IN THE SUPREME COURT OF IOWA

No. 16–0304

Filed December 15, 2017

LAVERNE EDWARD BELK,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Benton County, Lars Anderson, Judge.

An applicant in a postconviction-relief action appeals the district court's decision to grant the State's motion to dismiss. **REVERSED AND REMANDED.**

John J. Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Nicholas E. Siefert and John McCormally, Assistant Attorneys General, for appellee.

WIGGINS, Justice.

A prisoner appeals the district court's dismissal of his amended application for postconviction relief. The State filed a motion to dismiss alleging the prisoner failed to make a viable claim under the postconviction-relief act. The district court agreed and found as a matter of law the prisoner had not stated a claim for postconviction relief under Iowa Code section 822.2(1)(*a*) (2013). Although we agree with the district court's reasoning to some extent, we conclude the prisoner should have been given the opportunity to pursue his claim under section 822.2(1)(*e*). Therefore, we reverse the district court's judgment and remand the case for further proceedings consistent with this opinion.

I. Proceedings.

On April 23, 2013, Laverne Edward Belk filed his application for postconviction relief. On September 3, Belk amended his application for postconviction relief. Pursuant to Iowa Code section 822.2(1)(*a*), he alleged that his sentence violated the United States and Iowa Constitutions, namely the Equal Protection Clause, prohibitions against cruel and unusual punishment, the Due Process Clause, and the Ex Post Facto Clause. Relevant to this appeal, the substance of Belk's amended application alleged the Iowa Department of Corrections (IDOC) violated his liberty interest in obtaining parole because of the IDOC's failure to provide the sex offender treatment program (SOTP) in a timely manner.

Specifically, Belk argued it was the policy of the IDOC to delay his access to SOTP until he was close to his tentative discharge date. He further contended he is currently eligible for parole but has no meaningful chance for parole unless the IDOC recommends parole without the SOTP prerequisite. According to Belk, his tentative discharge date is October 22, 2019, but the IDOC will not offer him SOTP

until sometime in 2017. Belk argued the district court should require the IDOC to recommend him for parole without the condition of completing SOTP. He has requested SOTP to no avail prior to the filing of both his initial and amended applications.

In response to Belk's amended application, the State filed a motion to dismiss. The substance of the motion is that an application under chapter 822 is not the proper vehicle to contest the denial of his parole by the Iowa Board of Parole (IBOP). The State also filed a motion for summary judgment.

On July 3, 2014, the district court denied the State's motion to dismiss, finding Belk was not contesting the IBOP's agency action in denying him parole. Rather, the district court found Belk alleged the IDOC deprived him of his liberty or property interest that is actionable under the postconviction-relief act. The district court also denied the State's motion for summary judgment.

The case proceeded to trial on October 13, 2015. At the onset of the trial, the State renewed its motion to dismiss and its motion for summary judgment. The court reserved ruling on these motions until it received the parties' posttrial briefs.

The court entered its order on January 29, 2016. The court did not reach the merits of the claim. Rather, it decided the case by ruling on the State's renewed motion to dismiss. The court ruled as a matter of law that Belk had not stated a claim for postconviction relief under Iowa Code section 822.2(1)(*a*).

Belk appeals.

II. Issue.

Belk raises one issue on appeal. He claims the district court erred in granting the State's motion to dismiss. He contends the IDOC's policy

of refusing to provide timely SOTP substantially deprives him of his liberty interest, and thus we should allow him to pursue a remedy through postconviction relief.

III. Standard of Review.

A postconviction proceeding is a civil action. *Mabrier v. State*, 519 N.W.2d 84, 85 (Iowa 1994). We review civil motions to dismiss for correction of errors at law. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 78 (Iowa 2004).

IV. Analysis.

If the application for postconviction relief on its face shows no right of recovery under any state of facts, the court should grant a motion to dismiss. Iowa R. Civ. P. 1.421(1)(*f*); *see Rees*, 682 N.W.2d at 79. Almost every case will survive a motion to dismiss under notice pleading. *Rees*, 682 N.W.2d at 79. The application does not have to allege ultimate facts supporting each element of the cause of action, but it "must contain factual allegations that give the [State] 'fair notice' of the claim asserted so the [State] can adequately respond to the application." *Id.* The application meets the "fair notice" requirement "if it informs the [State] of the [events] giving rise to the claim and of the claim's general nature." *Id.* We view the applicant's allegations "in the light most favorable to the [applicant] with doubts resolved in that party's favor." *Geisler v. City Council of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009) (quoting *Haupt v. Miller*, 514 N.W.2d 905, 911 (Iowa 1994)).

The application alleges the district court has convicted and sentenced Belk for a public offense. The gravamen of his complaint is that his sentence violates a liberty interest: the IDOC's failure to provide him with SOTP in a timely manner prolongs his incarceration because

without the completion of SOTP, he argues, the IDOC refuses to recommend him for parole.

As a general doctrine, "[t]here is no constitutional or inherent right to be conditionally released from prison prior to the expiration of a valid sentence." *State v. Cronkhite*, 613 N.W.2d 664, 667 (Iowa 2000); *accord State v. Wright*, 309 N.W.2d 891, 894 (Iowa 1981) (holding the defendant does not "have a constitutional right to parole"); *State v. Cole*, 168 N.W.2d 37, 39–40 (Iowa 1969) (holding the granting of parole "is a matter of grace, favor, or forbearance" and "[i]t is not a matter of right"). The power to grant parole, much like the power to grant probation, is granted by statute—it is not a power the judiciary wields. *See Wright*, 309 N.W.2d at 894.

Although prisoners do not have a constitutional right to parole, a state may choose—but is under no duty—to establish a parole system. *Cronkhite*, 613 N.W.2d at 667–68 (citing *Vitek v. Jones*, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261 (1980); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 2104 (1979)); *accord Heidelberg v. Ill. Prisoner Review Bd.*, 163 F.3d 1025, 1026 (7th Cir. 1998) (per curiam). "Under such a system, states have authority to shorten prison terms based on good behavior." *Id.* at 668 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975 (1974)). "[O]nce a [state] scheme is implemented[,] prisoners are imbued with a liberty interest to which the procedural protections of the Due Process Clause attach."[1] *Id.* (citing *Vitek*, 445 U.S. at 488–89, 100 S. Ct. at 1261).

[1]The due process protections afforded for an inmate's liberty interest in parole is minimal. *See Pando v. Brown*, 87 F. Supp. 3d 963, 964–65 (N.D. Cal. 2015) (noting California has created a parole scheme that creates a liberty interest in parole, however, "[t]he United States Supreme Court has clearly stated that, in the parole context, a prisoner has received adequate process when he has been allowed an opportunity to be

However, the mere presence of a parole system does not automatically mean a prisoner has a constitutionally protected liberty interest in parole.[2] *Bd. of Pardons v. Allen*, 482 U.S. 369, 373, 107 S. Ct. 2415, 2418 (1987).[3] Rather, the existence of a protected liberty interest in parole depends on the state's parole statute. The following cases illustrate this principle.

In *Greenholtz*, the United States Supreme Court held the Nebraska statute created an expectation of parole protected by the Due Process Clause. *Greenholtz*, 442 U.S. at 12, 99 S. Ct. at 2106. The Nebraska statute provided,

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release unless it is of the opinion that his release should be deferred because:
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> (a) There is a substantial risk that he will not conform to the conditions of parole;
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> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
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> (c) His release would have a substantially adverse effect on institutional discipline; or
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> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Id. at 11, 99 S. Ct. at 2106 (quoting Neb. Rev. Stat. § 83-1,114(1) (1976) (emphasis added)). Additionally, the statute also provided a list of factors that the board must consider, as well as one catchall factor that allows

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heard and was provided a statement of the reasons why parole was denied" (citing *Swarthout v. Cooke*, 562 U.S. 216, 220, 131 S. Ct. 859, 862 (2011) (per curiam)).

[2]There does not appear to be any Iowa case applying the *Cronkhite* rule.

[3]The Montana legislature subsequently amended its parole scheme to make a grant of parole discretionary. *See Worden v. Mont. Bd. of Pardons & Parole*, 962 P.2d 1157, 1165 (Mont. 1998).

the board to consider other criteria it deems important. *Id.* at 11 & n.5, 16–18, 99 S. Ct. at 2106 & n.5, 2108–09 (quoting Neb. Rev. Stat. § 83-1,114(2)).

In holding the statute created a constitutionally protected liberty interest in parole, the Court noted the mandatory language—"it shall order"—and the presumption the statute created that the board must grant parole unless it finds one of the four reasons for deferral. *Id.* at 11–12, 99 S. Ct. at 2106. While recognizing the amount of subjectivity injected into parole decisions and the amount of broad discretion within the statutory authority of the board, the Court nevertheless held inmates in Nebraska had a liberty interest in early release. *Id.* at 12–13, 99 S. Ct. at 2106–07.

Allen is an important case because the language of the applicable Montana statute in that case resembles that of the relevant Iowa statute. In *Allen*, the United States Supreme Court examined whether the then Montana statute, like the Nebraska statute, created a liberty interest in parole. *Allen*, 482 U.S. at 376, 107 S. Ct. at 2419–20. The Montana statute provided,

> (1) Subject to the following restrictions, the board *shall* release on parole . . . any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]
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> . . . .
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> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

Id. at 376–77, 107 S. Ct. at 2420 (quoting Mont. Code Ann. § 46-23-201 (1985) (emphasis added)).

Based on the mandatory language "shall," the Court reasoned the Montana statute at the time created a presumption that the board would grant parole "when the designated findings [were] made. *Id.* at 377–78, 107 S. Ct. at 2420. Moreover, the Court reasoned, the Montana statute, like the Nebraska statute, mandated the board to "assess the impact of release on both the prisoner and the community." *Id.* at 379–80, 107 S. Ct. at 2421. Particularly, the Court explained both statutes emphasized the importance of "the prisoner's ability 'to lead a law-abiding life' " and "whether the release can be achieved without 'detriment to . . . the community.' " *Id.* at 380, 107 S. Ct. at 2421–22 (first quoting Neb. Rev. Stat. § 83-1,114(1)(a) (1981); and then quoting Mont. Code Ann. § 46-23-201(2) (1985)). After noting the similarities between the two statutes, the Court held the Montana statute created a liberty interest in parole. *Id.* at 381, 107 S. Ct. at 2422.

From *Greenholtz* and *Allen*, a court can conclude if the statute mandates that a parole board must release an inmate if the inmate meets certain statutorily created criteria, then a protected liberty interest in parole exists. In contrast, if the statute grants the parole board discretion to make the ultimate parole decision, even if the inmate meets the criteria, then the inmate does not have a protected liberty interest in parole. *See Richardson v. Joslin*, 501 F.3d 415, 419 (5th Cir. 2007) ("The hallmark of a statute that has not created a liberty interest is discretion" such that "[w]here the statute grants the prison administration discretion, the government has conferred no right on the inmate.").

We have allowed postconviction-relief actions to challenge SOTP classification decisions, work release revocations, and disciplinary

actions involving a substantial deprivation of liberty or property interests. *Pettit v. Iowa Dep't of Corr.*, 891 N.W.2d 189, 193–96 (Iowa 2017) (discussing SOTP classification); *Maghee v. State*, 773 N.W.2d 228, 235–42 (Iowa 2009) (examining revocation of work release); *Davis v. State*, 345 N.W.2d 97, 98–100 (Iowa 1984) (discussing administrative segregation).

In *Davis*, a prison disciplinary committee found an inmate guilty of violating a penitentiary rule and penalized him for thirty-six months in administrative segregation, plus loss of television, radio, and tape player privileges. *Davis*, 345 N.W.2d at 98. Without specifying which provision specifically applies,[4] we held applicants may bring claims challenging prison disciplinary proceedings under what is now chapter 822 when the actions of prison officials involve a substantial deprivation of liberty or property rights. *Id.* at 99. We reasoned "[i]t would be unwieldy to require separate actions and different procedures to review prison disciplinary proceedings depending on the type of punishment imposed." *Id.* Moreover, we stated,

> In many of the prison disciplinary proceedings in which judicial review will be sought, forfeiture of good and honor time will be involved but will be coupled with other means of discipline which can be characterized as a substantial deprivation of liberty or property but which are not expressly mentioned as a subject for review under [chapter 822]. We therefore approve litigating all such claims involving substantial deprivation of liberty or property interests pursuant to the procedures of [chapter 822] . . . .

Id.

[4]*Davis* implies the proper provision of what is now section 822.2 is section 822.2(1)(*e*). *See Maghee*, 773 N.W.2d at 238 (noting a transfer from the general prison population to segregation, as was the case in *Davis*, is a decision that falls within what is now section 822.2(1)(*e*), which provides postconviction review if the inmate "is otherwise unlawfully held in custody or other restraint").

In *Maghee*, we held an inmate properly brought a postconviction-relief action pursuant to what is now section 822.2(1)(*e*) to challenge the revocation of his work release after violating a prison rule. *Maghee*, 773 N.W.2d at 230, 235. We reasoned, "There is simply no principled reason to distinguish a transfer from work release to a secure institution from a transfer from the general prison population to segregation when both are based on rule violations." *Id.* at 237–38. "[W]e think a more manageable and consistent review process results when all transfer decisions are subject to the same postconviction-relief method of review." *Id.* at 238.

In *Pettit*, a prisoner sought to contest the IDOC's decision requiring him to take SOTP. *Pettit*, 891 N.W.2d at 192. After going through the prison adjudicative process, he filed a chapter 17A action. *Id.* We found that "[t]he result of an inmate not participating in SOTP is a loss of the accrual of earned time." *Id.* at 194. We found because the classification could extend the prisoner's time in prison due to a loss of earned time if he did not participate in SOTP, the proper method to contest the IDOC's SOTP classification was through a postconviction-relief action under Iowa Code section 822.2(1)(*f*) (and possibly 822.2(1)(*e*)). *Id.* at 195 & nn.3–4.

In light of the foregoing authorities, we conclude an inmate may proceed under Iowa Code section 822.2(1)(*e*) when alleging an unconstitutional denial of his or her liberty interest based on the IDOC's failure to offer SOTP when SOTP is a necessary prerequisite to parole. That section applies when "the person is otherwise unlawfully held in custody or other restraint." Iowa Code § 822.2(1)(*e*).

The State argues that an administrative appeal, followed by judicial review pursuant to chapter 17A, is the proper way to proceed.

However, it seems logical for postconviction-relief proceedings to be available for SOTP denials as it is available for SOTP classifications. *See Pettit*, 891 N.W.2d at 194. Prisons need clear rules for where and how prisoners can raise different kinds of complaints. In any event, as the district court pointed out, Belk's complaint is really with the IDOC rather than the IBOP.

Viewing the allegations of the amended application under notice pleading in the light most favorable to Belk, we find the amended application gives fair notice of Belk's claims to the State. The substance of his amended application alleged he had a protected liberty interest in obtaining parole. Moreover, Belk alleged the IDOC's decision to delay his access to SOTP unconstitutionally violated this interest when the IDOC would not recommend parole because of his failure to complete SOTP. Additionally, Belk alleged the IDOC does not offer SOTP to male sex offenders unless they near their tentative discharge dates. That is not the case for female sex offenders. Taking these allegations as true, a court could find Iowa's parole law creates a liberty interest. If the court so finds, the court must then consider whether the IDOC's actions as alleged has unconstitutionally violated this liberty interest. Belk is entitled to proceed with his action to prove these allegations.

Again, it is important to note, Belk's claim is not about the actions of the IBOP in denying him parole. Rather, Belk is claiming the actions of the IDOC—in delaying his access to SOTP based on his tentative discharge date and then recommending against his parole to the IBOP because of his failure to complete SOTP—has unconstitutionally violated his protected liberty interest.

We conclude Belk's amended application should not have been dismissed outright for failure to state a claim because, in fact, he had

stated a claim under Iowa Code section 822.2(1)(*e*). Notably, Belk's amended application cited only Iowa Code section 822.2(1)(*a*), although his original application also cited section 822.2(1)(*e*). We believe section 822.2(1)(*a*) is inapposite because Belk is not complaining about his "conviction or sentence." Iowa Code § 822.2(1)(*a*). Hence, we could potentially affirm on the basis that Belk has not relied on the correct section, but this would simply trigger the filing of another postconviction-relief action under section 822.2(1)(*e*).

Additionally, until today, there was no settled precedent on what avenue for relief, if any, was potentially available for an inmate in Belk's situation. Accordingly, we conclude this case should be reversed and remanded so Belk has an opportunity to amend his application to proceed under section 822.2(1)(*e*). Both here and below, the State took the position that postconviction relief was not available at all and thus there is no unfairness to the State in reversing for further proceedings under section 822.2(1)(*e*).

V. Disposition.

We reverse the district court judgment dismissing Belk's amended application. On remand, Belk should be given an opportunity to amend his application to seek relief under Iowa Code section 822.2(1)(*e*). If he does, the court must decide if the parole system in Iowa, together with the IDOC's actions, unconstitutionally interfered with a liberty interest that would allow Belk to obtain relief. We are not commenting on the merits of Belk's claims under section 822.2(1)(*e*). Rather, we have reviewed his allegations under the standard of notice pleading in the light most favorable to him. In other words, we have decided this opinion within the parameters of the standard of review governing a motion to dismiss.

Because the court held a hearing, the court may decide the issue under the record made if possible, but in its discretion, the court may request further testimony or briefs from the parties.

REVERSED AND REMANDED.

All justices concur except Waterman and Zager, JJ., who dissent.

WATERMAN, **Justice (dissenting).**

I respectfully dissent. I would affirm the district court's dismissal on grounds that Laverne Belk sued under the wrong statute and also because, in my view, Belk fails to state a claim upon which relief may be granted. I agree with the district court, the court of appeals, and the State that Iowa Code chapter 17A, the Iowa Administrative Procedure Act (IAPA), governs an inmate's challenge to the *policy* of the Iowa Department of Corrections (IDOC) to delay entry into the sex offender treatment program (SOTP) until closer to the inmate's release date. *See Fassett v. State*, No. 15–0816, 2016 WL 3554954, at *6–7 (Iowa Ct. App. June 29, 2016) (affirming dismissal of inmate's postconviction action under chapter 822). As the court of appeals recently held,

> decisions regarding the timing of inmates' participation in the SOTP is an agency action falling within discretion of the department of corrections and board of parole, and . . . chapter 17A is therefore the appropriate vehicle for [the inmate's] complaint regarding the fact he has not yet been allowed to participate.

Id. at *7. My colleagues cite no case holding such a challenge can be brought under chapter 822.

It is undisputed that Belk is not challenging his underlying conviction or court-imposed sentence. The majority therefore correctly concludes that Iowa Code section 822.2(1)(*a*) is inapposite. Nor is Belk appealing a disciplinary ruling or decision classifying him as a sex offender, which our precedents hold are to be brought under chapter 822. *See Pettit v. Iowa Dep't of Corr.*, 891 N.W.2d 189, 196 (Iowa 2017) (IDOC sex offender classification ruling); *Maghee v. State*, 773 N.W.2d 228, 241 (Iowa 2009) (requiring IDOC disciplinary decisions, including for "the forfeiture of earned-time credits, administrative segregation, or

transfer out of a work release or other community program" to be brought under chapter 822 rather than chapter 17A). Instead, Belk challenges the IDOC *policy* delaying SOTP and his alleged resulting harm from the related policy of the Iowa Board of Parole (IBOP) to require completion of the SOTP before granting parole.

It is well established that appeals of parole board determinations must be brought under chapter 17A rather than chapter 822. *Frazee v. Iowa Bd. of Parole*, 248 N.W.2d 80, 82–83 (Iowa 1976) (holding parole board is an agency under the IAPA subject to judicial review under chapter 17A); *McKeag v. State*, No. 10–1084, 2011 WL 3925537, at *2 (Iowa Ct. App. Sept. 8, 2011) (holding judicial review of parole board determinations must be under chapter 17A rather than chapter 822). And we have recently adjudicated challenges to IDOC policies relating to SOTP under chapter 17A. In *Breeden v. Iowa Department of Corrections*, inmates filed a petition for judicial review under Iowa Code section 17A.19 challenging the IDOC's policy refusing to accelerate the accrual of earned time after mandatory minimums were removed from their sentences. 887 N.W.2d 602, 605–06 (Iowa 2016). We unanimously affirmed the court of appeals decision requiring the IDOC to change its accrual policy in that decision which we reviewed under chapter 17A. *Id.* at 612–13. The majority today ignores this year-old decision.

On the other hand, in *State v. Iowa District Court*, we reviewed a postconviction challenge to IDOC's new, retroactive earned-time accrual policy under chapter 822. 902 N.W.2d 811, 814 (Iowa 2017). Such claims, however, fall squarely within section 822.2(1)(*f*) allowing actions alleging unlawful forfeiture of earned time. That section provides the basis for postconviction actions challenging individual classification decisions requiring an inmate to undergo SOTP or lose earned time. *See*

Pettit, 891 N.W.2d at 196 (requiring SOTP classification challenges to be brought under section 822.2(1)(*f*) because of the loss of earned time for noncompliance). Here, Belk concedes he faces no loss of earned time, so section 822.2(1)(*f*) does not apply.

My colleagues correctly observe that we have repeatedly held actions challenging inmate discipline are to be brought under chapter 822 rather than chapter 17A. This makes sense because the legislature has specified that "[t]he inmate disciplinary procedure, including but not limited to the method of awarding or forfeiting time pursuant to [chapter 903A], is not a contested case subject to chapter 17A." Iowa Code § 903A.3(4) (2013). The legislature also directed that the administrative law judges (ALJs) appointed by the director of the IDOC to preside over prisoner disciplinary hearings "are not subject to certain laws governing ALJs in other state agencies deciding contested cases under Iowa Code chapter 17A." *Office of Citizens' Aide/Ombudsman v. Edwards*, 825 N.W.2d 8, 17 n.4 (Iowa 2012); *see also* Iowa Code § 903A.1 ("Sections 10A.801 and 17A.11 do not apply to administrative law judges appointed pursuant to this section."). Because Belk does not appeal from a disciplinary hearing as in *Maghee* or from a proceeding classifying him as a sex offender as in *Pettit*, the cases relied on by my colleagues are inapposite.

In my view, the policies of the IDOC and the IBOP challenged by Belk constitute other agency action for which chapter 17A provides the exclusive vehicle for judicial review, as the court of appeals held in *Fassett*, 2016 WL 3554954, at *6.

> By its terms, the judicial review provisions of chapter 17A are "the *exclusive means* by which a person . . . adversely affected by agency action may seek judicial review of such agency action" except as "expressly provided

> otherwise by another statute referring to [chapter 17A] by name."

McKeag, 2011 WL 3925537 at *2 (alteration in original) (quoting Iowa Code § 17A.19). As noted, chapters 822 and 903A only negate the applicability of chapter 17A as to prison disciplinary actions, not what we have here. My colleagues fail to rebut the sound reasoning of *Fassett* and *McKeag* and choose instead to simply disregard those decisions as unpublished.

Belk relied solely on section 822.2(1)(*a*), which the district court and the majority today correctly conclude is inapplicable. But my colleagues quite generously permit Belk to proceed under section 822.2(1)(*e*). I do not think our court should *sua sponte* recast Belk's petition. Regardless, even under notice pleading, Belk alleges no facts to show that he is "unlawfully held in custody or other restraint" within the meaning of that section. A motion to dismiss tests the legal sufficiency of the petition. *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507, 516 (Iowa 2014) (affirming ruling granting motion to dismiss). "For purposes of reviewing a ruling on a motion to dismiss, we accept as true the petition's well-pleaded factual allegations, *but not its legal conclusions*." *Id.* at 507 (emphasis added). "We will affirm a district court ruling that granted a motion to dismiss when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted." *Id.* That is what we have here.

Belk has no constitutional right to release on parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex,* 442 U.S. 1, 7, 99 S. Ct. 2100, 2104 (1979); *State v. Cronkhite*, 613 N.W.2d 664, 667–68 (Iowa 2000) ("There is no constitutional or inherent right to be conditionally released from prison prior to the expiration of a valid sentence."); *State v. Wright,*

309 N.W.2d 891, 894 (Iowa 1981) (holding the defendant does not "have a constitutional right to parole"); *State v. Cole*, 168 N.W.2d 37, 39–40 (Iowa 1969) (holding the granting of parole "is a matter of grace, favor, or forbearance" and "[i]t is not a matter of right"). The power to grant parole belongs to the executive branch—it is not a power the judiciary wields. *See Wright*, 309 N.W.2d at 894. Thus, "parole decisions are legitimately within the discretion of the executive branch." *Doe v. State*, 688 N.W.2d 265, 271 (Iowa 2004) (unanimously affirming order granting motion to dismiss postconviction action challenging the IDOC's retroactive screening policy for sexually violent predators).

Because Iowa has enacted a parole system, inmates do have "a liberty interest to which the procedural protections of the Due Process Clause attach." *Cronkhite*, 613 N.W.2d at 668.[5] But Belk alleges no

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[5]The majority concludes without analysis that Iowa's parole system "resembles" the Nebraska and Montana parole systems that the United States Supreme Court indicated support a liberty interest. The majority fails to even cite the Iowa parole statute, much less identify the statutory provisions giving Belk a potential liberty interest in earlier access to the SOTP for parole eligibility. In my view, the governing Iowa statute grants the parole board discretion to require completion of SOTP. *See* Iowa Code § 906.4(1) ("A parole or work release shall be ordered only for the best interest of society and the offender, not as an award of clemency. The board shall release on parole or work release any person whom it has the power to so release, when *in its opinion* there is reasonable probability that the person can be released without detriment to the community or to the person. A person's release is not a detriment to the community or the person if the person is able and willing to fulfill the obligations of a law-abiding citizen, *in the board's determination*." (Emphasis added.)). The relevant administrative rule confirms this discretion. Iowa Admin. Code r. 205—8.10 ("The board may consider the following factors and others deemed relevant to the parole and work release decisions . . . .). Whether a liberty interest is created depends largely on the degree of discretion granted the parole board. *See* 1 Neil P. Cohen, *Law of Probation & Parole* § 6:6, at 6-8 to 6-10 (2d ed. 1999).

> Most states lodge greater discretion in their parole boards than did Nebraska. . . . Because much of the statutory language is so obviously and intentionally discretionary, most of the post-*Greenholtz* judicial decisions reject a prisoner's claim of a liberty interest in the granting of parole.
>
> Some parole statutes contain a mixture of discretionary and mandatory language and require detailed analysis to determine whether they create a liberty interest.

shortcomings in procedural due process. Rather, he claims the IDOC policies to delay SOTP for male inmates until close to their release while allowing earlier SOTP for female inmates violate his right to *equal protection* of the law. We analyze his equal protection claim under the rational-basis test. *See id.* Belk's claim is dead on arrival.

The IDOC has "broad discretion" in administering the SOTP. *State v. Iowa Dist. Court*, 888 N.W.2d 655, 663 (Iowa 2016) (quoting *Dykstra v. Iowa Dist. Court*, 783 N.W.2d 473, 479 (Iowa 2010)). "[C]ourts are obliged to grant prison officials a wide berth in the execution of policies and practices . . . ." *Id.* (quoting *Edwards*, 825 N.W.2d at 14). Neither Belk nor my colleagues cite any decision holding inmates have a constitutional right to accelerate their entry into a particular educational class or treatment program while in prison, even if it is required for their parole eligibility. Other courts have expressly rejected such claims. *Conkleton v. Raemisch*, 603 F. App'x 713, 716 (10th Cir. 2015) ("Plaintiff cannot succeed on his due process claim. Because Colorado's parole scheme for sex offenders is discretionary, with the parole board retaining its discretion to grant or deny parole regardless of whether the treatment criteria have been met, Plaintiff does not have a constitutionally protected liberty interest in being granted parole or in receiving a favorable parole certification or recommendation."); *Morgan v. Bartruff*, 545 F. App'x 592, 592 (8th Cir. 2013) (per curiam) (holding Iowa inmate failed to state an equal protection claim for "lack of access to sex-offender treatment and current inability to be heard and considered for parole

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Id. at 6-11 (footnote omitted). In *Cronkhite*, we unanimously rejected an inmate's constitutional challenges to earned-time statutes that delayed his parole eligibility based on the classification of his crime. 613 N.W.2d at 667–69. I reach the same conclusion here—Belk has no constitutional right to accelerate his access to the SOTP. Our court should not create an entirely new constitutional claim for parole eligibility without defining its parameters.

eligibility"); *Sherratt v. Utah Dep't of Corr.*, 545 F. App'x 744, 748–49 (10th Cir. 2013) ("Sherratt also claims that his inability to participate in SOTP unconstitutionally lengthened the term of his prison sentence. Sherratt's allegations are insufficient to state a claim for several reasons. . . . [C]ompletion of SOTP does not necessarily result in an earlier parole date. Finally, any purported interference with . . . Sherratt's parole is insufficient to state a claim under Section 1983 because there is no constitutional right to be released before the expiration of a valid sentence." (Citation omitted.)); *Griffin v. Mahoney*, 243 F. App'x 221, 222 (9th Cir. 2007) ("Sexual offenders serving criminal sentences do not have a constitutional right to rehabilitative treatment. Nor does the delay Griffin has experienced in being admitted to the program constitute an 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life,' making it insufficient to establish a liberty interest." (Citation omitted.) (quoting *Sandin v. Conner,* 515 U.S. 472, 484, 115 S. Ct. 2293, 2300 (1995))); *Wishon v. Gammon*, 978 F.2d 446, 449–50 (8th Cir. 1992) (rejecting equal protection claim alleging denial of educational and vocational opportunities in prison); *Stewart v. Davies*, 954 F.2d 515, 516 (8th Cir. 1992) (holding inmate "had no due process right or liberty interest in participation in rehabilitative programs" necessary for parole eligibility); *Sullivan v. S.C. Dep't of Corr.*, 586 S.E.2d 124, 127 (S.C. 2003) (finding the state's denial of an inmate's request for immediate placement in SOTP was not unconstitutional because South Carolina's constitution "does not mandate any particular timetable for the furnishing of any rehabilitative services"). Whether Belk alleges a viable equal protection claim is a question of law properly decided on a motion to dismiss.

The district court dismissed Belk's action because it concluded (correctly, in my view) that Belk's claims could not be brought under chapter 822. The district court did not reach the legal question whether the IDOC's delay in the SOTP presented an actionable constitutional claim. The State argued in district court that Belk's claim failed as a matter of law and argues that ground on appeal as an alternative basis to affirm the dismissal. "We will consider an alternative ground raised in the district court and urged on appeal even though the district court [did] not . . . rule on the alternative ground." *Hawkeye Foodserv. Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 610 (Iowa 2012). I would affirm the dismissal on this ground.

The IDOC argues it has a rational basis for providing the SOTP for women early in their sentence while offering the SOTP for men closer to their release dates. The IDOC explains that women sex offenders are few in number, and many were themselves victims of sexual abuse. The female inmates benefit from early sex offender treatment in a different form and location than male sex offenders. Male sex offenders are far more numerous and are less likely to reoffend upon release into the public when the sex offender treatment is fresh in mind. It therefore makes sense to require the SOTP for male sex offenders closer to their release dates. Belk alleges no valid ground for second-guessing the IDOC policy as to the timing of an inmate's entry into the SOTP.

Belk's end game—the relief he seeks—is for the court to issue an injunction requiring Iowa prison officials to offer the SOTP for male offenders earlier. It is not the judiciary's role to control the timing of prison rehabilitation programs. That is for the executive branch. It is worth repeating here Justice Scalia's warning against the use of structural injunctions in prison reform litigation:

> Structural injunctions . . . turn[] judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. . . .
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> The drawbacks of structural injunctions have been described at great length elsewhere. This case illustrates one of their most pernicious aspects: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. The factfinding judges traditionally engage in involves the determination of past or present facts based (except for a limited set of materials of which courts may take "judicial notice") exclusively upon a closed trial record. That is one reason why a district judge's factual findings are entitled to plain-error review: because having viewed the trial first hand he is in a better position to evaluate the evidence than a judge reviewing a cold record. In a very limited category of cases, judges have also traditionally been called upon to make some predictive judgments: which custody will best serve the interests of the child, for example, or whether a particular one-shot injunction will remedy the plaintiff's grievance. When a judge manages a structural injunction, however, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.
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> It is important to recognize that the dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of institutional-reform litigation. When a district court issues an injunction, it must make a factual assessment of the anticipated consequences of the injunction. And when the injunction undertakes to restructure a social institution, assessing the factual consequences of the injunction is necessarily the sort of predictive judgment that our system of government allocates to other government officials.
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> But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge *incompetent* policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions.

Brown v. Plata, 563 U.S. 493, 555–58, 131 S. Ct. 1910, 1953–55 (2011) (Scalia, J., dissenting) (citations omitted). We should heed Justice Scalia's warning.

While my colleagues in the majority expressly stop short of deciding the merits of Belk's claim, they reverse the district court's dismissal order by erroneously concluding Belk alleges a claim upon which relief could be granted, albeit under section 822.2(1)(*e*) instead of section 822.2(1)(*a*). I cannot join an opinion that breathes life into Belk's moribund legal theory. The saving grace is that on remand, the district court can reject Belk's equal protection claim on the merits through factual findings on the evidentiary record already developed in the bench trial.

Meanwhile, the damage has been done to our precedent. By implicitly blessing Belk's novel and unsupported legal theory and allowing Belk to proceed, the majority opens the door to unintended consequences. The district court's prescient warning rings true:

> [b]ootstrapping claims such as those raised by Belk into claims pursuable under [chapter 822] could greatly expand the types of claims pursued through post-conviction relief. . . . Numerous IDOC policies, practices and decisions, including those related to resource allocation, arguably can be claimed to impact the length of an inmate's stay in prison.

Internal programming decisions made by the IDOC based on the funding allocated by the legislature can now be challenged by inmates in postconviction actions with no discernable limiting principle. District courts should gird for fresh lawsuits under any number of scenarios, including under this theory predicted by the district court's question:

> [I]f Belk's claims are appropriately pursued under [chapter 822], could an inmate with mental illness pursue similar claims, arguing that IDOC's policies for providing mental health treatment to inmates with mental illnesses are

> unconstitutional and have lengthened the amount of time he or she must serve[?]

The majority essentially answers yes to that question—such mental health claims will survive a motion to dismiss and likely require an evidentiary hearing or trial to determine whether the court will order the IDOC to change its treatment or rehabilitation programs. Because the majority is wrong about our court's role, I respectfully dissent.

Zager, J., joins this dissent.