

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1427

JOHNSON COUNTY LAW NO. CVCV07149

HEATHER YOUNG, DEL HOLLAND, AND BLAKE HENDRICKSON,
Plaintiffs/Appellants/Cross-Appellees

VS.

THE IOWA CITY COMMUNITY SCHOOL DISTRICT; CHRIS LYNCH
INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF THE
BOARD OF DIRECTORS AND DIRECTOR; LATASHA DELOACH
INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF THE
IOWA CITY COMMUNITY SCHOOL DISTRICT; BRIAN KIRSCHLING
INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF THE
IOWA CITY SCHOOL DISTRICT; AND PAUL ROESLER
INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF THE
IOWA CITY COMMUNITY SCHOOL DISTRICT;
Defendants/Appellees/Cross-Appellants

Appeal from the Iowa District Court for Johnson County
The Honorable Sean McPartland, Judge

APPELLANTS' FINAL REPLY BRIEF/CROSS-APPELLEES' FINAL
BRIEF AND
REQUEST FOR ORAL ARGUMENT

Gregg Geerdes
Dey Building
105 Iowa Avenue, Suite 234
Iowa City, Iowa 52240
(319) 341-3304 Telephone
(319) 341-3306 Fax
geerdeslaw@peoplepc.com
ATTORNEY FOR APPELLANTS

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 24th day of January, 2019, I electronically filed this pleading with the Clerk of Court for the Supreme Court of Iowa. I certify that all participants in the case are registered electronic filing users and that service will be accomplished by this electronic filing.

/S/ GREGG GEERDES
GREGG GEERDES
Dey Building
105 Iowa Avenue, Suite 234
Iowa City, Iowa 52240
(319) 341-3304 Telephone
(319) 341-3306 Fax
geerdeslaw@peoplepc.com
ATTORNEY FOR APPELLANTS

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Berent v. Iowa City, 738 NW2d 193 (Iowa 2007).

Bowers v. Polk County Board of Supervisors, 638 NW2d 682 (Iowa 2002).

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APPELLANT’S REPLY BRIEF

ARGUMENT

I. WHETHER PLAINTIFFS’ CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED THEREBY MAKING DEFENDANTS LIABLE UNDER 42 USC §1983 AND §1985.

A. Standard of Review.

The parties agree that the standard of review for this constitutional issue is de novo.

B. Error Preservation.

Defendants Iowa City Community School District and the individual Defendants (collectively “The School District”) contend that error was not preserved on the equal protection and substantive due process issues. However, both of these claims were raised below, resisted by The School District and decided by the trial court. Accordingly error has been preserved. (Plaintiffs Young, Holland and Hendrickson’s (collectively “Referendum Petitioners”) February 21, 2017 Response Memorandum Par. B5, App. P. 875; Amended Petition Par. 6.32; App. P. 279; School District’s Reply Par. 5-10, App. P. 898-903; Summary Judgment Ruling Par. 9-10; App .P. 923-927, 930).

C. Reply Argument.

1. *The Right to Vote.*

The School District contends that Referendum Petitioners' right to vote was not violated for two reasons. First it is claimed that since there was a partial election on September 12, 2017 to select school board members and to determine whether bonds should be issued that this satisfies Referendum Petitioners' right to vote on the Hoover referendum issue. Secondly, The School District contends that a referendum election, as contrasted with a general election for office-seeking candidates, is not constitutionally protected. (School District's Brief, P. 24)

The School District provides little argument and no authority for its contention that allowing voters to vote for the bond proposal and school board candidates at the September 12th election somehow excuses The School District's refusal to allow an election on the Hoover anti-demolition referendum. Therefore this argument should be deemed waived. Soo Line RR v. Iowa Department of Transportation, 521 NW2d 685, 691 (Iowa 1994). Further, Referendum Petitioners had a right to an election on their referendum issue, as The School District concedes that the referendum petition satisfied the statutory

requirements regarding number of signatures, date of filing, address of signers, and dates of signing and that no objections were filed under Code §277.5. (Response to Statement of Undisputed Facts, Par. 2, 3, 5-7; App.P. 853-854). Because of this statutory compliance the petition was “valid” and the referendum language was therefore required to be forwarded to the auditor for inclusion on the September 12th ballot. It is conceded that The School District failed to comply with this statutory requirement. (Response to Statement of Undisputed Facts, Paragraphs 7-8; App.P. 854). By this failure The School District prevented the preparation of the proper ballots and thereby obstructed the referendum election and the right to vote at the same. Therefore, The School District’s contention that no record facts exist showing that it denied an election or the right to vote is clearly wrong. (School District’s Brief, P. 27) Code §278.2; Berent v. Iowa City, 738 NW2d 193, 197-201 (Iowa 2007). Further, neither the unrelated election of new school board members nor the general obligation bond election were a substitute for the anti-demolition referendum election. Specifically, a “no” vote on the bond question would not prevent The School District from using non-bond funds to demolish Hoover and would also require a vote against all funding for school improvement projects, some of

which may well be necessary, in order to prevent bond funding for the unnecessary Hoover demolition. Therefore, the fact that a partial election was held on September 12th does not excuse the failure to hold the required referendum election on this same date.

The School District's second contention is that voting at referendum elections is not constitutionally protected. (School District Brief, page 28). This argument has been rejected by the United States Supreme Court which on multiple occasions has ruled that referendum elections are in fact more constitutionally protected than candidate elections because the need to regulate candidates, who may be unfit or corrupt, is not present in referendum questions. Citizens United Against Rent Control v. City of Berkeley, 454 US 290, 298 (1981); citing First National Bank of Boston v. Bellotti, 435 US 765, 790 (1978). For example, the Supreme Court has specifically held that a referendum proposal to deregulate trucking and which in no way involved candidates was entitled to the "zenith" of first amendment protection. Meyer v. Grant, 486 US 414, 425 (1988).

Because of the Supreme Court's ruling that pursuit of the referendum process is entitled to this highest or "zenith" level of constitutional protection all other courts which have addressed the

constitutional issue have likewise concluded that the refusal to hold a statutorily required referendum election, even those which are unrelated to candidates, is a violation of constitutional rights actionable under 42 USC §1983. Friends of Congress Square Park v. City of Portland, 91 A. 3d 601, 606-607 (Me. 2014) (refusal to include referendum question requiring preservation of a park on ballot actionable under §1983); Montana Public Interest Research Group v. Johnson; 361 F. Supp 2nd 1222, 1228 (D.Ct. Mt. 2005) (restriction on initiative actionable under §1983); Semple v. Williams, 290 F. Supp 3d 1187, 1201 (D. Colo. 2018) (referendum to create single payer health care system constitutionally protected); City of Greensboro v. Guilford County Board of Elections, 251 F3d 935, 939 (M.D. N.C. 2017) and 120 F. Supp 3d 479, 487-488 (M.D. N.C. 2015) (denying citizens the opportunity for a referendum election seeking change in form of city government actionable under §1983).

Perhaps the most articulate explanation for why referendum elections are so constitutionally protected was given by the Utah Supreme Court in the context of a ballot question proposing placing restrictions on radioactive waste:

Intervenors argue that Moore [v. Ogilvie, 394 US 814 (1969)] is distinguishable from this case because Moore “involved requirements for placing third-party candidates on the ballot” while “this case involves rules regarding direct legislation.” However, intervenors have not provided us a cogent reason why a different rule should apply to candidates on the one hand and to initiatives on the other. The only difference between the case of a petition to place a candidate on the ballot and the case of a petition to place an initiative on the ballot is that the first involves a person and the second involves an idea that possibly could become law. The voters’ suffrage right is fundamental and not to be infringed, regardless of whether the voters are voting for candidates or initiatives....(T)he distinction between whether ballot access is denied to a candidate rather than to an initiative is a distinction without a relevant difference, and therefore a different rule is not required in this case. Gallivan v. Walker, 54 P.3d 1069, 1095 (Utah, 2002)

It is telling that nowhere in The School District’s 75 page brief does it cite a single case which holds that it is constitutionally permissible to refuse to hold a statutorily required referendum or other election. This is not meant as a criticism, as the undersigned has likewise completely failed to locate any such authority. Instead, The School District continues to cite only cases in which referendum supporters did not meet statutory requirements and therefore were not entitled to an election. (School District Brief, P. 24-26). These cases are Bowers v. Polk County Board of Supervisors, 638 NW2d 682, 692 (Iowa 2002) (insufficient signatures); Kelly v. Macon-Bibb County Board of

Elections, 608 F Supp 1036, 1038 (M.D. Ga. 1985) (same); Kendall v. Balcerzak, 650 F3d 515, 523 (4th Cir. 2011) (same); Taxpayers United for Assessment Cuts v. Austin, 994 F2d 291, 296 (6th Cir. 1993) (same).

This line of cases is obviously not on point because the issue in this appeal is not whether Iowa's rigorous statutory referendum requirements have been met, as The School District concedes the same. (Response to Statement of Undisputed Facts, Par. 2, 3, 5-7; App.P. 853-854). Instead, the primary issue is whether holding a statutorily required referendum election is protected by the United States Constitution. As stated above all other courts which have ruled on this issue have determined that required referendum elections are constitutionally protected. Indeed, the Iowa Court in Bowers acknowledged this conclusion when it stated that the rights of a referendum petitioner are equal to what the legislature has given him. Bowers v. Polk County Board of Supervisors, 638 NW2d 682, 692 (Iowa 2002). In Bowers the referendum petitioner did not meet the statutory number of signatures requirement and therefore the legislature did not give him the right to an election. In contrast, however, the present Hoover Referendum Petitioners met all requirements and

therefore have been given by the legislature the constitutionally protected right to an election.

2. *Due Process Rights.*

The School District contends that there is no protected liberty interest in the right to vote and therefore this right is not protected by the due process clause. (School District's Brief p. 29) This is not correct as courts have specifically ruled that there is a liberty interest in the fundamental right to vote which is protected by substantive due process. Arnard v. Odom, 870 F.2d 304, 311(5th Cir 1989); citing Harper v. Virginia Board of Elections, 381 US 479 (1966); Anderson v. Celebreeze, 460 US 780, 787 (1983).

Further, The School District under Berent and Code §278.2 had no authority to determine the legality of the Hoover referendum petition. When it purported to do so it therefore violated the procedural due process right of Referendum Petitioners to have a qualified and neutral tribunal determine the same. Ward v. Village of Monroeville, 409 US 57, 58 (1972).

3. *First Amendment Rights of Speech and Assembly.*

a. *Freedom of Speech.*

The School District contends that Referendum Petitioners' freedom of speech has not been violated because they were allowed to distribute their petition and to communicate with citizens regarding the same. (School District's Brief, P. 38-39). But allowing partial communication is not sufficient under the constitution. Instead Referendum Petitioners had the right to decide what they wished to communicate and who they wished to communicate with. Meyer v. Grant, 486 US 414, 424-425 (1988). Referendum Petitioners chose to communicate their referendum language to the September 12th voters. By refusing to comply with its mandate under Code §278.2 to forward the admittedly valid referendum petition to the auditor so that this language could be included on the September 12th ballot The School District blocked this communication. The fact that Referendum Petitioners could communicate other messages at other times and to other persons does not excuse The School District's stifling of this speech, as communication with the actual voters at the September 12th election was what Referendum Petitioners chose to do. Indeed, this September 12th communication was the only opportunity Referendum Petitioners had to obtain the votes needed to make the political change they advocated for. Therefore by preventing the communication of the

referendum ballot language on the crucial election day The School District reduced the quantum of speech that Referendum Petitioners were able to distribute and also prevented them from reaching their target audience, the September 12th voters. Under Meyer v. Grant this deprivation is actionable under §1983.

b. *Freedom of Association.*

The School District's brief does not challenge or otherwise reply to Referendum Petitioners' argument that their constitutional right of association has been violated. This failure should be deemed a waiver of the right to do so. Soo Line RR v. Iowa Department of Transportation, 521 NW2d 685, 691 (Iowa 1994). Further, it is clear that the right of association includes the right to access the ballot once statutory ballot requirements are met. Anderson v. Celebrezze, 460 US 780, 787-788 (1983). And it is also clear that the right of association applies to and protects group effort regarding both referendum proposals and the election of candidates. Citizens United Against Rent Control v. City of Berkeley, 454 US 290, 296-297 (1981). For these reasons it should be determined that Referendum Petitioners' right of association has been violated by The School District's illegal failure to

place the Hoover anti-demolition referendum question on the September 12th ballot.

4. *Other Constitutional Issues.*

a. *Trial Court Ruling on Constitutional Issues.*

The summary judgment ruling speaks for itself regarding whether The School District violated Referendum Petitioners' constitutional rights. The trial court specifically ruled that no violation of the right to vote occurred because "...the court has ordered the proposition be placed on the ballot at the next regular election, at which time Plaintiffs will have the opportunity to vote." (Summary Judgment Ruling, P. 9; App. P. 923) The trial court also ruled that "Plaintiffs have obtained their procedural due process through this action..." (Summary Judgment Ruling p. 10; App. P. 924).

Therefore, when the trial court vindicated Referendum Petitioners' right to vote and their procedural due process right by ordering an election in 2019 it obviously determined that The School District denied these rights in 2017 when it illegally obstructed the referendum process. Otherwise, the trial court would not have provided this relief.

b. *Both Statutory and Constitutional Violations Exist.*

The School District characterizes this appeal as one which is limited to statutory interpretation and that constitutional rights are not involved. (School District Brief, P. 44). Referendum Petitioners certainly agree that multiple statutory violations occurred when The School District refused to allow the 2017 referendum election to take place. However, it is well settled that state statutes may create fundamental rights which are protected under the United States Constitution. Bush v. Gore, 531 US 98, 104 (2000) (“...the right to vote as the legislature has prescribed is fundamental...”); State v. Cronkhite, 613 NW2d 664, 668 (Iowa 2000); Bowers v. Polk County Board of Supervisors, 638 NW2d 682, 692 (2002) (“...the only right that Bowers has was what the legislature gave him...”). Indeed, as explained in the Issue I portion of Referendum Petitioners’ brief and the above Section C1 of this reply brief the failure to hold a referendum election required by state law is a deprivation of constitutional rights actionable under §1983.

c. *Conspiracy.*

The School District contends that a school board cannot commit a 42 USC §1985 conspiracy as long as it is engaged in district business. (School District Brief, P. 46) As explained in Referendum Petitioners’

initial brief, as long as the elements of a conspiracy are satisfied the fact that this conspiracy was made during a public meeting and recorded in the official minutes does not make the conspiracy not a conspiracy. Instead, it only makes this conspiracy much easier to prove. Further, if The School District contends that for some reason it is immune from a conspiracy claim it was required to raise and pursue this claimed immunity as an affirmative defense which it has failed to do.

II. WHETHER DAMAGES AND ADDITIONAL OTHER RELIEF SHOULD BE AWARDED TO PLAINTIFFS

Referendum Petitioners agree with The School District that damages should not be determined by this appellate court and that this matter should be remanded to the district court to determine the same. (School District Brief, p. 49). Further, for the reasons stated in their initial brief Referendum Petitioners believe that a punitive damages award is appropriate as the record evidence shows that The School District did not act out of negligence but instead out of a desire to advance their own political agenda.

III. WHETHER QUALIFIED IMMUNITY IS AVAILABLE TO DEFENDANTS

A. As to the Entity Defendant.

The School District provides no authority or argument that the Iowa City Community School District, as an entity, is entitled to qualified immunity. This is not surprising because only individuals and not governmental entities are entitled to qualified immunity. Owen v. City of Independence, 445 US 622, 638-639 (1980). Accordingly any claim that the Iowa City Community School District is entitled to immunity should be deemed waived. Soo Line RR v. Iowa Department of Transportation, 521 NW2d 685, 691 (Iowa 1994).

B. As to the Individual Defendants.

1. No Immunity for Ministerial Actions.

The School District concedes that the referendum petition contained sufficient signatures, showed the dates of signing and the address of signers, was timely submitted and that no Code §277.5 objections against it were filed. (Response to Statement of Undisputed Facts, Par. 2, 3, 5-7; App.P. 853-854). Under Berent, Code §278.2 and the authorities cited in Issue III Section (2)(c) of Referendum Petitioners' initial brief this made the forwarding of the referendum language to the auditor a non-discretionary ministerial duty for which there is no qualified immunity.

Regarding whether attorney opinions should provide a basis for qualified immunity, as a matter of good governance this court should not give Iowa public officials carte blanche immunity to violate constitutional rights simply by having a friendly attorney provide them with an opinion condoning their illegal conduct. Indeed, that is why this court has previously rejected granting qualified immunity based on legal advice. Blessum v. Howard County, 295 NW2d 836, 849 (Iowa 1980).

IV. WHETHER DISCOVERY SHOULD BE AVAILABLE TO PLAINTIFFS REGARDING THE TRUE NATURE OF AND MOTIVATION FOR DEFENDANTS' ATTORNEY'S WRITTEN OPINIONS.

The School District continues to contend that it is not subject to discovery regarding their attorney's opinions on the processing of the referendum petition. However, by relying on these opinions The School District is obligated to provide discovery on the same. See, Fenceroy v. Gelita USA, Inc., 908 NW2d 235, 241-247 (Iowa 2018) and cases cited in appellants' initial brief. Further, the record clearly shows that counsel personally discussed the discovery issues between themselves in an attempt to resolve their discovery dispute without court involvement. (Motion to Compel Par. 1; App.P. 293). That is all

what R. Civ. P. 1.517 requires. There is no reason to believe that further discussion as to whether privilege has been waived would make any difference as the parties are at loggerheads on this legal issue. Accordingly this court should order that the requested discovery be granted.

V. WHETHER ATTORNEY FEES SHOULD BE AWARDED.

A. Standard of Review.

It is agreed that review of this issue should be for abuse of discretion.

B. Error Preservation.

On April 26, 2018 the District Court issued its summary judgment ruling. This ruling did not address the attorney fees issue. It also specifically stated that it was not a final ruling. Instead, this ruling set a thirty day deadline for the parties to submit any remaining issues to the court and scheduled a hearing for June 15, 2018 to address the same. The ruling further stated that the case would remain open until the court issued its future ruling. (Summary Judgment Ruling, p. 17; App.P. 931). Therefore, the April 26th ruling was not a final order for appeal purposes because it clearly contemplated further action by the

trial court. Marriage of McCreary, 276 NW2d 399, 400 (Iowa 1979). The scheduling of the future June 15th hearing itself made the April 26th ruling a non-final order. In Re Lang, 313 NW2d 473, 476 (Iowa 1981).

Referendum Petitioners therefore timely raised the attorney fee issue (which was not addressed in the summary judgment ruling) in their report of remaining issues filed on May 24th and the court in its final ruling of August 2, 2018 denied this fee request. This August 2, 2018 ruling stated both in its title and contents that it was the final ruling in the case. (August 2, 2018 Final Ruling, p. 1 and last paragraph; App.P. 980, 982).

R. Civ. P. 1.904 states that there is a 15 day time limit to request an expansion of a trial court's final ruling. However, as explained above, the summary judgment ruling of April 26th was not a final ruling. Therefore this rule has no bearing on this case.

Further, under R. Civ. P. 1.443 the trial court had the authority to provide for a 30 day deadline to file a report regarding the remaining issues. Therefore, because (without objection by The School District) the court on April 26th scheduled a thirty day deadline Referendum Petitioners satisfied the same when they filed their report on May 24, 2018.

C. Reply Argument.

Because of Lefemine v. Wideman, 568 US 1 (2012), as discussed in Referendum Petitioners' initial brief Appellants believe that they are entitled to attorney fees and that further discussion on this point is unnecessary. They also continue to believe that Iowa common law should provide attorney fees when fundamental rights are intentionally and wrongfully denied.

VI. WHETHER A “NO” VOTE ON THE PROPOSED REFERENDUM QUESTION WOULD MANDATE THAT THE HOOVER BUILDING NOT BE DEMOLISHED

A. Standard of Review.

It is agreed that appellate review on this issue is for errors of law.

B. Error Preservation.

The trial court ruled in its April 26th summary judgment ruling that this issue was not ripe for determination. The Court confirmed this view in its August 2nd final order. (Summary Judgment Ruling, P. 15; App.P. 929; Final Order, P. 2; App.P. 981). Indeed, the trial court specifically rejected The School District's claim that it was entitled to summary judgment on this issue. (Summary Judgment Ruling, P. 16; App.P. 930).

Further, as stated in Issue V above, the April 26th summary judgment ruling was not a final order and the report to the court filed on May 24th was therefore timely and appropriately filed as was the notice of appeal in this matter. Accordingly error has been preserved

C. Reply Argument.

The Hoover referendum language was limited to preventing the demolition of Hoover. Referendum Petitioners therefore agree that a “no” vote at the upcoming referendum election would not prevent the conveyance of the Hoover building to another owner. However, the sale, lease or other conveyance of the Hoover site is not at issue because The School District wishes to demolish the Hoover building and keep the underlying ground for its own purposes. That is why the Hoover referendum question was limited to whether demolition should occur. However, just because The School District (assuming it followed the correct statutory procedure and was not stopped by another referendum) could sell or lease the Hoover property does not mean that The School District could ignore a “no” vote in the now-scheduled referendum election and nevertheless demolish Hoover. Instead, as explained in Referendum Petitioners’ initial brief, referendums are not

advisory opinion polls and instead are binding on the government. Although the trial court concluded that the issue of whether a “no” vote was binding was not ripe for determination Referendum Petitioners believe that this court should address this issue so that future litigation will not be needed and so the citizens of Iowa can know whether their referendum elections have actual consequences or are instead just symbolic gestures which can be ignored by their government.

Finally, as explained in Referendum Petitioners’ initial brief a decision by the voters to retain a building clearly “trumps” a contrary desire by The School District. Otherwise there would be no purpose for Code Chapter 278 which clearly was designed by the legislature to let the voters have the ultimate power to determine whether a “disposition” should occur.

CROSS-APPELLEES’ BRIEF

VII. WHETHER A SCHOOL HOUSE DEMOLITION IS A “DISPOSITION” UNDER CODE §278.1

A. Standard of Review.

It is agreed that errors at law is the appropriate standard of review for this issue.

B. Error Preservation

The School District has not preserved error on this cross-appeal issue. The School District was required to have an objection filed, have an objections committee formed, and to then timely pursue a declaratory judgment action if it disputed whether a demolition is a type of disposition or otherwise questioned the legality of the referendum and could not simply reject the valid referendum petition. Code §277.5; Berent v. Iowa City, 738 NW2d 193, 200 (Iowa 2007). Because it failed to do so The School District did not preserve error and the trial court correctly determined that it need not address this issue. (September 6, 2017 Injunction Ruling, p. 16; renewed in Summary Judgment Ruling p. 11, f.n. 1; App.P. 260, 925).

C. Cross-Appellees' Argument

The trial court concluded that a “demolition” is indeed a “disposition” for purposes of Code § 278.1. (September 6, 2017 Injunction Ruling p. 18-21; renewed in Summary Judgment Ruling P. 11 f.n. 1; App. P. 262-265; 925). Although error was not preserved on this issue this conclusion was correct for the following reasons:

1. By standard dictionary definitions “disposition” of a building includes the demolition of this building. For example, Webster’s Third New International Dictionary of the English Language states that “disposition” includes “...the power of so placing, giving, ridding oneself of, relinquishing or doing with as one pleases...” Further, “disposition” includes “...the act or the power of disposing...” and “dispose” means “...to get rid of, throw away, discard...” Certainly under these definitions “disposition” includes the demolition of a building as by demolition one would certainly “get rid of” a building.
2. The specific inclusion by the legislature of the words “schoolhouse or site” in Code § 278.1 (emphasis added) demonstrates a clear legislative intent that the voters have the power to retain not just school land but also a school building. Obviously the ability of the public and a school district to keep a school building is lost if this building is demolished just as it is lost if this building and the land under it are conveyed to another owner. In recognition of this fact the legislature wisely chose to give voters the power to preserve both school sites and school buildings. Therefore, Referendum Petitioners were authorized under Code § 278.1 to pursue a referendum to prevent the Hoover demolition.

3. Any ambiguity in an election statute is to be interpreted in favor of providing for an election. Devine v. Wonderlich, 268 NW 2d 620, 622 (Iowa 1978). This pro-election deferential standard requires that the applicable referendum statutes be interpreted as requiring an election on either a school building demolition question or a school land conveyance question.
4. The School District's own conduct demonstrates that a demolition is a disposition. Specifically, The School District wishes to demolish Hoover. It has the authority to do so under Iowa Code §297.22 which states:

297.22 Power to sell, lease, or dispose of property-tax.
1. a. The board of directors of a school district may sell, lease, or dispose of, in whole or in part, a schoolhouse, school site, or other property belonging to the district.

Both §297.22 and §278.1 use a variation of the word “dispose.”

The School District contends, quite properly, that the word “dispose” in §297.22 gives it the power to demolish Hoover. However, if the power to “dispose” under Code §297.22 includes the power to demolish, a “disposition” under §278.1 must therefore also include a demolition. In other words, since The School District contends that “dispose” in §297.22 gives it the authority to demolish Hoover it must

also concede that the word “disposition” in §278.1 gives voters the opportunity to veto this demolition through the referendum process.

5. The opinions prepared by The School District’s counsel applied technical legal definitions to Code §278.1 in order to reach a result contrary to the ordinary language of this statute. (Opinions; App.P. 467-487). However, the interpretation of statutes is to be based on general language dictionaries and not technical definitions. State v. Torbox, 739 NW2d 850, 854 (Iowa 2007). As explained above, these general definitions make it clear that a “demolition” is a “disposition.”

Therefore, the district court correctly concluded that a “demolition” is indeed a “disposition” under the applicable statutes.

VIII. WHETHER THE SCHOOL BOARD EXCEEDED ITS AUTHORITY IN DETERMINING THAT THE REFERENDUM PETITION WAS NOT AUTHORIZED BY LAW

A. Standard of Review.

Cross-Appellees agree that error at law is the appropriate standard of review for this issue.

B. Error Preservation.

Error on this cross-appeal issue has not been preserved. The School District concedes that the referendum petition met the

statutory requirements for validity. (Response to Statement of Undisputed Facts, Par. 2, 3, 5-7; App.P. 852-854). The School District was therefore required to have someone file a proper objection, to form an objection committee, and to then pursue a declaratory judgment action if it wished to challenge the legality of the referendum question. It could not simply reject the referendum petition. Code §277.5; Berent v. Iowa City, 738 NW2d 193, 200 (Iowa 2007). Because no objection was filed, no objection committee formed, and no declaratory judgment timely pursued, error was not preserved.

C. Cross-Appellees' Argument.

Assuming that error on this issue was preserved, it is clear under Berent that a governmental body which receives a valid referendum petition has a duty to forward the same to the auditor so that the referendum question can be placed on the ballot. Berent v. Iowa City, 738 NW2d 193, 197-201 (Iowa 2007). It is conceded by The School District that the statutory criteria for validity under Code §277.4 (sufficient signatures and a showing of the date of signing and addresses of the petition signers) were satisfied and that no Code §277.5 objections were filed. Therefore The School District under

Berent had no authority to on its own reject the petition as being unauthorized. (Response to Statement of Undisputed Facts, Par. 2, 3, 5-7; App.P.852-854). As Berent also makes clear, this is the consensus of other jurisdictions as well.

The School District now contends that Berent is not applicable to this case because it involved the governmental body receiving the referendum petition determining that the petition was “legally insufficient” while the present appeal involves The School District’s determination that the petition was not “authorized by law.” (School District’s Brief, pages 67-68). This contention was not raised in the district court and should not now be considered. Further, there is no meaningful difference between these two phrases. Additionally, the purpose of the Berent decision was to require a neutral court to adjudicate the legal merit of a referendum petition and to prevent a governmental body from being able to reject referendum petitions which threaten the same government body’s chosen course of action, which is exactly what happened in this case. Berent v. Iowa City, 738 NW2d 193, 200-201 (Iowa 2007).

Accordingly, The School District’s contention that it had the authority to determine that the referendum petition was not

“authorized by law” is directly contrary to Berent and the applicable statutes and should be rejected.

IX. WHETHER THERE IS A PRIVATE CAUSE OF ACTION UNDER CODE CHAPTER 278

A. Standard of Review.

Cross-Appellees agree that error at law is the appropriate standard of review for this issue.

B. Error Preservation.

Cross-Appellees agree that error has been preserved on this issue.

C. Cross-Appellees’ Argument

The School District contends that there is no private cause of action to enforce the provisions of Code §278.1. The Trial Court disagreed and concluded that such a cause of action exists. (September 6, 2017 Injunction Ruling, pages 10-11; renewed in Summary Judgment Ruling page 11 f.n. 1; App.P. 254-255, 925).

Referendum Petitioners for the reasons described below agree with the Trial Court’s determination. Further, to the extent that the present appeal involves the deprivation of constitutional rights by a governmental actor Referendum Petitioners under 42 USC §1983 and §1985 have a cause of action to vindicate their constitutional rights and

to seek damages for the same. Therefore, for §1983 and §1985 purposes it is not necessary to determine if a private cause of action exists under Code Chapter 278.

Further, under the King analysis applied by the trial court Referendum Petitioners have the same for the following reasons. First, Chapter 278 was intended to let the voters in a school district determine whether a school building should be disposed of and Referendum Petitioners clearly are a member of this class. Second, as recognized by the Trial Court the legislature intended to provide the district voters with a remedy because otherwise these voters would be without recourse if the important election right given them under Code Chapter 278 was denied. (September 6, 2017 Injunction Ruling, pages 10-11; App.P. 254-255). Third, allowing a private cause of action under Chapter 278 would be consistent with the underlying purpose of this chapter which is to insure that local residents have the final say on whether a school building should be disposed of. Finally, determining that a private cause of action exists would not intrude on any state or federal law or agency, as the determination of what buildings a school district should have, how much they should cost, how they will be paid

for, where they should be located, and what they should consist of is a purely local decision.

Indeed, as pointed out by the trial court, there is no state or administrative process for determining the same or for otherwise enforcing the voters' choice. Therefore under these factors the trial court correctly concluded that a private cause of action exists under Chapter 278. See King v. State, 818 NW2d 1, 34-36 (Iowa 2012). (September 6, 2017 Injunction Ruling, pages 10-11; renewed in Summary Judgment Ruling page 11 f.n. 1; App.P. 254-255, 925).

The School District, however, contends that no private cause of action exists because Chapter 278 in its view only provides "uniform directions to school boards." (School District Brief, page 71). The reality is that Chapter 278 provides the exact opposite of state-wide uniformity. Instead, it allows the voters of each separate district to determine what they want regarding their district's school buildings. Some district voters may choose to preserve a building, some may prefer to build new, but each has the right to vote based on their own criteria and free of any uniform requirements. Undoubtedly what the voters in one district may decide will be different than what voters in other districts may choose because each district has unique needs,

buildings and financial circumstances. It is this statutorily provided non-uniform, district by district choice that Referendum Petitioners wish to pursue in this case.

CONCLUSION AND REQUESTED RELIEF

The bottom line in this appeal is that constitutional and other rights are violated when our government obstructs a statutorily required referendum election. Accordingly Referendum Petitioners request the following:

1. That the trial court's decision be reversed on the issue of whether Referendum Petitioners have suffered a deprivation of their constitutional rights and remanded with instructions to enter summary judgment in favor of Referendum Petitioners on the question of whether they are entitled to relief under 42 USC §1983 and §1985.
2. That on remand the trial court calculate appropriate damages.
3. That this court determine that no Defendant is entitled to qualified immunity.
4. That Referendum Petitioners after remand be allowed to conduct discovery on issues related to the motivation for Defendants' counsel's opinions and that the attorney-client privileges regarding the same be deemed to have been waived.

5. That the Trial Court on remand be instructed to calculate and award Referendum Petitioners nominal, actual, presumed substantial and punitive damages under 42 USC §1983 and §1985 as well as state law damages.
6. That Referendum Petitioners be awarded 42 USC §1988 and state law attorney fees in the amount requested at the trial court level and also be awarded fees and expenses for the appellate proceedings in this matter.
7. That this court determine that a “no” vote on the referendum question proposed by the Referendum Petitioners would prohibit the demolition of the Hoover building.
8. That this court determine that a demolition of a school building is a disposition under Code Chapter 278.
9. That this court rule that The School District had no authority to reject the petition submitted by Referendum Petitioners.
10. That this court determine that Referendum Petitioners have a cause of action under 42 USC §1983 and §1985 as well as under Code Chapter 278.

REQUEST FOR ORAL ARGUMENT

Appellants request to be heard at oral argument in this matter.

Respectfully Submitted,

BY: /S/ *GREGG GEERDES*
GREGG GEERDES
Dey Building
105 Iowa Avenue, Suite 234
Iowa City, Iowa 52240
(319) 341-3304 Telephone
(319) 341-3306 Fax
geerdeslaw@peoplepc.com
ATTORNEY FOR APPELLANTS/CROSS-
APPELLEES

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/S/ GREGG GEERDES
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January 24, 2019
Date

Respectfully Submitted,

BY: */S/ GREGG GEERDES*
GREGG GEERDES
Dey Building
105 Iowa Avenue, Suite 234
Iowa City, Iowa 52240
(319) 341-3304 Telephone
(319) 341-3306 Fax
geerdeslaw@peoplepc.com
ATTORNEY FOR APPELLANTS/CROSS-
APPELLEES