

The Supreme Court of the State of Louisiana

JUDGE HARRY CANTRELL

No.2020-CD-00915

VS.

STATE OF LOUISIANA

IN RE: State of Louisiana - Applicant Defendant; Applying For Supervisory Writ,
Parish of Orleans Civil, Civil District Court Number(s) 2020-03155;

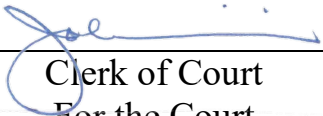
July 21, 2020

Writ application granted. See per curiam.

JLW
JDH
JTG
WJC
JHB

Johnson, C.J., dissents.
Crichton, J., would deny and assigns reasons.

Supreme Court of Louisiana
July 21, 2020



Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 2020-CD-0914

**JUDGE JANICE CLARK, LOUISIANA VOTERS FOR AN EXPERIENCED
JUDICIARY, AND ALL OTHER JUDGES SIMILARLY SITUATED**

VERSUS

STATE OF LOUISIANA

**ON SUPERVISORY WRIT TO THE NINETEENTH JUDICIAL DISTRICT
COURT, PARISH OF EAST BATON ROUGE**

Consolidated With

NO. 2020-CD-0915

JUDGE HARRY CANTRELL

VERSUS

STATE OF LOUISIANA

**ON SUPERVISORY WRIT TO THE CIVIL DISTRICT COURT,
PARISH OF ORLEANS**

PER CURIAM*

Writ granted. The supervisory authority of this court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court. **Marionneaux v. Hines**, 05-1191, p. 4 (La. 5/12/05), 902 So.2d 373, 376; **Progressive Security Insurance Company v. Foster**, 97-2985, p. 2 n.3 (La. 4/23/98), 711 So.2d 675, 678 n.3. This court can intervene under its own plenary supervisory powers, whether or not an intermediate court has properly acted on the matter. **Marionneaux**, 05-1191 at p. 4, 902 So.2d at 376.

The salient facts here are not in dispute. The plaintiff judges in these consolidated cases are over age seventy, their terms expire on December 31, 2020, and they intend to qualify and run for re-election despite the mandatory retirement

age imposed by La. Const. Art. V, § 23(B), which states: “Except as otherwise provided in this Section, a judge **shall not** remain in office beyond his seventieth birthday. A judge who attains seventy years of age while serving a term of office shall be allowed to complete that term of office.” (Emphasis added.)

Judge Clark contends Art. V, §23(B) is in conflict with three other provisions of the Louisiana Constitution: Art. I, §3 (“No person shall be denied the equal protection of the laws...”); Art. I, §7 (“No law shall curtail or restrain the freedom of speech...”); and Art. II, §2 (“Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.”). Judge Cantrell makes an equal protection argument and, in addition, claims the 2018 enactment of La. Const. Art. I, §10.1, prohibiting certain convicted felons from seeking or holding public office, tacitly repeals Art. V, §23(B), or otherwise renders it inactive. We find no merit in these assertions.

As we held in **Giepert v. Wingerter**, 531 So.2d 754, 755-56 (La. 1988), the validity of a constitutional mandatory retirement age for judges is not in doubt. Other state and federal courts considering this question have likewise upheld the validity of such provisions. See **Gregory v. Ashcroft**, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); **Zielasko v. State of Ohio**, 873 F.2d 957 (6th Cir. 1989); **Hatten v. Rains**, 854 F.2d 687 (5th Cir. 1988); **Diamond v. Cuomo**, 130 A.D.2d 292, 519 N.Y.S.2d 691, affirmed, 70 N.Y.2d 338, 514 N.E.2d 1356 (1987); **Sactre v. State**, 398 N.W.2d 538 (Minn. 1986); **Grinnell v. State**, 121 N.H. 823, 435 A.2d 523 (1981). Those who wish to change the mandatory retirement age provisions in Art. V, §23(B) are provided an avenue for doing so by La. Const. Art. XIII, § 1 (“An amendment to this constitution may be proposed by joint resolution at any regular session of the legislature...”).

Art. V, §23(B), like other mandatory judicial-retirement provisions, “draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system.” **Gregory v. Ashcroft**, 501 U.S. 452, 471, 111 S. Ct. 2395, 2407, 115 L. Ed. 2d 410 (1991) (quoting **O’Neil v. Baine**, 568 S.W.2d 761, 766 (Mo. 1978)). Founded on a generalization about age and performance that is not true for many if not most judges, Art. V, §23(B) nevertheless ensures increased opportunities for qualified persons to share in the judiciary through orderly retirements. See Gregory, 501 U.S. at 471, 111 S. Ct. at 2407. Because this explanation is a rational basis for the disparate treatment of judges by age, Art. V, §23(B) survives scrutiny under the Equal Protection Clause of the U.S. Constitution. See Gregory, 501 U.S. at 471-72, 111 S. Ct. at 2407.

As the plaintiffs point out, Art. V, §23(B) permits a judge “who attains seventy years of age while serving a term of office . . . to complete that term of office.” This admittedly undermines the premise that a judge over age seventy should no longer serve. Furthermore, depending on when a judge’s birthday falls in his term, this provision permits some judges to serve years longer than a colleague who may only be weeks or days older. However, despite these inequities, the provision has a rational basis in a legitimate state interest: avoidance of the substantial expense of special elections and *pro tempore* judicial appointments that would otherwise be necessary every time a judge reaches age seventy. Supported by that rational basis, Art. V, §23(B)’s concession allowing limited judicial service beyond age seventy does not violate the Equal Protection Clause of the U.S. Constitution.¹

¹ We also reject the argument that this court’s appointment of *ad hoc* or *pro tempore* judges over age seventy demonstrates the underpinnings of Art. V, §23(B) are false. Judges appointed *ad hoc* serve on a specific case or cases, and judges appointed *pro tempore* serve for specified and generally limited periods of time, unlike their elected counterparts, who serve multiyear terms. Appointed judges do not “remain in office” as do elected judges, but rather are appointed to specified cases or for a specified time.

When a judge nears the completion of his or her term, an election is scheduled to fill that position. It is essential, therefore, that whoever seeks judicial office be able to serve. The purpose of an election is to select someone who will serve in the office. If a person cannot serve, he or she cannot be a candidate for office. Pursuant to Art. V, §23(B), a judge who attains age seventy during their term of office cannot be a candidate for judicial office because that judge cannot serve another term.

The plaintiffs seek to avoid the straightforward effect of Art. V, §23(B) by pitting other state constitutional provisions against it. For example, they contend the provisions in La. Const. art. I, § 3 securing equal protection must defeat Art. V, § 23(B). Therefore, this is not a case where a statute enacted by the legislature or some action by a governmental agency bars these judges from serving another term of office. Instead, the plaintiffs argue that some of the provisions of the constitution must topple other provisions.²

Longstanding principles defeat that line of argument. As this court has recognized, “constitutional provisions should be construed, where possible, to allow each provision to stand and be given effect.” **Frugé v. Board of Trustees of Louisiana State Employees’ Retirement Sys.**, 08-1270, p. 8 (La. 12/2/08), 6 So.3d 124, 130 (citing **Perschall v. State**, 96-0322, pp. 21-22 (La. 7/1/97), 697 So.2d 240, 255). “If one constitutional provision addresses a subject in general terms, and another with the same subject in a more detailed way, the two should be harmonized if possible, but if there is any conflict, the latter will prevail.” **Perschall**, 96-0322 at 22, 697 So.2d at 255. The provision addressing eligibility for retaining judicial office, Art. V, § 23(B), speaks directly to judicial retirement. Although this

² In addition to an aged-based equal protection claim, Judge Clark argues the judicial retirement provision conflicts with Article I, § 7 (freedom of expression) and Article II, § 2 (separation of powers). Judge Cantrell argues that by the enactment of Article I, § 10.1 (prohibiting convicted felons from seeking or holding public office), the electorate no longer intends to enforce judicial retirement. Plaintiffs essentially invite this court to hold that the electorate is incapable of crafting a constitution that is not internally contradictory. We decline to so hold.

provision has been amended, judicial retirement was contemplated at the inception of our state constitution, just as was equal protection. Indeed, judicial retirement was a feature of the prior constitution and as previously noted, when the occasion allowed consideration of the interplay between the prior and current constitutions, this court observed: “The validity of some constitutional mandatory retirement age for judges is not in doubt.” **Giepert**, 531 So.2d at 755.

The plaintiffs fail to demonstrate why judicial retirement cannot be given effect as the electorate intended,³ without running afoul of the equal protection provision or other provisions in the same constitution. In so concluding, we draw from the observations by judicial colleagues from another state, whose constitution similarly contained both an Article I declaration of rights with equal protection and another Article with a judicial retirement age. “[E]ven if the [challengers] are correct in their assertion that implicit in the various provisions of Article I there is a prohibition against classifications predicated upon age, such a prohibition would only restrain governmental classifications, but would not prevent the people from using such classifications in structuring the government itself.” **Gondelman v. Commonwealth**, 554 A.2d 896, 905 (Pa. 1989).

We hold that a person constitutionally barred from serving as a judge cannot be a candidate for judicial office. Art. V, § 23(B) mandates that “a judge shall not remain in office beyond his seventieth birthday.” The reason to seek office is to “remain in office.” While Art. V, § 23(B) allows a 70-year-old judge to serve out his or her term, it does not allow him or her, as the plaintiffs contend, to seek re-election for another term. To the extent it held otherwise, we overrule **Cunningham v. Marullo**, 14-0931 (La. App. 4 Cir. 9/3/14), 150 So. 3d 21, writ denied, 14-1876 (La. 9/10/14), 148 So. 3d 570.

³ The argument that judicial retirement does not express the will of the electorate was objectively rejected by the voters’ recent defeat of 2014 La. Acts 875 (proposing to remove section 23(B) from Article V of the state constitution).

DECREE

For the stated reasons, judgment is hereby rendered in favor of the State of Louisiana, and the matter is remanded to the respective district courts with instructions to dismiss the actions of the plaintiffs, with prejudice.

JUDGMENT RENDERED; REMANDED WITH INSTRUCTIONS.