IN THE SUPREME COURT OF IOWA

ROB SAND, AUDITOR OF THE STATE OF IOWA,
Applicant-Appellee,

v.

JOHN DOE, in his official capacity,
and UNNAMED STATE AGENCY, STATE OF IOWA,
Defendants-Appellants.

No. 20-0477

SUPPLEMENTAL BRIEF OF AMICUS CURIAE KIRKWOOD INSTITUTE, INC.

Appeal from the Iowa District Court for Polk County
Hon. Heather Lauber, District Judge
Case No. CVCV059696

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Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Kirkwood Institute, Inc. is a nonprofit corporation formed under the laws of the State of Iowa. Its mission is, in part, to advance constitutional governance in the State of Iowa by advocating for the enforcement of rights guaranteed to all Iowans by the Constitution of the State of Iowa and the Constitution of the United States. A particular area of concern for the Kirkwood Institute is the separation of powers. The Kirkwood Institute submits this brief in response to this Court's order of December 4, 2020.

SUMMARY OF THE ARGUMENT

Iowa law requires state entities to resolve their disputes by binding arbitration, not litigation. The precedents of this Court demonstrate that the state auditor and the unnamed state agency are both entities subject to this jurisdiction stripping statute. The auditor's claim that he, as a constitutional officer, is not subject to the statute that deprives this Court of jurisdiction is wrong. This case must be dismissed.

ARGUMENT

I. This Court lacks subject matter jurisdiction over a dispute between entities of state government, including those headed by a constitutional officer.

A. Standard of review.

Review of a lower court's determination of subject-matter jurisdiction is reviewed for correction of errors at law. *Klinge* v. *Bentien*, 725 N.W.2d 13, 15 (Iowa 2006). Because the parties did not raise the issue below, however, review must be de novo.

B. Preservation of error.

The lack of jurisdiction may be raised at any time. *Bailey* v. *Batchelder*, 576 N.W.2d 334, 337-38 (Iowa 1998) ("Every court has inherent power to determine whether it has jurisdiction over the subject matter of the proceedings before it. It makes no difference how the question comes to its attention.")

C. The statute requiring arbitration between administrative departments, commissions, and boards of state government applies to constitutional officers of the state government.

The auditor cites a single case for the proposition that he, as a constitutional officer of the state government, is not bound by the arbitration requirement found in Iowa Code § 679A.19 (2019). This Court stated in *State ex rel. Turner* v. *Iowa State Highway Commission*, 186 N.W.2d 141, 145 (Iowa 1971) that "obviously, in our judgment, the Legislature did not contemplate in the enactment of [§ 679A.19], Code, that executive officers should come within the proscription of the section." This statement from *Turner* should be understood in its proper context.

Turner was a test case designed to determine the legal limits of the newly ratified "so-called 'item veto' amendment to the Constitution by vote of the electorate of the state at the general election in November of 1968." *Id.* at 143. Governor Robert Ray had exercised his new power to veto a condition to certain highway funds

that permanent resident engineer offices would not be moved from their current locations. *Id.* The governor purported to veto the condition but approve the appropriation. *Id.* The attorney general then brought a suit on behalf of the State of Iowa against the highway commission to enjoin it from moving any of the offices. Two state legislators and a taxpayer intervened as plaintiffs. *Id.* at 142.

This Court, immediately after stating it was "obvious" that constitutional officers were not subject to the arbitration requirement, found that the Attorney General lacked the ability to bring the suit in the first place. "[T]he matter before us now does not involve a controversy or dispute between the attorney general's office and the highway commission as such, but an involved question as to the manner and mode of the governor of a state exercising an item veto of a legislative measure." *Id.* at 145.

This Court then cited a prior case where the attorney general had been directed by statute to bring a test case to determine the constitutionality of legislation. "The procedure adopted herein cannot

be approved…the legislative call upon the Attorney General to test the constitutionality of the act, by action brought by himself, overlooked the limitations upon the power of the judiciary, and quite ignored the legitimate scope of the powers of the Attorney General." *Id.* at 146 (citing *State ex rel. Fletcher* v. *Executive Council of the State of Iowa*, 207 Iowa 923, 223 N.W. 737 (1929)). Thus, it was his lack of standing, not his status as a constitutional officer, that was determinative. "We have jurisdiction to entertain only justiciable causes, prosecuted by a bona fide litigant, whose private rights are alleged to be invaded by an unconstitutional act…judicial duty requires us to say that he has not legal standing as a plaintiff in this case…" *Id.*

Turner is a case about the importance of judicial independence and the need for actual litigants with real interests at stake to present constitutional questions. The case has no analysis of the text, structure, or history of Iowa Code § 679A.19 to support the so-called obviousness of its inapplicability to a constitutional officer. Certainly, this Court's treatment of the statute, as described in the Kirkwood

Institute's principal brief, in *Iowa Individual Health Benefit Reinsurance Ass'n* v. *State University of Iowa*, 876 N.W.2d 800, 811 (Iowa 2016) (*IIHBRA*) was far more robust. The most that *Turner* stands for on this point is that the attorney general lacks a freewheeling mandate to sue in the name of the State of Iowa to obtain advisory judgments from this Court.

Turner's "obvious" statement is dicta about an irrelevant issue. The constitutionality of Governor Ray's item veto was a dispute about *what the law is*. Did this condition on an appropriation become law or did it not? This is not a question that can be resolved in any litigation or arbitration between state entities. The enactment, or not, of the legislation affected the rights of the public in general and specific parties. No one could possibly believe that a statute could be blotted out of existence in an arbitration proceeding between state entities any more than it could by a contrived lawsuit among willing participants.

The auditor then turns to Iowa Code Chapter 7E to support his argument. He notes that the code distinguishes and defines terms such as "administrative departments," "administrative units," and "separate constitutional offices." Iowa Code § 7E.2. He claims, without authority, that these definitions apply to Iowa Code § 679A.19 and that the omission of the term "office" from the latter evidences an intent to exclude elected officials from its ambit and to permit litigation between them.

But Chapter 7E is about the organization of state government, not the scope of the judicial power. It regulates prosaic matters such the proper title of the head of a subunit of a principal subunit of a division of a department. (No need to look it up, the proper title is "unit manager." Iowa Code § 7E.2(3)(c)(3)). It styles the administrative entity under the supervision of an elective constitutional or statutory officer as an "office." Iowa Code § 7E.2(1). From the omission of the word "office" in § 679A.19 the auditor derives the conclusion that it does not apply to him. This is slim

analysis. The word "subunit" also doesn't appear in § 679A.19–surely he doesn't believe that unit managers get to run to court to adjudicate their bureaucratic disagreements.

Chapter 7E is a statute about organization and efficiency, not the substantive powers of agencies. It contains aspirational statements like "[t]he governor, as the chief executive officer of the state, should be provided with the facilities and the authority to carry out the functions of the governor's office efficiently and effectively within the policy limits established by the legislature." Iowa Code § 7E.1(2)(a). Or broad expressions that "[s]tructural reorganization should be a continuing process through careful executive and legislative appraisal of the placement of proposed new programs and the coordination of existing programs in response to changing emphasis or public needs…" Iowa Code § 7E.1(3).

The code authorizes internal reorganization within the statutory grants of power to the various entities involved. Iowa Code § 7E.2(4). And it contains broad requirements that the heads of the various

entities "plan, direct, coordinate, and execute" the functions of their entity and to participate in a coordinated budget process. Iowa Code § 7E.3. So, too, must the entities prepare an annual report of their activities. Iowa Code § 7E.3(4).

The auditor concludes his Chapter 7E argument with a reference to separation of powers, claiming that because constitutional officers are separately elected, the principle "necessitates that their occasional legal disputes require a judicial resolution." (Supplemental brief 13). But a proper understanding of separation of powers commands the opposite conclusion.

A statute is not necessary to prohibit litigation between entities of state government under the control of the same person. Such litigation would fail because the judiciary does not simply declare, in an advisory fashion, what the law is. *Turner*, 186 N.W.2d at 146. So, the Iowa Department of Human Services cannot not sue the Iowa Department of Public Health. A dispute between the two agencies must be resolved by the governor. Otherwise, the judiciary would

impermissibly take on the executive power by issuing a purely advisory opinion.

Iowa Code § 679A.19 only needs to exist for disputes between entities under different political control. And it must be remembered that the statute does not prohibit those entities, even those led by a constitutional officer, from having those disputes resolved. It simply "limits litigation between public entities because the people of Iowa foot the bill for both sides." *Bd. of Water Works Trustees of City of Des Moines* v. *Sac County Bd. of Supervisors*, 890 N.W.2d 50, 72 (Iowa 2017). "That is why the legislature enacted Iowa Code § 679A.19 to prohibit litigation between state departments, boards, and commissions." *Id.* (citing *IIHBRA*, 876 N.W.2d at 811). The dispute will be resolved, but by a panel of arbitrators rather than by judges.

The auditor's argument that there is something fundamentally different between a constitutional officer and a department of state government reflects a troubling misunderstanding of the source of the legitimacy and proper exercise of governmental power. "All political

power is inherent in the people." Iowa Const. Art. I, § 2. The governor is vested in "the supreme executive power of this state" and she shall "transact all executive business with the officers of the government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices." Iowa Const. Art. IV, §§ 1 and 8. She "shall take care that the laws are faithfully executed." Iowa Const. Art. IV, § 9. These laws, including those establishing and appropriating funds for the various agencies, independent commissions, and other entities of state government are created by the general assembly in the exercise of the "legislative authority of this state…" Iowa Const. Art. III, 2d Div., § 1.

All authority possessed by the various entities of state government ultimately derives from constitutional officers chosen by the People to exercise their political power. The Iowa Department of Human Services has no freestanding political existence, it exists as an expression of the governor's authority to execute the laws establishing

it and is administered by an official who serves at her pleasure after being confirmed by the state senate. It is a manifestation of the People's ultimate authority under our Constitution to delegate their power to elected representatives to promote their health, safety, and welfare. *Honomichl* v. *Valley View Swine, LLC*, 914 N.W.2d 223, 240 (Iowa 2018) (Waterman, J., concurring) (discussing the right of Iowans to delegate legislative power to "govern themselves through laws passed by their chosen representatives").

Essentially, the auditor, in distinguishing himself from mere departments of state government, reflects a view of governmental structure that is foreign to our constitution. It must be remembered that our state constitution, unlike the U.S. Constitution, contains an express guarantee of the separation of powers and a prohibition against their joint exercise. Iowa Const. Art. III, Div. 1, § 1 ("[n]o person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or

permitted.") The view that agencies are somehow independent of elected officials is one that "pose[s] a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2212 (2020) (Kavanaugh, J., concurring). As Justice Kavanaugh noted in his concurring opinion, "free-floating agencies simply do not comport with this constitutional structure." *Id.* at 2216.

The argument that constitutional officers are not subject to Iowa Code § 679A.19 is essentially an argument that the statute is largely ineffective. The governor, for example, could always be listed as the plaintiff on behalf of any agency under her control to eliminate the arbitration requirement. This Court will not "construe a statute that would produce impractical or absurd results." *United Fire & Cas. Co.* v. *Acker*, 541 N.W.2d 517, 518 (Iowa 1995). Rather, the Court will "interpret the language fairly and sensibly in accordance with the plain meaning of the words used by the legislature." *City of Des Moines* v. *Civil Serv. Comm'n*, 540 N.W.2d 52, 57 (Iowa 1995).

As this Court has already recognized, the purpose of Iowa Code § 679A.19 is to limit litigation costs between entities of state government. *Bd. of Water Works Trustees of City of Des Moines*, 890 N.W.2d at 72. This purpose would be defeated by a construction of the statute that permitted clever pleading and party selection to give state entities the ability to sue each other. The legislature has made a policy choice that disputes between these agencies must be resolved by arbitration, not the courts. The auditor's attempt to circumvent this choice should be rejected. To the extent that *Turner* suggests otherwise, it should be disavowed by this Court.

D. The auditor does not defend the propriety of being represented by an attorney not authorized by the executive council.

The auditor's brief simply ignores the arguments made by the Kirkwood Institute about the attorney general's duty to represent him. This duty (which harmonizes nicely with the prohibition against litigation among state agencies) requires the attorney general to be on both sides of this case. The auditor apparently has nothing he wishes

to share with this Court about why he appears before it by a lawyer who cannot legally be compensated for the work he is performing. Iowa Code § 13.7(1). One would think the auditor, whose duty it is to examine the expenditure of state funds, would say something in his own defense on this subject.

CONCLUSION

The case should be remanded to the district court with the instruction to dismiss it.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains **2293** words, excluding parts of the brief exempted by that rule.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Iowan Old Style, 14-point type.

No party, their counsel, or other individual has authored this brief in whole or in part. No party, their counsel, or other individual has contributed funds to the preparation of this brief.

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