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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 19-1065

In the Supreme Court of Texas

CITY OF DOUBLE HORN, *et al.*,

Petitioners,

vs.

STATE OF TEXAS,

Respondent.

On Petition for Review from the
Third District Court of Appeals, Austin, Texas
No. 03-19-00304-CV

REPLY TO RESPONSE TO PETITION FOR REVIEW

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REPLY ARGUMENT

I. Contrary to the State's suggestion, *quo warranto* law is not "well-settled."

The Response does not dispute that TEX. CIV. PRAC. & REM. CODE § 66.001, *et seq*. requires district courts to screen a petition for leave to file an information in the nature of *quo warranto* for jurisdictional purposes. *See* TEX. CIV. PRAC. & REM. CODE § 66.002(d); *Bute v. League City*, 390 S.W.2d 811, 815 (Tex. Civ. App.—Houston 1965, no writ) ("As a general rule, it is necessary to obtain leave of the court to invoke its jurisdiction in a *quo warranto* proceeding.")

Nor does the Response dispute that this Court considers *quo warranto* be an "extraordinary remedy." *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 490 (Tex. 1996). And the State cannot dispute that the standard a district court uses to screen a *quo warranto* proceeding is whether there is a "probable ground for the proceeding," which closely mirrors the "probable right to the relief sought" standard applied to injunctive relief, another one of this Court's extraordinary remedies—and one that is required to be satisfied with evidence.

However, according to the State there is nothing extraordinary about a *quo warranto* proceeding or how a district court should perform the jurisdictional screening process. The State argues that the Court of Appeals correctly held that a district court screening a *quo warranto* petition for leave under TEX. CIV. PRAC. & REM. CODE 66.002(d) is required to accept unverified, unsupported allegations as

true—even in the face of contrary certified public records. According to the State, in reaching its holding the Court of Appeals applied standards that are "well-settled,"[1] have been for "130 years,"[2] and there is no confusion among the limited case law available for *quo warranto* proceedings. As shown below and in the Petition, the State is wrong and *quo warranto* law is in clear need of this Court's intervention and clarification, particularly as to what the "probable ground" standard means in Section 66.002 and how district courts should evaluate the standard.

The Response glosses over the Court of Appeal's acknowledgment that there is no caselaw defining the "probable ground" standard in TEX. CIV. PRAC. & REM. CODE § 66.002(d). *State v. City of Double Horn*, 2019 WL 5582237, *4 (Tex. App.—Austin 2019, pet. filed). The statute is equally silent.

The State also ignores that this Court has not addressed a *quo warranto* suit challenging a municipal incorporation in forty (40) years and has never taken a case to address the issues presented here.

The Response also refuses to acknowledge that other states have wrestled with the screening process of *quo warranto* proceedings—including "what the judge to whom an applicant to file an information is authorized to do or consider in exercising the discretion which the law requires." *Walker v. Hamilton*, 209 Ga. 735, 738, 76

[1] Response, p. vii.
[2] Response, p. 12.

S.E.2d 12, 14 (1953). *Walker* resolved this uncertainty in Georgia by finding that while the statute did not specifically authorize it, the district court should be able to consider evidence when screening a *quo warranto* petition:

> We think it perfectly reasonable to assume that the object of the law is to avoid having title to a public office brought in question by false allegations. If such be the purpose or by false allegations. If such be the purpose of the law, **then obviously the trial judge, who is responsible for upholding this purpose and who is required to exercise a sound discretion, should be entitled to hear and consider evidence as a basis for his judgment**.

Walker, at 738 (emphasis added). The uncertainty that *Walker* addressed in Georgia in 1953 remains to this day in Texas jurisprudence. Unlike *Walker*, the State suggests that a district court in Texas must accept unsupported allegations and contends the law is "well-settled" on that requirement. However, the Court of Appeals is the only Texas court to have ever addressed the primary issue presented in the Petition: must a district court accept unverified, unsupported allegations as true when evaluating the "probable ground" standard for a *quo warranto* proceeding for jurisdictional purposes—even in the face of certified public records to the contrary?

While the Court of Appeals acknowledged the lack of authority on the applicable standard, it relied on three cases to hold that unverified and unsupported allegations in *quo warranto* petition must be taken as true for purposes of the probable ground standard. *Double Horn*, 2019 WL 5582237, at *4 (citing *Ramirez*

v. State, 973 S.W.2d 388, 393 (Tex. App.—El Paso 1998, no writ.); *State v. Fischer*, 769 S.W.2d 619, 622 (Tex. App.—Corpus Christi-Edinburg 1989, writ dism'd w.o.j.); and *State ex rel. Manchac v. City of Orange*, 274 S.W.2d 886, 888 (Tex. Civ. App.—Beaumont 1955, no pet.))

However, as the Petition points out, not one of these cases holds, or even suggests, that: (1) a district court should accept unverified or unsupported pleadings as true, or (2) that a district court cannot evaluate certified documents in making the probable ground determination for *quo warranto* proceedings. To the contrary, *Ramirez*, *Fischer*, and *City of Orange* each involved factually supported *quo warranto* pleadings and therefore the courts in those cases accepted factually supported allegations as true.

Ramirez considered an affidavit in support of the petition and found that "based on the evidence presented by the State, the trial court believed probable grounds existed for proceeding." 973 S.W.2d at 392-93 (emphasis added). And when *Fischer* stated, "we will accept as true the allegations contained in the State's petition," it did so based on allegations that were factually supported by evidence, including affidavits. 769 S.W.2d at 622. And when *City of Orange* held "the allegations contained in the petition sought to be filed must be taken as true for purposes of passing on this appeal," it did so based on a petition verified by an affidavit, 274 S.W.2d at 887-88, and relied on *State v. Huntsaker*, 17 S.W.2d 63, 65

(Tex. Civ. App.—Amarillo 1929, no pet.), which also considered a verified pleading. ("The allegations in the verified petition or information for quo warranto proceedings…must be taken as true…." (emphasis added).

The cases the Court of Appeals relied on for its holding are strikingly different because each involved factually supported pleadings that were accepted as true. That is not the case in this appeal, as the State's petition was not properly verified or supported by any affidavit or admissible evidence. Therefore, the Court of Appeals below is the first and only court to find that unsupported allegations in support of a *quo warranto* proceeding—an "extraordinary remedy"—must be accepted as true and automatically satisfy the heightened "probable ground for the proceeding standard" in Section 66.002(d).

Further, the Court of Appeals opinion is contrary to other cases suggesting that *quo warranto* pleadings should be factually supported, further demonstrating that the applicable law is not "well-settled." *See State ex rel. Yelkin v. Hand*, 331 S.W.2d 789, 797 (Tex. Civ. App.—Houston 1960), *writ ref'd n.r.e. per curiam*, 333 S.W.2d 109 (Tex. 1960) (an information supporting a *quo warranto* proceeding should be sworn to or otherwise established by evidence) (citing *Hunnicutt v. State ex rel. Whitt*, 12 S.W. 106, 108 (Tex. 1889) ("Such relations or information should be sworn to. Although this is not made necessary by the terms of the statute, it has been the practice under similar statutes.")).

Contrary to the State's suggestion, the law on how to consider, and what a district court can consider, when jurisdictionally screening under the "probable ground for the proceeding" standard is not settled at all. And the Court of Appeals' decision is not consistent with other case law, including the very three cases the Court of Appeals relied on for its holding. At minimum, there is confusion in the courts on what satisfies the probable ground standard and what judges may consider in screening for jurisdiction under Section 66.002(d). For purposes of Georgia's *quo warranto* statute and the same confusion, *Walker v. Hamilton* held that a reviewing district court can consider evidence. 76 S.E.2d at 14. This Court should grant the Petition and reach the same conclusion.

The Response suggests that if this Court allows a district court to consider evidence or facts when screening for the probable ground standard, "[i]t would allow a trial court to consider what amounts to a motion for summary judgment against the State without the benefit of any discovery." Response, p. 5.[3]

The State ignores that this Court already allows lower courts to consider evidence when making jurisdictional determinations. *See, e.g., Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 805 (Tex. 2018); *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009); *Texas Dep't of Parks & Wildlife v. Miranda*, 133

[3] It is noteworthy that when the trial court asked at the hearing if the State had any objections to Petitioners' certified evidence the State did not object (2RR 17: ln 6-14), thus waiving any evidentiary consideration.

S.W.3d 217, 227 (Tex. 2004); and *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000) (a lower court "is not required to look solely to the pleadings but may consider evidence *and must do so* when necessary to resolve the jurisdictional issues raised.").

As to the State's contention that it should be able to engage in discovery to support and defend its *quo warranto* petition[4], this Court's classification of *quo warranto* as an "extraordinary remedy" should require that the State have at the outset of its case some factual basis—through a proper verification, affidavit, or other admissible evidence—to support the heightened "probable ground for the proceeding" standard set forth in Section 66.002(d). No petitioner, including the State, should be permitted to present unverified, unsupported *quo warranto* allegations and then be able to conduct discovery to see if there is a basis for the claim. That is contrary to the statutory screening process which requires the district court to determine, prior to the information even being filed, that there is a "probable ground for the proceeding." TEX. CIV. PRAC. & REM. CODE § 66.002(d). If the petitioner gets to make unsupported allegations to then conduct discovery—the statutory screening process and a determination that there is a probable ground for the proceeding are weakened to the point of no effect.

[4] Response, p. 5.

And to satisfy the State's concern, if a petition for leave to file an information in the nature of *quo warranto* is properly verified or factually supported by admissible evidence—unlike in this case—then any genuine factual dispute could be treated just like factual disputes on any other jurisdictional determination. When evaluating for jurisdictional purposes in other matters, this Court has stated that a lower court should take as true all evidence favorable to the nonmovant and indulge in every reasonable inference and resolve any doubts in the nonmovant's favor. *Miranda,* 133 S.W.3d at 228; *see* also, *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). But the lower court should first determine that the plaintiff has at least raised a disputed fact issue regarding the jurisdictional issues. *See Bland,* 35 S.W.3d at 554; *Miranda,* 133 S.W.3d at 228; *Huckabee v. Time Warner Entm't Co. L.P.*, 19 S.W.3d 413, 420 (Tex. 2000); *Phan Son Van v. Pena*, 990 S.W.2d 751, 753 (Tex. 1999).

The State did not do so here, and according to the Court of Appeals that does not matter because a district court cannot consider evidence when screening a *quo warranto* proceeding for jurisdiction. The Court of Appeals erred in reaching that conclusion and this Court should clarify that just like jurisdictional screening for governmental immunity and other purposes, a district court can and should consider evidence when screening the extraordinary remedy of *quo warranto*.

In conclusion, contrary to the State's suggestion, a *quo warranto* proceeding should not be treated like any other case under the "fair notice"[5] pleading standard. Further, the "probable ground for the proceeding" standard should not be satisfied by unverified and unsupported allegations, particularly in the face of contrary certified public records. If such is the case, then the statutorily heightened standard, the requirement for judicial review and screening to invoke jurisdiction, and this Court's classification of *quo warranto* as an "extraordinary remedy" are rendered meaningless. This Court should grant the Petition to correct the Court of Appeal's error and to provide guidance on how lower courts should apply the probable ground standard to *quo warranto* proceedings.

II. This Court should also grant the Petition to clarify confusing *dicta* from 130 years ago.

The Response cites *Hunnicutt v. State ex rel. Whitt*, 12 S.W. 106, 108 (Tex. 1889) for the proposition that the State, but not other parties, need not verify a *quo warranto* pleading and therefore the law on this issue has been "well-settled" for 130 years.

As discussed in the Petition, *Hunnicutt* actually provides that *quo warranto* pleadings should be sworn to, notwithstanding the applicable statute not requiring same. 12 S.W. at 108 ("Such relations or information should be sworn to. Although

[5] Response, p. 9 (suggesting fair notice pleading standard should apply to *quo warranto* proceedings).

this is not made necessary by the terms of the statute, it has been the practice under similar statutes."). However, *Hunnicutt* also noted in *dicta* that "[t]he state's officer might file his information without relation, and in that case it would seem that his official statement, unsworn, would be sufficient to authorize a judge to direct an information to be filed." *Id*.

Contrary to the State's suggestion, *Hunnicutt's* "it would seem" language from 130 years ago did not settle the law applicable to this case. First, *Hunnicutt* addressed a *quo warranto* petition filed on relation of another (not the State on its own behalf). *Hunnicutt* also involved a verified information and supplementations thereto. *Id*. at 107. In fact, the petition in *Hunnicutt* was verified twice. *Id*. ("the original information was sworn to by the relator before the county attorney, ... [and after it was filed] [t]he relation and information… were again sworn to by the relator before the clerk of the district court.") *Id*. (emphasis added).

Therefore, the "it would seem" language is non-binding *dicta*. *Hunnicutt* did not hold that the State need not comply with the general rule that *quo warranto* pleading should be factually supported, as that issue was not before the Court. And *Hunnicutt* did not provide any explanation for its non-committal suggestion 130 years ago that "it would seem" that *quo warranto* pleading must be verified when filed on relation, but not when the State sues on its own behalf. Finally, *Hunnicutt* in no way suggests that an unverified or otherwise unsupported petition or

information is sufficient to meet the probable ground standard in the face of contrary certified public records—such as the case before the district court in this matter.

This Court should also note that while the State now says the law has not required it to verify *quo warranto* pleadings for 130 years, the State has judicially admitted in at least one other case that for a petition for leave to file an information in the nature of *quo warranto* "all the case law and existing authority requires is that a sworn petition be filed." *Ramirez*, 973 S.W.2d at 392. (emphasis added). Indeed, in *Ramirez* the State admitted that the "case law and existing authority requires" a sworn petition, one of the three cases that the State and the Court of Appeals rely on for the proposition that unsupported allegations in a *quo warranto* pleading should be accepted as true. *Id*. But now the State says a sworn petition is not required, and that has been the case for 130 years.

The Court should also not overlook that the State attached a verification from its counsel to support its petition in this case, contrary to its position now. (CR 16-40). However, the State's verification was admittedly not based on personal knowledge. The verification from the State's trial counsel noted that the State's attorney "has read the foregoing document and that based on knowledge gathered from the identified documents and websites the statements of fact contained therein are true and correct." (CR 16). The district court properly struck the verification for lack of personal knowledge. *In re Valliance Bank*, 422 S.W.3d 722, 726 n.1 (Tex.

App.—Fort Worth 2012, orig. proceeding) (a party's counsel may verify pleadings only when based on personal knowledge, which requires more than merely the status as counsel). And at the hearing, the State made no effort to correct its deficient verification or offer any admissible evidence in support of its petition. (1 RR – 3 RR).

In addition to *Hunnicutt*, in 1922 this Court again suggested that a district court should consider verified pleadings when screening a *quo warranto* petition. *Staples v. State*, 245 S.W. 639, 643 (Tex. 1922) ("If the district judge thinks the information with its verification sets out sufficient cause, and his judgment is satisfied, he enters his order authorizing the suit to be filed.") (emphasis added).

This Court should grant the Petition to clarify what *Hunnicutt* stands for, as its language on an issue not before the Court 130 years ago adds to the confusion in *quo warranto* case law. On one hand *Hunnicutt* suggests that *quo warranto* pleadings should be verified, and many cases have repeated and restated that position. But then *Hunnicutt* later suggests with no explanation that verification may not be necessary for cases brought by the State on its own behalf. And importantly neither issue was before the Court, as *Hunnicutt* involved a petition on relation of another (not the State on its own behalf) and involved a verified pleading (and therefore the issue of verification was not before the Court). Furthermore, if the State is not required to verify its *quo warranto* petition, does it meet the standard in

the face of contrary certified public documents? And if the State can play by different rules, unlike the "it would seem" language in *Hunnicutt*, this Court should expressly so state and ideally justify the distinction in favor of the State.

III. Summary

In conclusion, this Court should grant the Petition to guide lower courts on how to apply the undefined probable ground standard, including whether a *quo warranto* pleading must be factually supported and what a district judge may consider when determining if the statutorily heightened standard is met. The Court should also grant the Petition to clarify the *dicta* in *Hunnicutt* and its suggestion that *quo warranto* proceeds should be verified despite the statute not expressly requiring same, but possibly not if the State files the *quo warranto* proceeding on its own behalf. Finally, if the State is not required to factually support its petition, is the "probable ground" standard in Section 66.002(d) met if the unsupported allegations are contradicted by certified public documents, or is the district court allowed to consider evidence in making its "probable ground" determination?

Contrary to the State's suggestion, the law on what factual support and standards are required for the extraordinary remedy of *quo warranto* is certainly not "well settled." The applicable law is unclear, particularly the issues presented in the Petition, the law is inconsistently applied by lower courts, and the issues presented beg this Court's clarification.

PRAYER

For the reasons set forth above and in the Petition for Review, this Court should grant the Petition for Review, order full briefing on the merits, reverse the court of appeals' opinion and judgment, and render judgment affirming the trial court's order in favor of the Double Horn petitioners. Petitioners pray for costs and further relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been sent via electronic service to the State of Texas' attorneys of record, in compliance with Rule 6.3 of the TEXAS RULES OF APPELLATE PROCEDURE, on May 28, 2020.

/s/ Wm. Andrew Messer
WM. ANDREW MESSER

CERTIFICATE OF COMPLIANCE

This is to certify that, according to the computer program used to prepare this document, the document contains 3,281 words in compliance with Texas Rule of Appellate Procedure 9.4(i)(3), excluding those items in 9.4(i)(1).

/s/ Wm. Andrew Messer
WM. ANDREW MESSER

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