UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

vs.

Case No. 2:14-cv-11296-LPZ-RSW
Hon. Lawrence P. Zatkoff
Magistrate Judge R. Steven Whalen

CITY OF ANN ARBOR and
JACQUELINE BEAUDRY,
ANN ARBOR CITY CLERK,

Defendants.
_____/

Thomas Wieder (P33228)
Attorney for Plaintiff
2445 Newport Rd.
Ann Arbor, MI 48103
(734)769-6100
wiedert@aol.com

Office of the City Attorney
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendants
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170
spostema@a2gov.org
aelias@a2gov.org

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DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING WHETHER THERE MUST BE REENACTMENT OF A LAW FOUND TO BE UNCONSTITUTIONAL AND VOID TO MAKE IT ENFORCEABLE

The Plaintiff has claimed that reenactment of a Charter provision is required before enforcement of the provision again after a federal district court previously found it "unconstitutional and void." This argument assumes that the provision was repealed by the original district court order.[1] As a threshold issue, it is axiomatic that a court has no power to repeal Charter provisions in any manner. The Michigan Home Rules City Act provides that the method for amending (or repealing) provisions of a municipal Charter is through a vote of the residents. MCL 117.22-23. This method of Charter amendment is incorporated into the City's Charter by Charter Section 3.1.

If Plaintiff's logic were followed, a court-ordered "repeal" would supplant the statutory requirements, introduce another method for repeal not sanctioned by state law, and thus invade the constitutionally required Charter process. Section 22 of article 7 of the Michigan Constitution provides that under the general state laws it is the electors of each city who have the power and authority to amend their city's charter. "The power to adopt, amend, and repeal the existing charter is granted by the Home Rule Act for cities. … [W]ithin the range of the Constitution and the general Home Rule Act for cities, the electors thereof may

[1] Likewise, if this court were to require reenactment, it would require an implicit holding that the previous court order effected a repeal, because it would be nonsensical to put a Charter amendment on the ballot if the actual Charter provision were still on the books.

make, alter, amend, revise or repeal the charter of the city..." *Streat v. Vermilya*, 268 Mich. 1, 6, 255 N.W. 604, 606 (1934).

A federal district court finding that a law is unconstitutional and void does not strip the Charter provision from the books; the district court has no authority to do that. A federal district court does decide, in accordance with the principles of judicial review going back to *Marbury v. Madison*, 5 U.S. 137, 177 (1803), whether the legal enactment (such as the Charter provision) conflicts with the Constitution or a higher court's interpretation of the Constitution – then that higher law and not the Charter governs.[2] The enactment therefore becomes unenforceable, but it is not erased.

In fact, the *Feld* and *Human Rights Party* court orders did not even attempt to repeal the Charter provisions. They also did not even attempt to enjoin future enforcement of the Charter provisions. They declared that the plaintiffs in those cases were qualified to be on the ballot, and in one case that the Clerk must put the plaintiff on the ballot. They further declared that the Charter provision was "unconstitutional and void." But Plaintiff has cited no law that the term void means "repealed". As *Black's Law Dictionary* (9th ed. 2009) at 1413 states the term "repeal" means "abrogation of an existing law by legislative act." This generally

[2] Given the subsequent clarification by higher federal courts that such Charter provisions are constitutional, starting soon after the *Feld* and *Human Rights Party* cases, the City's request for declaratory relief is for a declaration of that higher law, which the City argues is consistent with the Charter provisions.

accepted definition is consistent with the idea that the district court's declaration was that the Charter provision was unenforceable; but it was not repealed.

Plaintiff has cited no binding authority (or any authority) for a rule in Michigan that there must be reenactment of a Charter provision prior to enforcement. Defendants submit there is no such rule in Michigan and that such a rule would also be inconsistent with the other doctrines already briefed. There are few courts (federal or otherwise) that even indirectly discuss this issue. For example, as outlined in Defendants' prior briefs, federal courts frequently adopt the revival doctrine and have found little need to elaborate further on the issue of reenactment. If a statute is automatically revived, it necessarily follows that it need not have been reenacted.

Likewise, the collateral estoppel cases previously cited by Defendants do not contain a requirement that the government first reenact the law before taking advantage of the principle that a material change in the law is an exception to the general collateral estoppel rule.[3] The very reason for this principle is to prevent injustice by allowing re-litigation of the issues to apply the new law or to correct previous misapplication of the law once the law has been clarified by a higher

[3] See also *Restatement (Second) of Judgments*, Sec. 28(2) and comment c and Section 29, comment (i) (a requirement for reenactment before enforcement to take advantage of this exception to collateral estoppel is not mentioned.)

court, and these cases likewise have no requirement that such re-litigation can take place only after reenactment of the statute. The issue simply is not raised in this context because it would defeat the purpose of re-litigating the same issue.

Moreover, the prior federal court orders are only effective for the plaintiffs in those cases; they do not benefit future plaintiffs. *Tesmer v. Granholm*, 333 F.3d 683, 701-02 (6th Cir. 2003) (*rev'd and remanded sub nom. Kowalski v. Tesmer*, 543 U.S. 125 (2004)). This principle also provides support for the conclusion that there can be future enforcement without the need for reenactment. *Tesmer* is a case with a convoluted history. In *Tesmer v Kowalski*, 114 F. Supp. 2d 603, (ED Mich 2000), three indigent criminal defendants and two attorneys who handled assigned appeals challenged the constitutionality of Public Act 200 of 1999 (MCL §770.3a), which codified the practice – that was followed by some Michigan circuit court judges after a 1994 amendment to Michigan's constitution[4] – of denying appointed appellate counsel to indigents who pleaded guilty. Named as defendants were Attorney General Granholm and three circuit judges who had denied requests for appointed appellate counsel to represent the plaintiff indigents.

Judge Roberts of this Court ruled that plaintiff attorneys (attorneys who acted as appointed counsel) had standing to assert the due process and equal protection rights of indigent defendants who had pleaded guilty or no contest. *Id.*

[4] The 1994 amendment of Art. 1, §20 provided that "an appeal by an accused who pleads guilty or *nolo contendere* shall be by leave of the court," not as a right.

at 611. (*Younger v Harris,* abstention, however, deprived the indigent plaintiffs of standing.) Judge Roberts concluded that Public Act 200 violated the U.S. Constitution's guarantees of equal protection and due process. On March 31, 2000, the day before the effective date of Public Act 200, she entered a declaratory judgment to that effect, stating that the law was declared to be in violation of equal protection and due process requirements of the United States Constitution.

Soon afterwards, the plaintiffs moved for an injunction. One of the defendant circuit judges continued to refuse to appoint appellate counsel for indigents who had pleaded guilty. Another circuit judge, who had notice of the declaratory judgments, refused to follow it. Additionally, Judge Dennis Kolenda refused to appoint appellate counsel, relying on the fact that he was not a party to the original action. Judge Roberts declined the plaintiffs' request that she consider their motion to certify a defendant class of all Michigan circuit judges. Nevertheless, she enjoined the defendant judge and Judge Kolenda from violating the declaratory judgment. *Tesmer v Kowalski,* 114 F. Supp. 2d 622, 625 (ED Mich 2000).

The three defendant circuit judges and Judge Kolenda appealed from the June 30, 2000 injunctive order. The Sixth Circuit upheld Judge Roberts' rulings on standing, but reversed her decision that Public Act 200 was unconstitutional.

Tesmer v Granholm, 295 F. 3d 536 (6th Cir, 2003).

On rehearing en banc, (333 F. 3d 683 (6th Cir. 2003) (rev'd on standing determination in *Kowalski v Tesmer,* 543 U.S. 125 (2004))), the Sixth Circuit considered the scope of Judge Roberts' injunction. By purporting to reach judges who were not parties to the action, the injunction went too far:

> Under the declaratory judgment statute, 28 U.S.C. § 2201(a), a court "may declare the rights and other legal relations of any interested party seeking such declaration." Declaratory judgment is effective as to only the plaintiffs who obtained it. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). . . . Thus, under *Doran* and authority from sister circuits, we hold that the declaration and injunction *applies only insofar as it states the rights of the named attorney-plaintiffs.*

Id. at 701-702. Emphasis added. The fact that the Court would not enjoin the non-party judges from continuing to base their actions on the statute, means that the statute remained in place and was not repealed.

That a prior Court ruling is binding between the parties for the purposes of that case but does not alter the underlying statute is directly stated in the Third Circuit opinion that *Tesmer* cited. In *YMCA of Princeton v Kugler,* 463 F. 2d 203 (3rd Cir. 1972), the Attorney General of New Jersey moved for a stay of a declaratory judgment that the New Jersey statute criminalizing abortion was unconstitutional. The Third Circuit denied a stay because the declaratory judgment applied only to seven plaintiff physicians. The court explained:

In the absence of a class action determination the declaratory

> judgment is binding only between these seven individual physician plaintiffs and the defendant appellant. *Between the State of New Jersey and any other persons the opinion of the three-judge district court has only stare decisis effect to be weighed against conflicting opinions in the New Jersey Courts. The State remains free to take whatever steps against others than the individual plaintiffs it deems appropriate to enforce the statute by criminal sanctions.*

Id. at 204. (Emphasis added.)

What this case clearly establishes is that the statute at issue remains in effect and can still be enforced by the state. The court held that the state could continue to enforce the statute despite the ruling of unconstitutionality.

For these reasons, Defendants submit that there is no rule that reenactment of a Charter provision is necessary prior to enforcement. Plaintiff's request for this Court to adopt such a court-made rule is without legal basis. Such a rule would, of necessity, alter the provisions of the Michigan constitution and the Michigan Home Rule City Act governing municipal charters.

Dated May 6, 2014

Respectfully submitted,

By: /s/ Stephen K. Postema_
Stephen K. Postema (P38871)
Attorneys for Defendants
OFFICE OF THE CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Thomas Wieder; and I hereby certify that I have mailed by US Mail the document to the following non-ECF participant: None.

/s/ Jane Allen
Legal Assistant
Ann Arbor City Attorney's Office
City of Ann Arbor
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
(734) 794-6180