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CLERK DISTRICT COURT
POLK COUNTY IOWA

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

THOMAS W. GEORGE, JOHN P. ROEHRICK and CARLTON G. SALMONS, **Plaintiffs,** **vs.** **MAT SCHULTZ, in his official capacity as State Commissioner of Elections,** **Defendant.**	**CASE NO. EQCE 67313** **ORDER**

A contested hearing on the defendant's motion to dismiss was held before the undersigned on April 8, 2011 as previously scheduled. Upon consideration of the arguments made at the hearing, and having reviewed the court file and being otherwise duly advised in the premises, the court rules as follows:

This is an action for declaratory relief based on the purported unconstitutionality of the ballots which are anticipated to be used in future judicial retention elections throughout the state of Iowa. Specifically, the plaintiffs argue that the statutes pertaining to judicial retention ballots (Iowa Code §§46.21, 46.22, 49.30 and 49.37(1)(c)) run afoul of the requirement contained within the Iowa Constitution located at Article V, §17 that judicial officers stand for retention "on a separate ballot." The sole basis for the defendant's motion to dismiss is that the plaintiffs do not enjoy the necessary standing to maintain the action.

The standards when considering a motion to dismiss are well settled. The sufficiency of a claim in the face of a motion to dismiss is measured by the allegations pled therein, all of which are deemed to be true for purposes of the motion. O'Hara v.

State, 642 N.W.2d 303, 305 (Iowa 2002). While a motion to dismiss admits the well-pleaded facts in a petition, the same deference is not extended to conclusions contained therein. Kingsway Cathedral v. Iowa Dep't of Transp., 711 N.W.2d 6, 8 (Iowa 2006). Where the facts pertinent to the determinative issue in a motion to dismiss are disputed, the case usually cannot be resolved on such a motion. Pennsylvania Life Ins. Co. v. Simoni, 641 N.W.2d 807, 810 (Iowa 2002). A motion to dismiss should only be granted if there is no state of facts conceivable under which a plaintiff might show a right of recovery. Kingsway, 711 N.W.2d at 7.

Whether the court may consider matter outside the pleadings depends on the focus of the motion. When the motion pertains to the adequacy of the petition to state a claim for relief, facts outside the pleadings are not to be considered. Carroll v. Martir, 610 N.W.2d 850, 856 (Iowa 2000). Such a motion should only be granted when there exists no conceivable set of facts entitling the non-moving party to relief. Kingsway, 711 N.W.2d at 7. "Under notice pleading, nearly every case will survive a motion to dismiss." Id. (citation omitted).

Facts outside the pleadings may be considered when they arose after the petition was filed, they are not disputed by the parties, and the issues in the motion to dismiss do not concern the adequacy of the petition to state a claim for relief. Wilson v. Ribbens, 678 N.W.2d 417, 418 (Iowa 2004). Affidavits and other evidentiary showings may be used in support of and in resistance to motions to dismiss based on lack of standing. Citizens v. City of Shenandoah, 686 N.W.2d 470, 473 (Iowa 2004). An evidentiary hearing is not required when the motion is based on these grounds, however. Id. An

evidentiary hearing has not been requested, so the court will examine the motion based on the allegations of the petition and the exhibits attached thereto.

The issue of standing pertains to whether "the party asserting an issue is not properly situated to seek an adjudication" from the courts. Godfrey v. State, 752 N.W.2d 413, 417 (Iowa 2008). It is related to the doctrine that prohibits advisory opinions by the court, in that both [require] the court to dispose of only those issues that affect the rights of the parties present." Alons v. Iowa Dist. Court for Woodbury County, 698 N.W.2d 858, 864 (Iowa 2005) (citation omitted). Historically, the elements that a plaintiff must establish to prove standing are that they 1) have a specific personal or legal interest in the litigation; and 2) be injuriously affected. Godfrey, 752 N.W.2d at 418 (citations omitted); see also Rieff v. Evans, 630 N.W.2d 278, 284 (Iowa 2001) (plaintiff has burden to prove standing). These two elements are separate requirements, and both must be established in order for a litigant to have proper standing. Godfrey, 752 N.W.2d at 418; Alons, 698 N.W.2d at 864.

The requirement of a specific personal or legal interest looks to whether the plaintiffs "have a special interest in the challenged action, 'as distinguished from a general interest.'" Godfrey, 752 N.W.2d at 419 (quoting City of Des Moines v. PERB, 275 N.W.2d 753, 759 (Iowa 1979)). The second requirement, that of "injury in fact," is also tied to differentiating the plaintiffs' claimed harm from that which may have been suffered by the public in general. Alons, 698 N.W.2d at 870. In other words, the "injury in fact" requirement distinguishes "a person with a direct stake in the outcome of a litigation-even though small-from a person with a mere interest in the problem." Godfrey, 752 N.W.2d at 419 (quoting United States v. Students Challenging Regulatory

Agency Proceedings, 412 U.S. 669, 689 n.14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254, 270 n. 14 (1973) (litigant must "show some 'specific and perceptible harm' from the challenged action, distinguished from those citizens who are outside the subject of the action but claim to be affected"). Such an injury must be both concrete and particularized, and actual or imminent, not conjectural or hypothetical. Alons, 698 N.W.2d at 867-68 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 1112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364 (1992)).

Not only are these two components of standing separate from each other, they stand apart from a discussion of the potential merits of the claim. "In short, the focus is on the party, not on the claim….Even if the claim could be meritorious, the court will not hear the claim if the party bringing it lacks standing." Id. at 864 (citations omitted). Standing does not depend upon the legal merit of the litigants' claims, "but rather whether, if the wrong alleged produces a legally cognizable injury, they are among those who have sustained it." Citizens, 686 N.W.2d at 475 (quoted in Alons, 698 N.W.2d at 864)).

The plaintiffs' arguments regarding their entitlement to standing under the traditional approach outlined above can best be described as difficult to pin down. As far as the court can determine from its analysis of the plaintiff's brief and oral arguments at hearing, the plaintiffs contend that they each have an interest as voters in being able to cast their votes in judicial retention elections on ballots that pass constitutional muster. They further urge that they have been sufficiently injured by not being allowed to vote using a separate ballot as contemplated by the cited provisions of the Iowa Constitution:

> The Plaintiffs have the right, as made clear in Article V, Section 17, to vote in judicial elections by separate ballot,

> and that right was denied by the Defendant's predecessor and will be denied by the current Defendant.
>
> ….
>
> In this case, the three Plaintiffs are not merely concerned, as the voters were in Lance [v. Coffman, 549 U.S. 437, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007)] that the law was not followed. The three Plaintiffs here are concerned with an act, or series of acts, planned by Defendant Schultz, that will prevent the Plaintiffs from casting their votes to retain or not to retain judges by separate ballot.

Brief in Support of Plaintiffs' Resistance to Defendant's Motion to Dismiss, p. 10-11; see also Plaintiffs' Resistance to Defendant's Motion to Dismiss, ¶3.

By urging that they have standing under the facts and circumstances of this case in their capacity as voters in past and upcoming judicial retention elections, the plaintiffs fall far short of what is required. In order for a litigant to obtain standing based on their status as voters, there must be some indication that their constitutional right to cast a vote has been arbitrarily impaired by state action so as to result in "dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or a stuffing of the ballot box." Baker v. Carr, 369 U.S. 186, 208, 82 S.Ct. 691, 705, 7 L.Ed.2d 663 (1962); see also Miller v. Moore, 169 F.3d 1119, 1123 (8th Cir. 1999) (voter has standing to challenge state law governing elections when that law "would restrict his ability to vote for the candidate of his choice or dilute the effect of his vote if his chosen candidate were not fairly presented to the voting public"). Iowa law would also require some injury or harm to flow from the impairment of the value of a given plaintiff's vote; if the ability of that vote to be cast or counted has not been affected by the statute they challenge, standing does not arise. Luse v. Wray, 254 N.W.2d 324, 328-29 (Iowa 1977).

Boiled down to its essence, the plaintiffs' concerns surrounding the manner in which judicial retention elections are handled in the state of Iowa are that the provisions of the Iowa Constitution are not being followed. This exact argument was rejected by the United States Supreme Court in Lance:

> The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing. See, e.g., Baker v. Carr, 369 U.S. 186, 207-208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Because plaintiffs assert no particularized stake in the litigation, we hold that they lack standing to bring their Elections Clause claim.

549 U.S. at 442, 127 S.Ct. at 1198; see also Fed. Election Comm'n v. Akins, 524 U.S. 11, 24, 118 S.Ct. 1777, 1786, 141 L.Ed.2d 10 (1998) ("injury to the interest in seeing that the law is obeyed" is too abstract and indefinite to provide for standing, absent a concrete injury).

The plaintiffs have not established either a personal or legal interest in this litigation or the required injury in fact. As a result, they do not enjoy standing to pursue this litigation in the traditional sense. As a fallback argument, they argue that the traditional requirements of standing be waived in order to "resolve certain questions of great public importance and interest in our system of government." Godfrey, 752 N.W.2d at 425. This exception was recognized by the court in Godfrey, although not found to be applicable under the facts of that dispute. Id. at 428. For the reasons outlined in Godfrey, this court concludes that the benefit of the exception should not be extended to the plaintiffs herein.

The court in Godfrey made it clear that the doctrine of standing "not only serves to limit which persons may bring a lawsuit, but it has developed into a larger cultural doctrine, concerned with the 'role of the courts in a democratic society.'" Id. at 417-18 (citations omitted). As applied to the "public importance" exception to traditional standing, the court expanded upon that theme to explain the limited utility of the exception:

> 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 (citation omitted). In order to properly justify the court's intervention into the validity of the actions of either the executive or legislative branches, the challenge of a litigant without traditional standing should at a minimum "implicate[] fraud, surprise, personal and private gain, or other such evils inconsistent with the democratic…process." Id. at 427. Otherwise, the court risks assuming an unwanted "position of authority" over the other two branches of government. Id. (quoting Lujan v. Defenders of Wildlife, 504

U.S. 555, 574, 112 S.Ct. 2130, 2143, 119 L.Ed.2d 351, 373 (1992)). Ultimately, the court construed the "public importance" exception to not only look to whether the issues posed were "of utmost importance," but also whether "the constitutional protections are most needed." Id.

The only challenge to the legislative process posed by the plaintiff in Godfrey was "to uphold the internal workings of the legislative process that promotes and encourages legislators to understand and debate the merits of each separate subject." Id. This was found to be inadequate to justify waiving traditional standing, as the statute in question was the result of cooperation between the legislative and executive branches to resolve issues resulting from an earlier decision of the court involving prior legislation. Id. at 416-17, 427-28. The court ultimately determined that any claimed violation of the single-subject requirement contained within the Iowa Constitution, standing alone, was inadequate to allow for waiver of traditional standing. Id. at 428 ("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").

The plaintiffs herein have failed to specify the nature of the claimed constitutional harm that would justify this court's waiver of traditional standing, beyond the fact that the legislation in question and the practices of the defendant as this state's commissioner of elections is in violation of the "separate ballot" language contained within the Iowa Constitution. This circular argument is inadequate to meet the stringent standard established in Godfrey when the courts will address an issue of claimed great importance in the absence of traditional standing. At a certain level, any issue that addresses the provisions of a state's founding document is of "great public importance." Godfrey

requires more, and the plaintiffs herein have not convinced this court that their position is deserving of judicial resolution. This is not a reflection on the merits of the claim (since standing is determined independent of the merits), but merely this court's conclusion that absent traditional standing, it "is not important enough to require judicial intervention into the internal affairs of …government." Id.

The court will not waive the requirements for standing under the circumstances presented. As a result, this action must be dismissed.

IT IS THEREFORE ORDERED that the defendant's motion to dismiss is granted. This action is dismissed at the cost of the plaintiffs.

Dated this 19th day of April, 2011.

Michael D. Huppert
Judge, Fifth Judicial District of Iowa

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