IN THE COURT OF APPEALS OF IOWA

No. 1-773 / 11-0691
Filed December 7, 2011

THOMAS W. GEORGE, JOHN P. ROEHRICK, and CARLTON G. SALMONS,
Plaintiffs-Appellants,

vs.

MATT SCHULTZ, in his Official Capacity as State Commissioner of Elections,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Plaintiffs appeal from the district court's dismissal of their declaratory judgment action for lack of standing. **AFFIRMED.**

Thomas W. George, John P. Roehrick, and Carlton G. Salmons of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellants.

Thomas J. Miller, Attorney General, Jeffrey S. Thompson, Deputy Attorney General, and Meghan Gavin, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Plaintiffs, three Iowa attorneys, appeal from the district court's dismissal of their declaratory judgment action for lack of standing. They contend the court erred in not applying the "great public importance" exception to standing discussed in *Godfrey v. State*, 752 N.W.2d 413, 425 (Iowa 2008), to their constitutional challenge to the form of the judicial retention ballot. We affirm.

Background Facts and Proceedings. On election day, November 2, 2010, three Iowa Supreme Court justices were not retained in office. The ballot for the judicial retention election was on the same paper ballot as other elected offices and issues. On December 13, 2010, plaintiffs filed a petition for declaratory judgment and application for injunction in Polk County district court, seeking (1) a declaration the ballot used in the judicial election was illegal and (2) an injunction prohibiting the justices from leaving office until the constitutional question regarding the ballot could be resolved. The petition named as defendants then Iowa Secretary of State Michael Mauro and the three justices: Marsha Ternus, Michael Streit, and David Baker.

The State moved to dismiss the petition and resisted the application for an injunction, noting the three justices opposed the injunction application and would leave office on December 31. Plaintiffs withdrew their application for an injunction.

In February of 2011 the plaintiffs filed a supplemental and substituted petition for declaratory judgment, substituting Matt Schultz, who was elected to replace Michael Mauro, as defendant. They alleged the optical scan ballots that

combine candidate elections and other issues and measures with judicial retention matters are illegal and void under Article V, Section 17 of the Iowa Constitution, which provides in pertinent part:

> They shall at such judicial election stand for retention in office on a separate ballot which shall submit the question of whether such judge shall be retained in office for the tenure prescribed for such office and when such tenure is a term of years, on their request, they shall, at the judicial election next before the end of each term, stand again for retention on such ballot.

The plaintiffs alleged they were injured in fact by having cast void and illegal ballots in the November 2, 2010 election and they would be injured in fact by casting judicial retention ballots in future elections. They sought a declaratory judgment that use of such ballots is illegal and void and requiring a separate ballot for judicial elections in the future.

The State again moved to dismiss, contending none of the grounds nor the alleged injury in fact was sufficient to confer standing on the plaintiffs. The plaintiffs resisted. Following a contested hearing, the district court granted the State's motion to dismiss.

The court determined the plaintiffs did not "enjoy standing to pursue [the] litigation" because they had "not established either a personal or legal interest" in the litigation "or the required injury in fact." Considering the plaintiffs' argument for a "great public importance" exception to standing, the court concluded the issue raised "'is not important enough to require judicial intervention into the internal affairs of . . . government.'" *Godfrey*, 752 N.W.2d at 428.

Scope of Review. A district court's decision to dismiss a case based on a lack of standing is reviewed for errors at law. *Id.* at 417.

Merits. On appeal, the plaintiffs' objection is to the second portion of the court's order, its determination the great public importance exception to standing was not warranted in this case.

In *Godfrey* our supreme court discussed the possibility of an exception to the doctrine of standing in Iowa "to resolve certain questions of great public importance and interest in our system of government." *Id.* at 425. Plaintiffs here contend the constitutional issue they seek to raise in district court satisfies the approach discussed in *Godfrey*, that the standing requirement should be waived when "the issue is of utmost importance and the constitutional protections are most needed." *Id.* at 427.

We begin our analysis by noting, although our supreme court has recognized the possibility of a "great public importance" exception to standing in Iowa, it has never found an issue of sufficient public import to apply the exception. *See, e.g.*, *id.* at 426-28 (concluding the legislature's violation of the constitutional requirement that any legislation "embrace but one subject, and matters properly connected therewith" was not, "in the broad scheme of constitutional violations," important enough to support waiver of standing); *Alons v. Dist. Ct.*, 698 N.W.2d 858, 864-65 (Iowa 2005) (discussing the requirements for a "public interest" exception, but not applying it).

Plaintiffs contend the constitutional issue is of "utmost importance." They argue the words of the constitution are mandatory, but the constitution does not protect itself, so they should be allowed to. Plaintiff assert:

> This is to say that when a claim is presented showing clearly the text of the Constitution defied by specific offending statutes,

> coupled with an administrative insistence that the inconsistent statutes will be obeyed and not the imperative commands of the Constitution itself, *Godfrey* standing must exist for someone to make a challenge.

Yet they did not challenge the constitutionality of the statutes pertaining to the ballots,[1] and did not contest the election as provided in Iowa Code chapter 57, but sought a declaration, in their supplemental and substituted petition, that the ballots to be used in future judicial elections would be illegal and void, thus invalidating the retention election.

The district court dismissed their suit because they "failed to specify the nature of the constitutional harm that would justify this court's waiver of traditional standing, beyond the fact that the legislation in question . . . is in violation of the 'separate ballot' language contained within the Iowa Constitution." Plaintiffs respond that "it is harm to the Constitution itself, . . . that is the *sine qua non* of standing under *Godfrey.*" The majority in *Godfrey* saw the absence of any allegation implicating "fraud, surprise, personal and private gain, or other such evils" as diminishing the need to intervene in the legislature's acts. "While we strive to protect people from all constitutional violations, we do not respond to all violations the same, or even provide a remedy for every violation." *Godfrey*, 752 N.W.2d at 428. Plaintiffs instead urge us to follow the reasoning of the dissent, that

> the proper circumstances to apply the doctrine occur in the exceptional case where a citizen claims a branch of government

[1] Iowa Code section 46.21 (2009) provides for the names of the judges to "be placed on one ballot." Section 46.22 allows "either a separate ballot or a distinct heading" on an optical scan ballot "to distinguish the judicial ballot." Section 49.37 sets forth the arrangement of the ballot, with judges arranged in a group "separated by a distinct line" on the ballot.

> violated a provision of the Iowa Constitution that presents a clear threat to the essential nature of state government as guaranteed by the constitution.

Id. at 429 (Wiggins and Hecht, JJ., dissenting). We do not believe printing a judicial election ballot on the same piece of paper as the general election ballot is that exceptional case that "presents a clear threat to the essential nature of state government." It is not a question of the "utmost importance" requiring us to apply, for the first time, an exception to standing.

Plaintiffs draw further on the language of *Godfrey* to argue the circumstances of this case are where "constitutional protections are most needed." *Id.* at 427. They present a litany of possibilities they assert will follow from the current system of judicial retention election ballots not being separate ballots: judges and justices thus retained could have their qualifications called into question, judicial positions could be left vacant when the majority vote of the people is rendered nugatory, the outcome of close votes on appeal could be affected, convicted criminals could challenge the actions of a district court judge, any court action by a person not properly authorized to be a judge would be void, and more. We are not persuaded. Plaintiffs have not convinced us a decision not to apply the exception to standing in their case would result in a "constitutional crisis." Our supreme court stated it well:

> In a broad sense, standing is deeply rooted in the separation-of-powers doctrine and the concept that the branch of government with the ultimate responsibility to decide the constitutionality of the actions of the other two branches of government should only exercise that power sparingly and in a manner that does not unnecessarily interfere with the policy and executory functions of the two other properly elected branches of government. While this policy of standing has no specific constitutional basis in Iowa, as it does in federal law, it is compatible with the overall constitutional

> framework in this state and properly reflects our role in relationship to the other two coequal branches of government. This ultimate power to decide disputes between the other branches of government and to determine the constitutionality of the acts of the other branches of government does not exist as a form of judicial superiority, but is a delicate and essential judicial responsibility found at the heart of our superior form of government. We have the greatest respect for the other two branches of government and exercise our power with the greatest of caution.

Id. at 425.

We conclude the district court did not err in ruling the plaintiffs failed to present a case of sufficient public importance to justify applying an exception to standing. Others, such as judges or justices directly affected by judicial elections are better situated to bring a challenge to the judicial elections. *See id.* (noting standing exists to ensure (1) litigants are true adversaries, (2) the people most concerned with an issue become the litigants, and (3) "a real, concrete case exists to enable the court to feel, sense, and properly weigh the actual consequences of its decision"). The circumstances before us are not those where the constitutional protections are most needed.

AFFIRMED.

Vaitheswaran, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I respectfully dissent.

The simple question here is whether three Iowa voters have the right to challenge a provision that may ultimately result in their votes in an Iowa judicial retention election being found to be illegal and/or not counted. The district court found the three do not because they do not enjoy standing to pursue litigation on the issue first because they have "not established either a personal or legal interest" in the litigation "or the required injury of fact," and second because the issue raised "is not important enough to require judicial intervention into the internal affairs of government." The State Commissioner of Election urges affirmance, contending the challenge does not warrant the public importance exception to standing and the majority has complied.

I cannot accept the conclusion of the majority that an individual does not have a right to challenge the state's alleged failure to construct a ballot in a manner so as to insure the ballot meets all constitutional dictates and the voter can be assured no constitutional violation will preclude his or her vote from being counted. The right to vote and to have one's vote counted is of a personal and legal interest to any citizen entitled to cast a ballot, *see Gray v. Saunders*, 372 U.S. 368, 375, 83 S. Ct. 801, 805, 9 L. Ed. 2d 821, 827 (1963), and the fact many others have the same personal right does not make it any less of a specific and personal right to the person casting the ballot.

Nor can I accept that an issue that could well result in having future judicial retention ballots being declared void or illegal in this state is not important enough to allow judicial intervention in the internal affairs of government.

I believe the question whether judicial retentions ballots are illegal and void under Article V, Section 17 of the Iowa Constitution is of major importance to this state. The issue whether the constitutional provision that provides judicial elections be on a separate ballot precludes combining it on a ballot with candidate election and other issues and measures needs to be addressed, and it is in the state's interest to do so. A reasonable challenge has been advanced that needs to be resolved. About a third of all Iowa judges are on retention ballots every two years. The question, if not resolved, may arise again and could find judicial elections in limbo.

I would find the three plaintiffs had standing and reverse the holding they did not. I would remand to the district court to address the issue. It is important the issue be decided so it does not come to the forefront again in judicial elections in the future. It is in the interest of each individual voter and the state that the issue be resolved. These three eligible voters should have the right to have their challenge decided.