

IN THE SUPREME COURT OF IOWA

Supreme Court No. 19-1644
Polk County No. EQCE084330

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, a nonprofit corporation, and FOOD & WATER WATCH, a nonprofit corporation,

Plaintiffs/Appellees,

v.

STATE OF IOWA; DEPARTMENT OF NATURAL RESOURCES; BRUCE TRAUTMAN, in his official capacity as Acting Director of the Department of Natural Resources; ENVIRONMENTAL PROTECTION COMMISSION; MARY BOOTE, NANCY COUSER, LISA GOCHENOUR, REBECCA GUINN, HOWARD HILL, HAROLD HOMMES, RALPH LENTS, BOB SINCLAIR, JOE RIDING, in their official capacities as Commissioners of the Environmental Protection Commission; NATURAL RESOURCE COMMISSION; MARCUS BRANSTAD, RICHARD FRANCISO, LAURA HOMMEL, TOM PRICKETT, PHYLLIS REIMER, DENNIS SCHEMMEL, and MARGO UNDERWOOD, in their official capacities and Commissioners of the Natural Resource Commission; DEPARTMENT OF AGRICULTURAL AND LAND STEWARDSHIP; AND MICHAEL NAIG, in his official capacity as Secretary of Agriculture,

Defendants/Appellants.

APPEAL FROM THE IOWA DISTRICT COURT

IN AND FOR POLK COUNTY

THE HONORABLE ROBERT B. HANSON

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING

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Iowa Citizens for Community Improvement and Food & Water Watch (collectively “Iowa Citizens”) respectfully petition for rehearing and state the following points of law or fact the Court has overlooked or misapprehended:

1. The judiciary must hold the legislative and executive branches accountable to the people from whom the Constitution derives authority.
2. Iowa Citizens pleaded *uncontested* claims that the public trust doctrine provides drinking water and recreational use rights, and that such rights are property interests protected by the due process and unenumerated rights clauses.
3. A claim alleging a deprivation of a substantial constitutional right is justiciable notwithstanding the political question doctrine.
4. The public rights doctrine has no basis in Iowa law and applies only in federal court.
5. The Court has never applied the federal redressability requirement until now and it conflicts with Iowa courts’ broad jurisdiction.
6. The petition’s factual allegations support redressability under the standard of review for motions to dismiss.
7. Redressability does not demand substantial or complete relief, just some form of relief.

8. Declaratory relief provides redress because the Court should presume the legislature will honor a judicial decree.
9. The decision here denies Iowa Citizens' access to a judicial forum to protect their uncontested property interest, which deprives Iowa Citizens of due process of law.

ARGUMENT

The Iowa Constitution charges the judiciary with protecting Iowans' constitutional rights but the decision here makes the public trust doctrine a right without a remedy. "One of the fundamental principles of law is for remedies to be available when we discover wrongs." *Board of Water Works Trustees for the City of Des Moines v. Sac County Board of Supervisors*, 890 N.W.2d 50, 71-72 (Iowa 2017) (Cady, C.J., concurring in part and dissenting in part).

Iowa Citizens pleaded a claim that the State violated Iowa Citizens' constitutionally protected property interest in the drinking water and recreational use of the Raccoon River. Claims alleging a deprivation of a substantial constitutional right are *always* justiciable and the courts of Iowa *must* adjudicate such claims. Without the State contesting this claim, the Court declares it nonjusticiable. This error – if left to stand – will erode

constitutional protections and abdicate this Court’s role as the guarantor of Iowans’ rights.

Iowa courts are courts of general jurisdiction not subject to federal limitations. Accordingly, this Court, until now, has *never* held that the “redressability” element of the Cases or Controversies limitation in Article III of the U.S. Constitution applies in Iowa courts. The Court erred by adopting this requirement and further erred by divorcing its redressability analysis from the standard of review, misapplying the federal redressability standard, and rejecting redress afforded by declaratory relief.

The Court has applied redressability to deny Iowa Citizens standing without leave to amend the petition. The Court also held the public trust doctrine claim was a nonjusticiable political question. These holdings independently deny Iowa Citizens a judicial forum to secure relief for their uncontested property interest and thus deprives them of due process of law.

I. IOWA CITIZENS’ CLAIM ALLEGING THE DEPRIVATION OF A SUBSTANTIAL CONSTITUTIONAL RIGHT IS JUSTICIABLE

The Court applies the political question doctrine without regard to its obligation to resolve claims alleging violations of constitutional rights. The Court improperly defers to “the branches of our government whose duty it is

to represent the public” under the “belie[f] it would exceed our institutional role to ‘hold the state accountable to the public.’” Slip Op. at 30. The Court’s deference has no basis in the Constitution.

“All political power is inherent in the people.” Iowa Const. art. I, § 2. The Constitution reigns supreme over all of the branches of state government, including the legislative branch, because the people of Iowa hold the state’s sovereignty. *C.C. Taft Co. v. Alber*, 171 N.W. 719, 720 (1919); Iowa Const. art. XII, § 1 (“[The] Constitution shall be the supreme law of the State.”).

The judiciary bears the “responsibility to protect the state constitutional rights of its citizens.” *Godfrey v. State*, 898 N.W.2d 844, 865 (Iowa 2017). “When individuals invoke the Iowa Constitution’s guarantees of freedom and equality, courts are bound to interpret those guarantees.” *Varnum v. Brien*, 763 N.W.2d 862, 876 (Iowa 2009). This Court’s precedent has unwaveringly protected Iowans’ fundamental rights and does not comport with the deference now given to the legislature. *See* Brief of *Amicus Curiae* Drake Law Professors at 10-13.

The Court erred by abdicating its role to adjudicate Iowa Citizens’ constitutionally based public trust doctrine claims. This Court’s prior decisions have established the precedent which the Court misapplied. In

Luse v. Wray, 254 N.W.2d 324 (Iowa 1977), this Court recognized the primacy of claims alleging the deprivation of a constitutionally protected right. The Court observed that the “judicial power” conferred to the courts “include[s] the gamut of the determination of constitutional questions.” *Id.* at 327 (citing Iowa Const. art. V, § 1 and *Marbury v. Madison*, 1 Cranch 137 (1803)). The Court held, notwithstanding the political question doctrine, “that Iowa courts have power to adjudicate substantial claims of deprivation of federal or Iowa constitutional rights by the houses of the Iowa General Assembly[.]” *Id.* at 328.

The Court misapprehends *State ex rel. Turner v. Scott*, 269 N.W.2d 828 (Iowa 1987), as somehow limiting *Luse*. Slip Op. at 22-23. The Court states that in *Turner* the Court “clarified the limited scope of the *Luse* holding” and that “there had been no ‘showing of deprivation of substantial constitutional rights’ as in *Luse*.” Slip Op. at 22. But *Turner* did not limit *Luse*; rather, the Court held the Attorney General’s *quo warranto* action was nonjusticiable because the Attorney General did not make a showing of a deprivation of substantial constitutional rights. *Turner*, 269 N.W.2d at 832.¹

¹ Other decisions by this Court help show the error here. In *King v. State*, the Court declined to hold claims alleging school funding violated the education clause of the Iowa Constitution raised a nonjusticiable political question. 818 N.W.2d 1, 23 (Iowa 2012). The Court reached the merits of the equal

The Court reframes Iowa Citizens’ argument as broadly claiming that “constitutional claims are always justiciable.” Slip Op. at 22 (citing *State ex rel. Dickey v. Besler*, 954 N.W.2d 425 (Iowa 2021)). The Court then cites *Besler* as a basis for applying the political question doctrine. Slip Op. at 26. But *Besler* did not involve an allegation that the plaintiff had been deprived of substantial constitutional rights. *Besler*, 954 N.W.2d at 429. The sole claim Dickey alleged was that the Governor failed to appoint Besler by the constitutionally required deadline. *Id.* In contrast, here Iowa Citizens pleaded claims that the public trust doctrine provides their members with drinking water and recreational use rights, that such rights are property interests protected by the due process and unenumerated rights clauses of the Constitution, and that the State has violated those rights. (Petition at ¶¶ 76-88, App. 22-24); Plaintiffs-Appellees’ Final Brief at 53-56.

The Court compounded this error by summarily rejecting Iowa Citizens’ claim because “the substantive basis for their claims remains the public rights doctrine.” Slip Op. at 23. The Court does not explain the basis or source of the public rights doctrine. *Id.* No decision of this Court has applied the public rights doctrine and no state court has held that the public

protection and substantive due process claims because unlike in this matter, those issues had been raised in the District Court. *Id.* at 11.

rights doctrine precludes a public trust doctrine claim. Moreover, the public rights doctrine concerns the jurisdiction of non-Article III judges, federal agency regulatory schemes, and does not apply to state common law claims. *See Stern v. Marshall*, 564 U.S. 462, 494-495 (2011) (by deeming the claim an “amorphous public right,” Article III “would be transformed from the guardian of individual liberty and separation of powers the Court has long recognized into mere wishful thinking.”).

Regardless of the inapt public rights doctrine, the Court should not have addressed whether Iowa Citizens have stated a claim in the first instance. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (issues must be both raised and decided by the district court for appellate review). The State neither contested the scope of the public trust doctrine nor whether Iowa Citizens stated a claim under the due process clause. The State conceded this during oral argument, a concession the Court acknowledges. Slip. Op. at 13 (“the merits are not before us on this appeal.”); *see also* Slip Op. at 38 (McDonald, J., dissenting), Slip Op. at 42-43 (Oxley, J., dissenting). Accordingly, the Court should rehear this appeal.

II. REDRESSABILITY SHOULD NOT LIMIT THE SCOPE OF IOWA COURTS' JURISDICTION

The federal redressability requirement conflicts with Iowa courts' broad jurisdiction. The Court overlooked and misapprehended the law of standing when it held – for the first time ever – that redressability is required to secure jurisdiction and that Iowa Citizens failed to demonstrate redressability. Slip Op. at 14-20.

For both public trust doctrine and more general environmental claims, standing law does not reference redressability. *See Bushby v. Wash. County Conservation Bd.*, 654 N.W.2d 494, 496-497 (Iowa 2002); *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829, 837 (Iowa 2019). The Court correctly states that this Court has relied on federal law for interpreting whether a party had been injuriously affected. Slip Op. at 14; *Bushby*, 654 N.W.2d at 496-497; *Alons v. Iowa District Court*, 698 N.W.2d 858, 867-869 (Iowa 2005). However, this Court has *never* applied the standing inquiry to determine whether a court could order any type of relief that would redress an injury. The Court should grant this petition because Iowa courts have broad jurisdiction not subject to the “Cases” or “Controversies” limits Article III places on federal courts.

III. IOWA CITIZENS DEMONSTRATE REDRESSABILITY

Even if redressability applies – which it should not – the Court should grant this petition because the Court overlooked the standard of review, allegations in the complaint, and misapplied the redressability analysis. In the alternative Iowa Citizens request that, because the Court applied a new standing requirement for the first time, the Court should remand the appeal with leave to amend the petition to include more specific allegations. *See* Iowa R. Civ. P. 1.402(4) (“Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.”).

First, the Court erred when it did not apply the deferential standard of review for factual allegations in a motion to dismiss. A motion to dismiss may be granted only when the allegations of the non-moving party, taken as true, fail to state any claim upon which any relief may be granted. A petition is assessed in the light most favorable to the petitioners, and all doubts and ambiguities are resolved in the petitioners’ favor. *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d 192, 194 (Iowa 2007).

Second, the Court overlooks allegations in the petition that support the redressability of injunctive relief. Instead of accepting as true that injunctive relieve would limit the fertilizer and manure runoff alleged,² the Court

² *See* Petition ¶¶ 17-19, 23, 46, 61, 82-83; App. 10-11, 16, 19, 23.

identifies a single nutrient reduction practice – reducing overall fertilizer application – and concludes the practice would not redress the injury. Citing the 2008 Water Quality Improvement Plan, the Court concludes that “a 50% reduction in overall fertilizer application in the watershed . . . would only produce a 20% reduction in Raccoon River nitrate levels” and thus “not come close” to redressing Iowa Citizens injuries. Slip Op. at 18. The Court did not accept as true that other practices identified in the Plan would also reduce nitrates, including the timing of fertilizer applications, cover crops, riparian buffers, and constructed wetlands. *See* 2008 Water Quality Improvement Plan at 137-140, attached as Exhibit 1. The petition further alleged that the Iowa Nutrient Reduction Strategy also identified some of these same practices as reducing nitrogen and phosphorus. “The Iowa Nutrient Reduction Strategy identifies best management practices that reduce nitrogen and phosphorus discharges to surface waters, including but not limited to cover crops, no till, conversion to perennial grasses, conversion to grazed pasture, and land retirement.”³ (Petition ¶ 61; App. 19).

³ The Court also concludes it is not clear that “reductions in farmers’ fertilizer use” would provide redress because cyanobacteria and related toxins are “increasing due to climate change.” This analysis does not accept as true the allegation that “[p]hosphorus and nitrogen in surface waters provides nutrients for cyanobacteria, and thus serve as a driver for cyanobacteria growth and the resulting harms.” (Petition ¶ 24; App. 11).

Critically, the Court overlooks established law that Iowa Citizens need not demonstrate that the requested relief will redress one hundred percent of their injuries, but only that it will do some good. *See, e.g., P.I.R.G. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73 (3d Cir. 1990).

Third, the Court mistakenly concludes that nitrate pollution in the Raccoon River more directly affects the Des Moines Water Works, which is thus “better positioned to bring a lawsuit.” Slip Op. at 18. But the Court overlooks that it has held the Board could not bring this action. In *Board of Water Works Trustees*, this Court held that the Board, as a subdivision of the state, could not bring a claim alleging a due process violation against the State or other subdivisions of the state. 890 N.W.2d at 71-72 (“We see no cogent reason to overrule our precedent holding that subordinate public entities cannot challenge the constitutionality of statutes enacted by the legislature that created them.”). The Board, unable to challenge the constitutionality of section 20 of Senate File 512 and unable to hold the State accountable for violating the public trust doctrine, should not justify denying Iowa Citizens standing.

Finally, the Court incorrectly applies the redressability analysis to reject the redress afforded by declaratory relief. Slip Op. at 16-17, 19. In *Uzuegbunam v. Preczewski*, the U.S. Supreme Court recently held that

nominal damages “provide the necessary redress for a completed violation of a legal right.” 141 S.Ct. 792, 802, ___ U.S. ___ (2021). In so holding, Justice Thomas explained that nominal damages as a remedy evolved in the common law when declaratory relief had been unavailable. *Id.* at 798-800. Thus, given that §1 provided redressability for a violation of the right to free speech under the First Amendment in *Uzuegbunam*, declaratory relief provides redress here, especially when it would declare the respective rights and duties under the public trust doctrine and declare section 20 of Senate File 512 unconstitutional. Declaratory relief undeniably provides redress. *See Chernaik v. Kitzhaber*, 328 P.3d 799, 807 (Oregon Ct. App. 2014) (holding declaratory relief justiciable because “it must be assumed that the state will act in accordance with a judicially issued declaration regarding the scope of any duties that the state may have under the public trust doctrine”).

IV. THE COURT DEPRIVES IOWA CITIZENS OF DUE PROCESS OF LAW

The decision here denies Iowa Citizens access to judicial relief for an uncontested claim alleging deprivation of a property interest, and thus deprives Iowa Citizens due process of law under the Iowa Constitution and the U.S. Constitution. Iowa Const. art. I, § 9; U.S. Const. amend. XIV, § 1.

The public trust doctrine use right is a property interest, and any attempt to restrict that right “is a deprivation of the citizen of his property without due process of law[.]” *Witke v. State Conservation Commission*, 56 N.W.2d 582, 588-589 (Iowa 1953). This Court has even recognized the use right as a “paramount right,” the loss of which weighed against concluding a warrantless search was voluntary. *State v. Pettijohn*, 899 N.W.2d 1, 35 (Iowa 2017). State action violating procedural due process includes action by a state supreme court. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-887 (2009) (judicial bias violates procedural due process). In Iowa, “due process must be afforded when an individual is threatened by state action which will deprive the individual of a protected liberty or property interest.” *Callender v. Skiles*, 591 N.W.2d 182, 189 (Iowa 1999).

Here, the Court applied redressability to deny standing without leave to amend the petition. The Court has also held uncontested claims alleging deprivation of substantial constitutional rights were nonjusticiable political questions. These holdings independently deny a judicial forum for Iowa Citizens to secure relief for their uncontested property interest and thus deprives them of property without due process of law. *See Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 567 (Iowa 2019) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *see also Skiles*, 591 N.W.2d at 192 (holding state

law denying standing to putative father to overcome paternity violates procedural due process).

V. CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully Submitted,

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/s/ Brent Newell
Signature

July 1, 2021
Date

Proof of Service

I, Brent Newell, hereby certify that on the 1st day of July 2021, I, or a person acting on my behalf, did serve Plaintiffs-Appellees' PETITION FOR REHEARING on all other parties to this appeal by EDMS to the respective counsel for said parties:

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Certificate of Filing

I, Brent Newell, hereby certify that on the 1st day of July 2021, I, or a person acting on my behalf, filed Plaintiffs-Appellees' PETITION FOR REHEARING with the Clerk of the Iowa Supreme Court by EDMS.

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