IN THE
SUPREME COURT OF IOWA

No. 19-1598
Johnson County No. CVCV080344

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STATE OF IOWA,
Appellant,

v.

JASON BESLER
Appellee.

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ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE ROBERT HANSON, DISTRICT COURT JUDGE

PROOF REPLY BRIEF FOR APPELLANT

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On April 29, 2020, I served this brief on all other parties by EDMS to their respective counsel:

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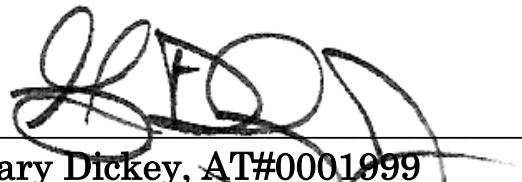
I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on April 29, 2020.



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Other Authorities:

Iowa R. Civ. P. 1.1301

REPLY ARGUMENT

Jason Besler's effort to defend the district court's pre-petition dismissal is notable in that it does not address the question presented, which is whether Gary Dickey satisfied the conditions set forth in Rule 1.1302(2) to warrant leave to file a quo warranto action. Instead, he seeks to reframe the appeal into an argument about the legal merits of a claim that Dickey has not yet even filed. Not surprisingly, none of Besler's arguments are tethered to the actual text of the rule. Nor does he cite any supportive case law arising after transfer of the quo warranto cause of action to the Iowa Rules of Civil Procedure. Instead, he offers up a series of policy arguments—none of which are convincing.

I. NEITHER THE TEXT, NOR THE CASE LAW, SUPPORTS BESLER'S VIEW THAT RULE 1.1302 AFFORDS THE DISTRICT COURT THE AUTHORITY TO DETERMINE THE MERITS OF AN APPLICANT'S CLAIM BEFORE HE OR SHE FILES A PETITION

In the decision below, the district court denied Dickey's application for leave to file a quo warranto action after deciding the merits of his potential claim as a matter of law—*before he*

even filed his petition. Besler does not dispute that Dickey sought leave from the Johnson County Attorney prior to making his application. Nor does he dispute that Dickey is a citizen of this state. These undisputed facts are fatal to Besler's argument because they are the only prerequisites for leave under Iowa Rule of Civil Procedure 1.1302.

Besler also offers no meaningful answer to case law that makes clear that application to obtain leave to file a quo warranto action is simply a procedural step to "designate the relator as a person who may lawfully call the defendants into court for the trial of a disputed question of law or fact." *State ex rel. Fullterton v. Des Moines City Ry. Co.*, 135 Iowa 694, 715, 109 N.W. 867, 875 (1906). It is "merely a preliminary question" that "determines nothing except the privilege or authority of the relator to institute and prosecute the suit." *Id.* at 714. Indeed, it is so insignificant that a district court may grant leave to sue without even serving notice to the defendant. *Id.* (observing that "the statute does not require notice, and we cannot conceive how the failure to so

provide lays the statute open to the constitutional objection raised by counsel").

Instead, Besler's principal argument is that the district court appropriately exercised its discretion in deciding the merits of Dickey's claim as a matter of law. (Besler Br. at 14). In his view, Rule 1.1302 gives the district court a "gatekeeping role" that allows it to pass judgment on the substance of the underlying claim at the same time it considers whether to grant leave. (Besler Br. at 20-21). Noticeably absent from Besler's analysis is any mention of the text of Rule 1.1302. He is equally silent about the standard by which a district court should exercise its gatekeeping function in passing on the underlying legal merits. For example, is it the motion to dismiss standard under Rule 1.421? Or is the summary judgment standard from Rule 1.981? If it is the former, the district court erred in considering evidence outside of Dickey's application for leave. *See Hawkeye Foodservice Distrib. v. Iowa Educators Corp.*, 812 N.W.2d 600, 609 (Iowa 2012) ("The court cannot rely on evidence to support a motion to dismiss, nor can it rely on facts not alleged in the

petition"). If it is the latter, the district court double-faulted in failing to view the facts in the light most favorable to Dickey and failing to decide whether there is a genuine issue of material fact.[1] *See Banwart v. 50th St. Sports, L.L.C.*, 910 N.W.2d 540, 544-45 (Iowa 2018) (explaining the summary judgment standard). Besler's inability to offer any limiting principles to his gatekeeping theory underscores its implausibility. In the end, Besler's position is as impractical as it is legally untenable. *Compare State v. Wilson*, ___ N.W.2d ___, 2020 Iowa Sup. LEXIS 37 (Iowa Apr. 10, 2020) (refusing to infer right to pretrial hearing in the 2017 "stand your ground" legislation where none was provided in the text).

Besler's only remaining option is to suggest that public interest would not be advanced by allowing Dickey to proceed.

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[1] In his brief, Besler perpetuates the falsehood that the "facts in this case are undisputed." (Besler Br. at 15). Dickey does not accept the factual or legal assertions from Governor Reynolds and her chief of staff that she appointed Besler within thirty days as required by article V, section 15. Even Michael Scott knows by now that a mere verbal declaration to staff has no force of law. The Office, *Money* (Season 4, Episode 7) https://www.youtube.com/watch?v=C-m3RtoguAQ. More importantly, the volley over the record further reinforces why the district court should not be making pre-filing judgments on the merits.

(Besler Br. at 18). According to Besler, allowing these types of quo warranto actions "could have a destabilizing effect on Iowa's judicial system." (Besler Br. at 21). The interest Dickey seeks to vindicate supports the opposite conclusion. "In practice," a judicial appointment has been considered "made when it was communicated to the nominee." (11/13/18 Resistance, Ex. F Letter from Kottmeyer to Koopmans at 2)(App. at ___). Here, Governor Reynolds did not notify either nominee, the judicial selection committee, or the chief judge of the appointment within the thirty-day timeframe. Nor did she, or her staff, memorialize her decision in any written record for several more days. It is hard to argue under these facts that Dickey's lawsuit can disrupt the judicial nominating process more than the Governor already has.

Keep in mind this is not some technical "irregularit[y] in the judicial nominating or appointment process." (Besler Br. at 21). Rather, the underlying dispute involves resolution of whether the Governor complied with the *constitutionally prescribed* process for selecting a district court judge. *See* Michael Streit, Opinion, *Gov. Reynolds missed deadline and must comply with the Iowa*

Constitution, Des Moines Reg. (Oct. 8, 2018) ("These deadlines are not meant to be arbitrary, but instead are established to create procedures to ensure our government is conducted according to a rule of law").[2] Even if the public interest could be furthered by a gatekeeper to weed out frivolous lawsuits, this is not one of them. Furthermore, history has shown that our judicial system is not so fragile as to be upended by quo warranto actions challenging judicial appointments. *See State ex rel. Adams v. Murray*, 219 Iowa 108, 257 N.W.2d 553 (1934) (quo warranto action to determine title to district court vacancy in the fifteenth judicial district); *State ex rel. Halbach v. Claussen*, 216 Iowa 1079, 250 N.W. 195 (1933) (quo warranto action challenging defendant's claim to judgeship on the Iowa Supreme Court).

In a final effort to deter the Court from reaching the question presented, Besler contends the Constitution does not afford Dickey a remedy for his quo warranto action. (Besler Br. at

[2] https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2018/10/08/gov-reynolds-missed-deadline-and-must-comply-iowa-constitution/1537548002/ (last accessed Apr. 27, 2020).

22). The cornerstone of Besler's argument is the erroneous premise that "the Iowa Constitution clearly leaves to the chief justice the determination whether a judicial appointment is timely made." (Besler Br. at 23).[3] In reality, article V, section 15 simply identifies who has authority to make a judicial appointment. Iowa Const. art. V, § 15. It says nothing about who decides whether an appointment has been timely made—and Besler knows better to argue otherwise. Indeed, Chief Justice Cady made this much clear in his subsequent public statement in which he acknowledged that the Governor Reynolds' purported appointment

[3] Attempting to seize on the holding in *State ex. rel. Turner v. Scott*, 269 N.W.2d 828 (Iowa 1978), Besler's standing argument drifts into justiciability waters. (Besler Br. at 23). Unlike the constitutional provision at issue in *Turner*, which declared that "[e]ach house shall choose its own officers, and judge of the qualification, election, and return of its own members," article V, section 15 says nothing about who decides when an appointment is made. *Compare id.* (quoting Iowa Const. art. III, section 7). Thus, what was true in *Turner*—that the Iowa Constitution clearly leaves to the Senate the determination as to whether a member is qualified—is not true here. "From the beginning of our constitutional journey as a state, as now, the courts have been given the role to interpret the constitution and provide the needed definition so our constitutional principles can be applied to resolve the disputes we face today." *Chiodo v. Schultz*, 846 N.W.2d 845, 849 (Iowa 2014). For this reason, the *Turner* holds no persuasive force to the issues presented in this appeal.

could be "resolved *differently through the legal process established to resolve disputes*." Dar Danielson, *Chief Justice won't take action in dispute over district judge's appointment by governor*, Radio Iowa (Oct. 10, 2018) (emphasis added).[4] In any event, Besler's quibble over remedies is academic at this stage. It is premature to speculate on the remedy that Dickey seeks when he has not even filed his petition in this matter.

II. BESLER'S STANDING ARGUMENT IS MISPLACED BECAUSE THE PLAINTIFF IS THE STATE OF IOWA

Besler's standing argument suffers from a fundamental problem in that it fails to recognize that the State of Iowa—not Dickey—is the plaintiff in a quo warranto action. As the text of Rule 1.1301 makes clear, quo warranto is an equitable cause of action "brought in the name of the state." Iowa R. Civ. P. 1.1301. Unlike other causes of action to which the standing doctrine has been applied, quo warranto does not vindicate individual interests. *Fullerton*, 135 Iowa at 711, 109 N.W. at 874 ("the proceeding is allowed on the theory that offices are designed for

[4] https://www.radioiowa.com/2018/10/10/chief-justice-wont-take-action-in-dispute-over-district-judges-appointment-by-governor/ (last accessed Apr. 28, 2020).

the public benefit and not for private emolument and the tenure of them by persons legally elected or appointed is a matter mainly of public concern"). As the Iowa Supreme Court has explained, quo warranto proceedings "are peculiarly public in their nature," and "cannot be brought to redress private grievances." *State ex. rel. Hutt v. Anthes Force Oiler Co.*, 237 Iowa 722, 729, 22 N.W.2d 324, 327 (1946). Regardless of whether the prosecution is brought by a county attorney, attorney general, or private citizen, the "*State is the plaintiff in each instance*." *Fullerton*, 135 Iowa at 710, 109 N.W. at 874 (emphasis added); *Ellis v. State*, 383 S.W.2d 635, 638 (Tx. Ct. App. 1964) ("The State is the real prosecutor of such a suit, which is instituted for the benefit of the public"). The right involved in a quo warranto action "is not the right of the individual to initiate the action, but it is the right *of the State* to determine whether a public office or franchise is being unlawfully held or exercised, and to terminate any such unlawful possession or exercise. *State v. Winneshiek Coop. Burial Ass'n*, 234 Iowa 1196, 1199, 15 N.W.2d 367, 369 (1944) (Smith, J., specially concurring); *see also Ellis*, 383 S.W.2d at 638 (explaining that quo

warranto proceedings are those through which the State acts to protect itself and the good of the public generally, through the duly chosen agents of the State who have full control of the proceeding). Indeed, "even where the relator is found to be estopped or disqualified to prosecute the action in his own private interest it has been held that the court will retain jurisdiction and pass upon the merits of the case so far as it affects public interest." *Winneshiek Coop. Burial Ass'n*, 234 Iowa at 1199, 15 N.W. at 369 (Smith, J., specially concurring); *Fullerton*, 135 Iowa at 712, 109 N.W. at 874.

To the extent that the standing question still remains relevant to this appeal, Dickey's status as a citizen and taxpayer is sufficient. "One who is a citizen and taxpayer may file an information charging the respondent with usurping a public office." *Fullerton*, 135 Iowa at 713, 109 N.W. at 875 (cataloguing cases); *see also Carleton v. Civil Service Comm*, 522 A.2d 825, 828 (Conn. App. Ct. 1987) ("A taxpayer qualifies for standing because as such he is interested in having the duties annexed to the several public offices recognized by the city charter performed by

persons legally elected or appointed thereto whether or not another person claims the office"). The "broad conferral of standing . . . is justified by the purpose of quo warranto actions." *Bateson v. Weddle*, 48 A.3d 652, 658 (Conn. 2012). "[A]lthough [the quo warranto] remedy is of a special and extraordinary character, it is designed, nevertheless, to effect a speedy and effective means of settling a class of disputes affecting public interests, and the salutary purposes of the statute which provides it should not be thwarted by a narrow and technical construction." *Fullerton*, 135 Iowa at 712, 109 N.W. at 874.

CONCLUSION

The State of Iowa, through Gary Dickey, Jr., asks this Court to reverse the district court's decision and remand with appropriate instructions.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $8.00, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

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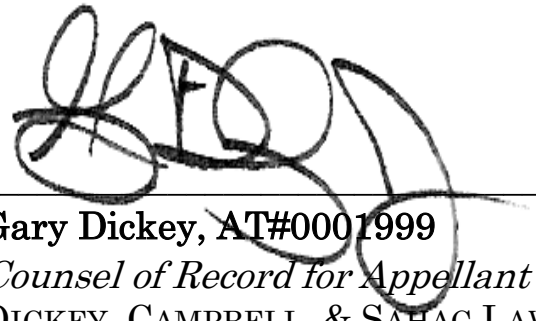

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