Nullifying an Initiative Gag Order

Taylor v. Johnson
(Corbett O'Meara, E.D. Mich. 5:16-cv-10256)

On January 26, 2016, 17 local officials in Michigan and one voter filed a federal complaint in the Eastern District of Michigan against the state and its secretary of state challenging the constitutionality of a "gag order on public bodies and public officials that prohibits them from communicating with and informing their constituents about ballot questions in an objectively neutral way during the two months before an election."[1] Effective January 6, Michigan's election laws provided,

> Except for an election official in the performance of his or her duties under the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992, a public body, or a person acting for a public body, shall not, during the period 60 days before an election in which a local ballot question appears on a ballot, use public funds or resources for a communication by means of radio, television, mass mailing, or prerecorded telephone message if that communication references a local ballot question and is targeted to the relevant electorate where the local ballot question appears on the ballot.[2]

With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[3]

Judge Corbett O'Meara set the case for hearing on February 4.[4] Judge O'Meara accepted four amicus curiae briefs.[5]

On February 5, Judge O'Meara ruled that the provision was void as unconstitutionally vague.[6] "Public officials deserve clarity on this issue so that they may serve the public in the normal course without fear of arbitrary sanction or prosecution."[7] "For example, Plaintiff Douglas Alexander, City Manager for the City of Algonac, was planning to communicate factual, neutral information regarding a ballot proposal in the city's quarterly newsletter."[8]

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1. Complaint at 2, Taylor v. Johnson, No. 5:16-cv-10256 (E.D. Mich. Jan. 26, 2016), D.E. 1; *see Lawsuit: "Gag Order" Unconstitutional*, Cheboygan Daily Trib., Jan. 27, 2016, at A3; Caleb Whitmer, *Lawsuit Filed Against Controversial Ballot Question Restrictions*, Holland Sentinel, Jan. 27, 2016, Mich. News, at 3.

2. Mich. Comp. Laws § 169.257(3); *see* Opinion at 2, *Taylor*, No. 5:16-cv-10256 (E.D. Mich. Feb. 5, 2016), D.E. 27, 2016 WL 447539.

3. Motion, *Taylor*, No. 5:16-cv-10256 (E.D. Mich. Jan. 26, 2016), D.E. 3.

4. Notice, *id.* (Jan. 29, 2016), D.E. 14; *see* Notice, *id.* (Jan. 28, 2016), D.E. 13 (initially setting the hearing for February 3).

5. Brief, *id.* (Feb. 3, 2016), D.E. 26; Brief, *id.* (Feb. 2, 2016), D.E. 24; Docket Sheet, *id.* (Jan. 26, 2016).

6. Opinion, *supra* note 2, at 9; *see* Jonathan Oosting, *Judge Halts "Gag Order" Law on Ballot Info*, Detroit News, Feb. 6, 2016, at A3; *see also* Jackie Smith, *Officials Hurry Ballot Issue Info Out to Voters*, Port Huron Times Herald, Feb. 22, 2016, at A6.

7. Opinion, *supra* note 2, at 9; *see* Amy Biolchini & Caleb Whitmer, *Temporary Reprieve*, Holland Sentinel, Feb. 7, 2016, Mich. News, at 1.

8. Opinion, *supra* note 2, at 3.

Pursuant to the parties' agreement, Judge O'Meara converted the preliminary injunction to a permanent injunction, thereby resolving the case, on April 28.[9]

9. Consent Judgment, *Taylor*, No. 5:16-cv-10256 (E.D. Mich. Apr. 28, 2016), D.E. 35.