

STATE OF MICHIGAN
COURT OF APPEALS

TOM BARROW,

Plaintiff-Appellee,

v

CITY OF DETROIT ELECTION COMMISSION
and DETROIT CITY CLERK JANICE
WINFREY,

Defendants,

and

MICHAEL DUGGAN and MICHAEL DUGGAN
FOR MAYOR COMMITTEE,

Intervening Defendants-Appellants.

FOR PUBLICATION
June 18, 2013

No. 316695
Wayne Circuit Court
LC No. 13-007068-AW

Advance Sheets Version

Before: STEPHENS, P.J., and TALBOT and MURRAY, JJ.

STEPHENS, P.J. (*concurring in part and dissenting in part*).

I concur with the majority in all respects with regard to Duggan's nonconstitutional arguments. I write separately to respectfully dissent from the majority's conclusion regarding the constitutionality of the Detroit City Charter's durational residency requirements.¹ Consistent with both Michigan and federal caselaw, on the record that currently exists, I conclude that the durational residency requirements are unconstitutional. Accordingly, I would reverse the trial court and order that Duggan's name be placed on the ballot.

The right to travel from state to state and from county to county is a fundamental right. *Gilson v Dep't of Treasury*, 215 Mich App 43, 50; 544 NW2d 673 (1996) (interstate travel);

¹ Duggan has challenged the constitutionality of two portions of the Charter: §§ 2-101 and 3-111. I recognize that strictly speaking, § 2-101 is a voter registration requirement and not a durational residency requirement. However, in order to vote one must be a resident, and by imposing a one-year voter registration requirement, § 2-101 arguably imposes a de facto durational residency requirement. In any event, it is undisputed that § 3-111 by its express terms imposes a durational residency requirement of one year for prospective candidates for elected city office.

Grace v Detroit, 760 F Supp 646, 651 (ED Mich, 1991) (intrastate travel). It is well established that classifications that are based upon the exercise of a fundamental right offend the Equal Protection Clauses of both the United States and the Michigan Constitutions, Const 1963, art 1 § 2; US Const, Am XIV. See *Doe v Dep't of Social Servs*, 439 Mich 650, 662; 487 NW2d 166 (1992). See also *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982). The case cited by the majority to support their assertion that the Michigan equal protection standard is coextensive with the federal Equal Protection Clause, *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003), expressly adopted the strict scrutiny analytical framework for cases involving any suspect class or fundamental right. This Court has held:

The constitutional guarantee of equal protection mandates that persons in similar circumstances be treated alike. In order to perform an equal protection analysis, we must first determine which constitutional test applies, strict scrutiny or the rational basis test. Because the right to interstate travel is a fundamental right, we will review a statute that penalizes the right to travel under the strict scrutiny test [*Gilson*, 215 Mich App at 49-50 (citations omitted).]

Generally speaking, if a law or regulation is determined to be subject to strict scrutiny, “the government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest.” *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 319; 783 NW2d 695 (2010); *Gilson*, 215 Mich App at 50.

This Court has held in the past that durational residency requirements infringe on the right to travel and are therefore subject to strict scrutiny. In *Grano v Ortisi*, 86 Mich App 482, 495; 272 NW2d 693 (1978), a case strikingly similar to the one at bar, this Court rejected durational residency requirements for candidates seeking elected office. Durational residency requirements for applicants for nonelected public-sector employment were rebuffed in *Musto v Redford Twp*, 137 Mich App 30, 34; 357 NW2d 791 (1984). No distinction has been made between inter- and intrastate travel.

In *Grano*, 86 Mich App at 495, this Court concluded that a city’s two-year residency requirement for candidates for municipal judgeships “substantially affect[s] the fundamental right of free travel . . . thus requiring [the government] to demonstrate that the provision serves a compelling state interest.” The *Grano* Court noted that durational residency requirements had been declared unconstitutional with regard to candidates for the office of city commissioner in Pontiac, *Alexander v Kammer*, 363 F Supp 324, 327 (ED Mich, 1973), and mayor in the city of Warren, *Bolanowski v Raich*, 330 F Supp 724, 731 (ED Mich, 1971). The *Grano* Court relied heavily on *Green v McKeon*, 468 F2d 883, 885 (CA 6, 1972).² In *Green*, the United States Court of Appeals for the Sixth Circuit concluded that a two-year residency requirement as a condition of eligibility to hold elective office in the city of Plymouth’s charter was subject to strict scrutiny, and that the durational residency requirement was not narrowly tailored to a compelling government interest. *Id.* The *Grano* Court similarly determined that the city’s justification for

² I disagree with the majority that *Green* is no longer good law upon which we can rely. It has never been reversed or vacated.

the municipal judgeship durational residency requirement, “to insure that candidates are knowledgeable about local procedures and laws and known to the electorate,” was not compelling, and that even if it were, the durational residency requirement was not narrowly tailored to effectuate that interest. *Grano*, 86 Mich App at 495. Similarly, in *Musto*, 137 Mich App at 34, this Court relied on *Grano* to conclude that a state statute that imposed a requirement that applicants for local police and fire departments be residents of the locality for one year before applying was subject to strict scrutiny because it imposed “a penalty on the exercise of [the right to travel].” Similarly, in 1991, the United States District Court for the Eastern District of Michigan, relying not only on *Grano* and *Musto*, but on a number of federal right-to-travel cases, concluded that the requirement of the city of Detroit that applicants to the Detroit Police Department be residents of the city for 60 days before applying was subject to strict scrutiny under the Equal Protection Clauses of both the Michigan and the United States Constitutions, because the requirement classified applicants on the basis of their exercise of the right to travel. *Grace*, 760 F Supp at 651.

Grano and *Musto* are not unique. Any number of federal courts have reached the same conclusion—that durational residency requirements infringe on the right to travel and are therefore subject to strict scrutiny. See, e.g., *Westenfelder v Ferguson*, 998 F Supp 146, 151 (D RI, 1998) (durational residency requirement for welfare benefits); *Robertson v Bartels*, 150 F Supp 2d 691, 696 (D NJ, 2001), motion to intervene granted, motion to vacate order denied, motion to modify order granted 890 F Supp 2d 519 (2012) (durational residency requirement for elected office); *Walsh v City & Co of Honolulu*, 423 F Supp 2d 1094, 1101 (D Hawaii, 2006) (residency requirement to apply for public employment). Although I acknowledge that these cases are not binding on us, because the Michigan and federal Equal Protection Clauses are indeed coextensive, *Harvey*, 469 Mich at 6, they are nonetheless persuasive.

On the basis of *Grano* and *Musto* alone, I would conclude that §§ 2-101 and 3-111 of the Detroit City Charter are subject to strict scrutiny, rather than some lower standard of constitutional review. First, although I acknowledge that these cases predate November 1, 1990, and we are therefore not bound by them, MCR 7.215(J)(1), these cases have also never been overruled. I would not conclude that merely because these cases are old they are wrong. Rather, I would conclude that we should follow our prior cases, particularly when no contrary Michigan authority has arisen in the intervening years. Two post-1990 cases, *Gilson*, 215 Mich App at 50, and *People v Ghosh*, 188 Mich App 545, 547; 470 NW2d 497 (1991), reiterated that the application of strict scrutiny to statutes that impede intra- and interstate travel is appropriate. Moreover, I find the rationale of *Grano* and *Musto* persuasive. In those cases, the panels found that the very creation of separate classifications of persons based solely on whether they had exercised their right to travel either within a state or between states subjected that decision to strict scrutiny because it implicated a fundamental right. In that regard, there is no principled distinction between the residency requirements at issue in *Grano*, *Musto*, or *Grace*, and the provisions of the Detroit City Charter at issue in this case. The majority opines that the charter provision has only a minor effect on intrastate travel. In *Maldonado v Houstoun*, 177 FRD 311, 331 (ED Pa, 1997), citing *Mem Hosp v Maricopa Co*, 415 US 250, 256-257; 94 S Ct 1076; 39 L Ed 2d 306 (1974), the court rejected a durational residency requirement that deprived persons of some but not all welfare benefits, noting that the Supreme Court has never made clear the “amount of impact required to give rise to the compelling-state interest test . . .” Even an unjustified minor impingement on a constitutional right is abhorrent to the law. I concede that in

a hierarchy of rights and benefits the right to travel may pale against a liberty interest of an accused or need of a critically ill recipient of governmental health insurance. However, the right to travel inter- or intrastate remains one of the fundamental rights under the Michigan Constitution and is worthy of protection.

Because the challenged provisions of the Detroit City Charter are subject to strict scrutiny, it is defendants' burden to establish that the provisions are narrowly tailored to serve a compelling governmental interest. *Shepherd Montessori Ctr*, 486 Mich at 319. However, defendants have not filed an appellate brief in the instant case.³ I am therefore left to rely on the record below to glean what compelling interest defendants believe justifies the durational residency requirements here. Defendants cited the charter commentary in their circuit court brief. The commentary to § 2-101 states that “[r]equiring that candidates for elective office reside for a specified period of time in the community they seek to serve makes it more likely that elected officials will be intimately familiar with the unique issues impacting their communities.”⁴ Similarly, the commentary to § 3-111 states that the residency requirement “is a significant means of assuring that [candidates] have a demonstrable commitment to the City of Detroit and first-hand familiarity with issues confronting the City.” Defendants relied on both these provisions in the circuit court; accordingly, it is reasonable to conclude that these are the governmental interests defendants believe justify the requirements. I disagree.

Even assuming, arguendo, that familiarity with the community and the issues confronting it is a compelling governmental interest; defendants have not established that the charter's residency and voter registration requirements are narrowly tailored to serve that interest. Indeed, the governmental interest asserted by defendants in this case is not materially different from the governmental interests asserted in *Grano*, or in *Green*, the case upon which *Grano* heavily relied. As the *Grano* Court correctly held:

“The [residency] restriction is in no way “tailored” to achieve the stated municipal goal [of ensuring familiarity with the community and the problems facing it]. It permits a two year resident of [the city] to hold public office regardless of his lack of knowledge of the governmental problems of the city. On the other hand, it excludes more recent arrivals who have had experience in local government elsewhere or who have made diligent efforts to become well acquainted with the municipality.” [*Grano*, 86 Mich App at 493, quoting *Green*, 468 F2d at 885.]

³ Ordinarily, if a party bearing the burden of proof declined altogether to file an appellate brief in this Court, I would conclude on that basis alone that it had failed to meet its burden. However, given the unique circumstances of this case, particularly the expedited manner in which it has arrived at this Court; I am willing to conclude that while this Court would benefit from further briefing from defendants on the strict scrutiny issue we can look to the record below which includes the Detroit City Charter and its commentary.

⁴ Language such as this is strongly indicative that the drafters of the Detroit City Charter intended for § 2-101 to serve principally as a residency requirement.

Similarly, there is no reason to believe that the charter's durational residency requirements are an effective proxy for community familiarity or knowledge of the problems facing the community. Mere presence in a community is no more indicative of civic consciousness than mere presence at a crime scene is indicative of guilt. A person who has been a long term Detroit resident may be politically disengaged, lacking all knowledge of the community and its problems. By contrast, a politically and socially active resident who has lived in the community for only months may learn and know a great deal about the community and its problems in a short period. The durational residency requirements at issue here would permit the former to seek public office, but prevent the latter from doing so.⁵ As noted in *Grano*, 86 Mich App at 495, "[w]e also have confidence, as expressed in [our] previous opinions, that the normal processes of our elective system will sufficiently insure that only qualified and knowledgeable candidates will gain office." Accordingly, I conclude that the charter's durational residency requirements are not narrowly tailored to serve a compelling governmental interest.

For the foregoing reasons I would conclude that the charter's durational residency requirements are unconstitutional, because they impermissibly classify Duggan and other candidates on the basis of the candidate's exercise of the fundamental right to travel. I would reverse the trial court's opinion and order that defendants place Duggan's name on the ballot.

/s/ Cynthia Diane Stephens

⁵ Moreover, even if I were to construe § 2-101 as distinguishing between the imposition of a durational voter registration requirement and a durational residency requirement, I would still conclude that § 2-101 is not narrowly tailored to serve the governmental interest most likely advanced by defendants. Perhaps obviously, being a registered voter is not narrowly tailored to community familiarity and engagement. It does not follow that candidates will be familiar with the community simply because they have registered to vote a year before filing for office.