. Dickey is attempting to represent an interest he believes the general public has, which is not sufficient to confer standing. *Alons v. Iowa Dist. Ct. for Woodbury Cty.*, 698 N.W.2d 858, 865 (Iowa 2005) (holding plaintiffs lacked standing to challenge a district court decree challenging a civil union where they were not parties to the district court action); *Polk County et al. v. District Ct. of Polk County*, 110 N.W. 1054, 1055 (1907) (holding petitioners lacked standing to challenge an order finding the grand and petit juries for the year 1907 were illegally drawn, where they were attempting to represent the general public rather than their individual interests). A claim based on a right to represent the general public fails to meet either prong of the standing test. *Alons*, 698 N.W.2d at 870.

Mr. Dickey asserts he has standing as a practicing attorney in the sixth judicial district because he has a "risk of injury." Appellant Br. at 29.

Mr. Dickey's status as a practicing attorney alone is not sufficient to confer standing. Mr. Dickey has not asserted how he is individually injured by Judge Besler's appointment; nor has he alleged how any of his clients would be injured. Standing cannot be based on an injury that is speculative. *Godfrey*, 752 N.W.2d at 423; *Rush*, 2020 WL825953, at *14. Moreover, Mr. Dickey seeks to remove a judge from office in a district in which Mr. Dickey does not reside, undercutting his assertion that he will be harmed.

Mr. Dickey next asserts he has taxpayer standing because Judge Besler's salary "comes from the general fund to which Dickey has contributed with his state income taxes." Appellant Br. at 30. Taxpayer standing is available only "to prevent unlawful acts by public officers which would 'increase the amount of taxes [the taxpayer] is required to pay, or diminish a fund to which [the taxpayer] has contributed." *Alons*, 698 N.W.2d at 865. Mr. Dickey's taxpayer standing argument presumes that if he is successful in his action, the judgeship would be left open, thus reducing the judicial branch's salary expenses. But, as discussed above, if the judicial position is left unfilled, the judicial branch and citizens in the sixth judicial district would be harmed, undermining the public interest—the primary consideration in whether to allow a quo warranto action. Alternatively, if a court were to allow the case to proceed and find the appointment was untimely, and the chief

justice proceeded to make the appointment, salary expenses would be equal to what they are now. Under either scenario, Mr. Dickey has not presented a compelling reason that his action should be allowed to proceed.

Finally, Mr. Dickey contends the case should be allowed to proceed under the public interest exception to the standing doctrine. Chief Justice Cady, who discussed the public interest exception to the standing requirement at length in *Godfrey*, observed that the exception must be used sparingly, particularly where the dispute concerns the constitutionality of actions taken by the other branches of government. *Godfrey*, 752 N.W.2d at 427. "Without an individual injury by the complainant under such circumstances, we risk assuming 'a position of authority' over the acts of another branch of government," he cautioned. *Id*. Here, the action Mr. Dickey seeks to file indisputably concerns the constitutionality of actions taken by another branch of government. The letter from the chief justice's office to the governor's office, ten years after the Court's decision in *Godfrey*, echoed many of the themes discussed by the Court in that case. The chief justice recognized the deference the governor is entitled to in her interpretation of how to make an appointment, and the Court should extend the same deference here.

Mr. Dickey asks this Court to order the district court to assume a position of authority over the executive branch, a separate and co-equal branch

of government, and declare the appointment unconstitutional. If the district court were to do so, the person most harmed would be Judge Besler, the defendant in this action, who lawfully applied to serve the public as a district court judge and has done nothing wrong. The sixth judicial district would also be harmed, as would litigants with cases pending in front of Judge Besler. As Chief Justice Cady observed in *Godfrey*, "In the broad scheme of constitutional violations, the constitutional issue presented in this case is not one of great public importance to support [the Court's] waiver of [the] standing rule." *Godfrey*, 752 N.W.2d at 428.

CONCLUSION

For the reasons stated above, Judge Besler respectfully requests that the Court affirm the district court's order denying the Application for leave to file a quo warranto action.

REQUEST FOR ORAL ARGUMENT

If the Court grants oral argument in this case, the Defendant requests to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Emily Willits
EMILY WILLITS
Assistant Attorney General

1305 E. Walnut St., 2nd Fl.
Des Moines, Iowa 50319
Phone: (515) 281-6403
e-Mail: emily.willits@ag.iowa.gov
ATTORNEY FOR DEFENDANT-APPELLEE JASON BESLER

CERTIFICATE OF COMPLIANCE

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because it was prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 6,341 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Emily Willits
Emily Willits
Assistant Attorney General

CERTIFICATE OF FILING

I, Emily Willits, hereby certify that on the 15th day of May, 2020, I, or a person acting on my behalf, filed Defendant-Appellee's Brief with the Clerk of the Iowa Supreme Court by EDMS.

/s/ Emily Willits
Emily Willits
Assistant Attorney General

PROOF OF SERVICE

I, Emily Willits, hereby certify that on the 15th day of May, 2020, I, or a person acting on my behalf, did serve Defendant-Appellee's Brief on all other parties to this appeal via EDMS as follows:

Gary Dickey
Dickey, Campbell & Sahag Law Firm, PLC

301 E. Walnut St., Ste. 1
Des Moines, IA 50309
(515) 288-5008
Email: gary@iowajustice.com

/s/ Emily Willits
Emily Willits
Assistant Attorney General