UNITED STATES DISTRICT COURT
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) 994-6647
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

PLAINTIFF'S SUPPLEMENTAL BRIEF
IN RESPONSE TO THE COURT'S ORDER OF APRIL 30, 2014

ARGUMENT

The Court asks the question: "If a law is found 'unconstitutional and void' by a federal district court, must that law be officially re-enacted before it is enforced?" Plaintiff argues that, under the circumstances of this case, the answer is clearly "yes."

Plaintiff will cite, infra, cases which clearly support the view that re-enactment must precede enforcement, but there is little case authority directly on point. What is clear is a consistent view of the status of a law which has been found to be unconstitutional and void. That view, beginning with Marbury v. Madison, and continuing to the present day, is that such a law is "no law at all," "is as if never written," "is nothing more than a blank page," etc.

This long-standing and nearly unanimous view by the courts of voided laws is that they are figuratively, and legally, wiped off the pages of statute books and city charters, even if new editions are printed containing them. They, essentially, cease to exist and had no legal existence since the day they were enacted. Given this view, there is then no law to be enforced, because it is gone, or never was. Re-enactment is the only way the voided provisions could return as enforceable law.

Circumstances of this case include: 1) The federal cases voiding the two portions of Section 12.2 of the Ann Arbor Charter were not appealed and have never been overruled; 2) Defendants do not assert that the decisions voiding the sections were erroneous at the time made; rather they assert that, due to changes in the law since that time, the Charter provisions would be found constitutional if the question were litigated today.

The Court's question suggests, but does not indicate, what it views as the current status of the voided provisions. It appears that the Court is asking that, if the voided provisions were judged to be constitutional today, would re-enactment be required to permit enforcement of them?

Plaintiff asserts that these provisions have no actual existence that would properly be the subject of litigation to determine their current constitutionality or to reinstate them. This does not prevent the City, which exudes confidence that the provisions would be found constitutional today, from placing the original Charter language, or any revised version, before the voters for approval.

In Defendants' Brief in Support of its Motion to Dismiss, they state "it would be a manifest injustice to bar the City from applying today's law… (at p. 17) and refer to "Plaintiff's claim that the City of Ann Arbor is the only city in Michigan that cannot enforce their one-year eligibility requirements…) (at. p. 19.) This is nonsense. The City may place before the voters a referendum to re-enact the original provisions or some alternative. If the voters approve, and the new provisions are not successfully challenged legally, this matter is disposed of. If the voters don't approve re-enactment of the original provisions, it may indicate that voters prefer the more lenient de facto procedures that have been in effect for over 40 years, since the Feld and HRP cases were decided.

Michigan case law supports the position that re-enactment is the only way to restore a void statute. Fenn v Kinsey, 45 Mich. 446 (1881) concerned a statute that the Supreme Court had determined to be void and unconstitutional. The Supreme Court said this about the voided statute: "The only proper way to construe void legislation is to treat

it as absolutely void until the legislative power, after obtaining authority to do so, sees fit to re-enact it." Ibid., p. 450.

A leading case on the issue of re-enactment is State v. Miller, 66 W.Va. 436, 66 S.E. 522 (1909). This case dealt with the effect of a federal law change which eliminated a constitutional conflict between the state and the federal government over regulation of commerce.

> This limitation upon the power of the state was removed by the Wilson act, but the state statute had been previously passed at a time when, by reason of the limitation, it could not take effect, and was void in so far as it contemplated such transactions. As to them it was a dead, worthless thing. The removal of the limitation by the act of Congress did not convert it into a valid statute, nor put life or efficacy into it. That could be done only by re-enactment by the state Legislature, … A void statute can be made effective only by re-enactment. *State v. Tufly, 20 Nev. 427, 22 Pac. 1054, 19 Am. St. Rep. 374;Comstock, etc., Co. v. Allen, 21 Nev. 325, 31 Pac. 434; Jones v. McCaskill, 112 Ga. 453, 37 S. E. 724;Erie v. Brady, 150 Pa. 462, 24 Atl. 641; Seneca Mining Co. v. Osmun, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.* (Miller, at p. 523, emphasis added.)

Grayson-Robinson Stores v. Oneida 209 Ga. 613, 75 S.E.2d 161 (1953) dealt with Georgia's Fair Trade Act, which was found unconstitutional because it conflicted with the Sherman Act and violated the Supremacy Clause. Later amendments to the Sherman Act eliminated the constitutional conflicts. The Supreme Court of Georgia held:

> So we accordingly agree that the provisions of Georgia's Fair Trade Act are not prohibited by the Sherman Act as amended by the Miller-Tydings Act and by the McGuire Act; but we do not agree with the contention that Georgia's act became valid, without re-enactment, after the Sherman Act was thus amended. …'The general rule is that an unconstitutional statute, though having the form and name of law is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.' 11 Am.Jur. (Constitutional Law) 827, § 148. Ibid., p. 617. (emphasis added)

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Plaintiff incorporates by reference the arguments found at pp. 6-8 of his Brief in Support of Plaintiff's Motion for Summary Judgment. To the authorities cited therein, he would add the following: "An act of congress repugnant to the constitution cannot become a law." Marbury v. Madison, 1 Cranch 137, 138, U.S.Dist.Col. (1803).

> An act of the legislature which is not authorized by the state constitution at the time of its passage is absolutely null and void. It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence. It is as if it had never been enacted, and it is to be regarded as never having been possessed of any legal force or effect. State ex rel. Stevenson v. Tufly, 20 Nev. 427, 22 P. 1054 (1890). (emphasis added)

> The void ab initio doctrine is a longstanding legal doctrine which essentially stands for the proposition that an ordinance or statute held unconstitutional is considered void in its entirety and inoperative as if it had no existence from the time of its enactment. Heritage Building Group v. Plumstead Twp., Not Reported in F.Supp.2d, 2011 WL 3803899 (E.D.Pa. 2011). (emphasis added)

The three citations above span 208 years of American jurisprudence. A law found unconstitutional and void by a federal district court shares the characteristics of "no existence," "void in its entirety," and "as if it had never been enacted" cited in those three cases. That includes the voided provisions of the Ann Arbor Charter. Two centuries of case law declare that there is nothing there to be enforced.

As discussed in prior briefs of the parties in this matter, in certain limited circumstances, a law ruled unconstitutional and void may subsequently be viewed as constitutional and enforceable under the "revival doctrine," with no re-enactment required. Plaintiff asserts that the revival doctrine has no applicability to this case and is not useful in answering the Court's question. Plaintiff's Reply Brief in Support of His Motion for Summary Judgment, pp. 5-8.

Specifically, revival cases have the common elements of a ruling of unconstitutionality and voidness by a court of last resort, followed by an overruling of that decision in a subsequent decision by that court. During the period between the two decisions, the law at issue is regarded as unconstitutional and void. The overruling decision removes that determination, leaving the law constitutional and enforceable, and no re-enactment would be required.

In the instant case, there is no reversal of the original decisions, or even the suggestion that they were erroneous at the time made. Defendants' claim is that the intervening changes in case law make those decisions no longer "good law." Defendants do not ask this Court to overrule Feld and HRP in their Motion.

Another line of cases, of which Wilkerson v. Rahrer, 140 U.S. 545 (1891) is a leading one, dealt with the question of whether re-enactment was necessary after a ruling that the state law regulating liquor unconstitutionally sought to regulate liquor in interstate commerce. A subsequent Act of Congress specifically allowed the states to apply their laws to the commerce in liquor in question. A defendant prosecuted under a state law asserted that the state law had to be re-enacted after the Act of Congress was passed to be enforceable. The Supreme Court rejected this argument:

> This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state. Ibid., p. 563.

In these cases, re-enactment was not required, because the court had only found that application of one portion of the state law to interstate commerce was unconstitutional.

The court did not find that any portion of the state law had been ruled unconstitutional and void.

If not re-enactment, what procedure would be used to allow a voided law to again be enforced? The City seems to believe that it can survey developments in the law, and when it concludes there has been enough change to make its Charter provisions constitutional and enforceable, it can resume enforcement. It provides no support for such a notion. It might have chosen to resume enforcement and hope to stimulate litigation such as this which might bring it the relief it wants. Again, no support, or even explanation, is offered as to how this unexplained legal process could "unvoid" the void and non-existent provisions.

These notions raise very troubling questions. If the City can decide when to enforce, or when to prompt litigation, this discretion to decide when to try either of these efforts raises the disturbing specter of the City using its power to try to stop a particular candidate from getting on the ballot.

When the provisions were voided in 1972, the City was left with absolutely no valid eligibility requirements in its Charter. It did not appeal those decisions. Instead, the City adopted a practice of allowing anyone on the ballot who was registered to vote in the city (or ward) at the time of filing petitions. It made no attempt, for thirty years, to adopt new, constitutional requirements. As the key changes in the law in this area were happening later in the 1970s and early 1980s, the City did nothing in response.

Realizing, in 2003, that the City still had no valid eligibility requirements or, at most, the ward residency requirement, the City Council put a proposed amendment to the Charter on the ballot. It did not seek to re-enact the original Section 12.2 provisions. In

fact, it seemed to assume that all the Section 12.2 requirements were nonexistent, except, relying on Circuit Court Judge Connors' opinion in Wojack, that the ward durational residency requirement still existed. The ballot language regarding elected officials was:

> Shall the Charter be amended to replace the requirement that the Mayor and Council Members be registered electors in the City at the time of election and that Council Members be residents in their wards for one year prior to their election, with a requirement that the Mayor and Council Members be registered electors of the City, and the Council Members of their wards, on the date they are elected or appointed to office…?

The underlined language in the ballot proposal, which is supposed to be the Charter language that is being replaced, has never appeared in the Charter.

In this instance, Plaintiff Dascola was aware of the voiding of the Charter provisions and relied on that fact in determining whether he would run for City Council this year. The Charter provisions were void on the day Plaintiff began circulating his petitions, void on the day that he filed those petitions and void on the day that the Clerk certified that those petitions contained sufficient valid signatures. This strongly supports the argument that, should the Charter provisions once again be made effective, such a decision should be prospective only and not affect Plaintiff Dascola.

(Plaintiff would like to comment on the footnote contained in the Court's April 30, 2014 Order. Plaintiff does not disagree with Defendants that both Charter provisions are at issue. If this Court decides that both voided provisions are still unenforceable, that would decide the matter in favor of the Plaintiff. If it decides that both provisions are enforceable, that would decide the matter in favor of the Defendants. If, however, the Court were to find the voter registration requirement unenforceable and the ward residency requirement enforceable, there would remain a factual dispute as to whether Plaintiff Dascola meets that requirement.)

_/s/ Thomas F. Wieder_____
Thomas F. Wieder (P33228)
Attorney for Plaintiff

Dated: May 6, 2014

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: Stephen K. Postema and Abigail Elias.