IN THE SUPREME COURT OF IOWA
No. 24-0029

Robert Teig,
Plaintiff-Appellant,

vs.

Brad Hart, Tyler Olson, Ann Poe, Patrick Loeffler, Dale Todd, Scott Olson, and Ashley Vanorney,
Defendants-Appellees.

Appeal From the Linn County Iowa District Court
CVCV097672
Honorable Andrew B. Chappell, District Court Judge

Plaintiff's Resistance to Defendants' Application for Further Review of Court of Appeals Decision Dated January 9, 2025

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Introduction

Defendants closed a city council meeting to interview Alissa van Sloten for the city clerk job. She requested the closed session under the code section that allows a public meeting to be closed "only to the extent a closed session is necessary . . . to prevent needless and irreparable injury to that individual's reputation . . .." Iowa code §21.5(1)(i).

The city council did not have specific information to show there would be needless and irreparable injury if the meeting were open, and no damaging information came out during the closed session. That means it was not necessary to close the meeting to protect Ms. Van Sloten. The result would have been the same if the meeting had been public; either way, there was no information about her that would have caused her needless and irreparable injury.

The Court of Appeals said Defendants violated Iowa's open meetings law because they closed the meeting without any factual basis for finding closure was necessary to prevent needless and irreparable injury. January 9, 2025, Decision. Defendants now say,

> [t]he applicant should be the only person deciding what will and will not harm the applicant's reputation, which the applicant does by requesting a closed session, and that should be enough.

Application for Further Review, p. 19. Defendants did not make this statement to the Court of Appeals and now want this Court to tell the Court of Appeals it was wrong for a new reason.

Claimed Reasons for Further Review

Defendants argue further review should be granted because there is "an issue of broad public importance that this Court should ultimately determine" and "an important question of law relating to Iowa's Open Meetings law (Iowa Code Chapter 21) that has not been, but should be, settled by this Court. *See* Iowa R. App. P. 6.1103(1)(b)(2) & (4)." Application, p. 4

This Court would have examined these factors when it decided to entrust the case to the Court of Appeals. See rule 6.1101(2) (Criteria for retention). Nothing relating to these factors has changed, and there is nothing to show the Court was wrong in transferring the case.

The only thing that has changed is that the Court of Appeals analyzed chapter 21 and decided Defendants violated the law. Defendants want a second bite at the apple to again argue a public body has no responsibility to determine if there is a legitimate basis to close a public meeting.

This time Defendants want to argue a private person should "be the only person deciding what will and will not harm the applicant's reputation." That means Defendants want a private person to decide what meetings will and will not be open to the public. That is the issue Defendants ask this Court to address.

Although the Court may examine any of the issues raised in the original appeal, there is a fundamental rule that appellate review is defined by the issues raised by the parties. The statement Defendants now make was not made to the Court of Appeals. So, a critical factor in deciding whether to grant further review should be whether Defendants have presented a viable new argument.

They have not.

Argument

Defendants' Application includes three components: 1) a parade of horribles not supported by a factual record; 2) assertion of a third party's rights to try to protect Defendants; and 3) an inadequate examination of code §21.5.

1. Defendants' parade of horribles

Defendants say the Court of Appeals' decision reverses years of common practice and understanding of the law by governmental bodies. There is no evidence of this in the record. If there were, this would support denial of further review to avoid delay in guiding government bodies on how to stop violating the law.

Defendants argue the decision will harm job applicants, compel applicants to disclose information not relevant to a job interview, harm recruiting and retention of qualified employees, chill candid job interviews, and cause government bodies to shift responsibilities to staff who are not subject to the open meetings law. They say moving in and out of closed session is not realistic or feasible especially considering the varying degrees of public meeting experience and sophistication among government bodies. The also claim that electronic meeting access means closing a meeting is no longer as simple as walking to the next room.

Defendants cite "no evidence that such a parade of horribles" is anything more than a rhetorical device, see *Texas v. Cobb*, 532 U.S. 162, 171 (2001); that is because there is no evidence in the record. In addition, these claims cannot be considered legislative facts nor is there

any basis to take judicial notice. As noted by Judge Philip P. Simon, "[j]ust saying it does not make it so . . .." *Palmer v. Berryhill*, CAUSE NO. 3:17-CV-782-PPS/MGG, 5 (N.D. Ind. Mar. 18, 2019). https://casetext.com/case/palmer-v-berryhill-13.

Actual experience with open interviews shows Defendants' conjectures are unfounded. For example, the Iowa Public Information Board used an open session to interview two job applicants for the IPIB executive director job. IPIB Board Meeting Agenda and Minutes, March 3, 2023, https://ipib.iowa.gov/events/ipib-board-meeting-march-3-2023. And interviews of judicial applicants are done in public. See e.g., State Judicial Nominating commission Interview of Judge Jeffrey Farrell, May 29, 2024, https://www.youtube.com/watch?v=3yzdcNvVzjI. Plaintiff asks the Court to take judicial notice of these interview examples. Iowa R. Evid. 5.201(c)(2).

Even if there were some basis for Defendants' claims, they relate to policy arguments about whether open interviews are a good idea and when the presumption of an open interview can be overcome. "It is for the legislature and not for the courts to pass upon the policy, wisdom, advisability, or justice of a statute." *Gravert v. Nebergall*, 539 N.W.2d

184, 188 (Iowa 1995); see also *State v. Hauge*, 973 N.W.2d 453, 465-66 (Iowa 2022) (". . . we leave policy decisions to the legislature.").

2. Defendants' claim of protection based on a third party's rights

Much of Defendants' Application focuses on job applicants and alleged harm to them under the Court of Appeals' decision. Even if there were such harms, they could only be raised by an applicant. Defendants have no standing to claim protection based on the rights of a third party. See *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 567 (Iowa 1976).

This is especially true because of the different interests protected by chapter 21.

Twice Defendants note that §21.5(1)(i) is "for the protection of the employee." *Feller v. Scott Cnty. Civ. Serv. Comm'n*, 435 N.W.2d 387, 390 (Iowa App. 1988). But there is more to the quotation. It says the section "is for the protection of the employee **and not for the protection of the [government body]**. [emphasis supplied]." Id.

There are no facts showing any harm to Ms. Van Sloten. Any harm would be conjectural (at best), she is not a party, and her interests

are not the same as the City's interests (which should be to see that the statute is followed to protect the public's right to know).

3. Defendants' inadequate examination of chapter 21

There are multiple shortcomings in Defendants' arguments that show there is no basis for this Court to decide that "[t]he applicant should be the only person deciding what will and will not harm the applicant's reputation, which the applicant does by requesting a closed session, and that should be enough."

Defendants have never addressed the fact that closure requires more than just some injury to reputation. The statute does not say, "to prevent injury to that individual's reputation." Rather than cover every injury, the legislature included limitations to prevent only "needless and irreparable" injury. While Defendants submitted their own testimony that damaging information possibly could come out in any job interview, they provided no evidence to show any damage was needless or irreparable. The Court must give effect to all words in the statute. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012).

Defendants seem to think the only way to request a closed session is before a meeting is held. Although that can be done, it is not

required. This means a person would not have to disclose all damaging information prior to the start of their interview. If an issue does not arise, there is no concern and the meeting stays open. If a legitimate issue does arise, it can be addressed in an appropriate fashion and then a determination can be made whether closure is necessary for that particular information. That process may be inconvenient, but the statute requires more than just a closure request and an unsupported claim of concern about reputational injury.

Defendants claim chapter 21 does not require that the government body possess any particular piece of information when it decides to close a meeting. Application, p. 10. This is mistaken. The statute says that closure is allowed only to the extent necessary to prevent needless and irreparable injury. Per force, there must be particular facts to support such a conclusion.

The closest analogy is issuance of a search warrant. In order to issue a warrant, a neutral and detached magistrate must find there is probable cause to find a crime has been committed and that evidence will be found in a particular location. A mere request for a warrant

does not suffice; particular facts must be provided in order for the court to properly exercise its discretion.

By analogy, the government body is the neutral and detached decision maker that must decide if it is "necessary" (a higher standard than probable cause) to close a meeting to prevent needless and irreparable injury. It also must have more than a mere request; the statute otherwise would say a meeting may be closed just upon request. There must be particular facts showing closure is necessary to prevent injury and that the injury would be needless and irreparable. It was noted long ago a meeting may be closed only upon a "proper showing." *Feller v. Scott County Civ. Serv. Commn.*, 435 N.W.2d 387, 390 (Iowa App. 1988) (stating that government body may "close a public session upon a proper showing"). Without facts, it is impossible to satisfy the showing required to close a meeting.

Nothing in the Court of Appeals' decision requires a job applicant to do anything or dictates the source of the information upon which the government body can rely. All that is required is that the government body "identify specific information that will injure the applicant's reputation in a way that is needless and irreparable and that the

meeting may be closed only 'when necessary' to prevent the disclosure of the injuring information." Decision, pp. 9-10. A person may be faced with a hard choice if they are faced with the prospect of providing negative information in order to obtain a closed session, but the law often presents hard choices. A hard choice is not the same as no choice, *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000). No one is entitled to a government job, *Peightal v. Metropolitan Dade County*, 815 F. Supp. 1454, 1471 (S.D. Fla. 1993), and it is the legislature's prerogative to make policy choices regarding the public's right to know how government hiring decisions are made.

As an ultimate consideration, "[c]ourts exist to decide cases, not academic questions of law." *Homan v. Branstad*, 864 N.W. 2d 321, 328 (Iowa 2015). Cases depend on facts, and here the facts show there was no real concern for reputational injury.

Ms. Van Sloten pointed to no specific concerns about her reputation. (Tr. 129:22-23). She referred to "the unknown" (125:10) or "a possibility" she was not aware of (128:20-25). She told plaintiff she did not request closure because of concerns for her reputation and said closing meetings was standard practice. (Tr. 348:21-24). At trial, she

admitted that the reason she asked for a closed session was because she did not like being in the public eye:

> Q. [by defense counsel] You -- you testified that you wouldn't have applied for the City Clerk position if you knew your -- if you had known your interview was going to be open; is that accurate?
>
> A. Yes.
>
> Q. Can you just explain why?
>
> A. Yes, I get nervous. I'm kind of an introvert, so I do get a little bit worried about public speaking.

(Tr. 165:11-18). She was "not comfortable" disclosing her qualifications "to the general public" (135:14-15) and testified:

> Q. *** Your job application, was all good stuff in there?
>
> A. In my opinion, yes.
>
> Q. Why keep it secret?
>
> A. Because it's personal information.
>
> Q. Your education, your job experience, that's all personal?
>
> A. Yes.
>
> Q. And the public shouldn't know that?
>
> A. When applying for a job I would say no.
>
> Q. All right. And the same thing for the interview? That's why it needed to be secret, same reasons?

A. Yes.

(Tr. 140:14 - 141:1).

Introversion is not protected by §21.5.

Conclusion

The Court of Appeals found a meeting can be closed only if the government body knows specific harmful information about the applicant. Defendants say, "[t]his cannot be what the Iowa Legislature intended." Application, p. 19. They ask for a ruling that, "[t]he applicant should be the only person deciding what will and will not harm the applicant's reputation, which the applicant does by requesting a closed session, and that should be enough."

Section 21.5 says:

> 1. A governmental body may hold a closed session only to the extent a closed session is necessary for any of the following reasons:
>
> * * *
>
> i. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

If Defendants were correct, (i) would say:

> i. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered ~~when necessary to prevent needless and irreparable injury to that individual's reputation~~ and that individual requests a closed session.

The Court is "not permitted to rewrite Iowa Code section [21.5(i)]" "to second-guess the policy choices codified by [the] legislature" and "reach the result sought by the [Defendants]." *In re Estate of Whalen*, 827 N.W.2d 184, 194, 185, 192 (Iowa 2013). There is no reason to grant further review when Defendants cannot obtain the relief they seek.

Defendants' application should be denied.

Certificate of Compliance

This resistance complies with the typeface requirements of Iowa R. App. P. 6.1103(2)(c) and type-volume requirements of Iowa R. App. P. 6.1103(5) because it was prepared in a proportionally spaced typeface using Century Schoolbook 14-point font and contains 2,392 words, excluding the parts exempted by Iowa R. App. P. 6.1103(5)(a).

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Respectfully Submitted,

s/ Robert L. Teig

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