

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF MECKLENBURG)
)
RURAL AND RED,)
)
Plaintiff)
) Case No. CL20001144-00
v.)
)
COMMISSIONER OF VIRGINIA/BOARD OF ELECTIONS)
)
Defendant)

PLAINTIFF’S BRIEF IN OPPOSITION TO DEFENDANT’S DEMURRERS

INTRODUCTION

1. Plaintiff repeats and re-alleges each and every allegation contained in the original complaint. It is a right of each and every citizen to know the plain meaning of the eligibility requirements for one who would seek to attain the highest political office in the Republic, which office is coincident with the Command-N-Chief of the Armed Forces of the United States, the most powerful armed force in history. Justice Thomas has joked before Congress that the U.S. Supreme Court is avoiding this issue. Such avoidance likely stems from the assertion that this is a political issue. So also was Virginia v Loving, and Brown v Board of Education, and Texas v White. Yet the court addressed these issues and their rulings have stood. Why? Because of the authority and political legitimacy of the court. Plaintiff agrees with Thomas Jefferson, knowing of no better final repository of the rights of the people but the people. What Mr. Jefferson failed to make explicit is that when we get to the point of relying on the “final repository,” we are back in a state of nature, which is mean, nasty, and brutish. Such a state can be seen all across our republic today, in Portland, Oregon, Seattle, Washington, and Philadelphia,

Pennsylvania. When the authorities the people put over them to adjudicate the law fail in their responsibilities, the people necessarily adjudicate for themselves. Everyone does what is right in their own eyes. This is the definition of that state of nature for which mankind devised government.

2. In such a state, might makes right, and violence to still opposing free expressions achieves its goal. Our Republic is at a crossroads. Will it enforce the rule of law or will it not? Plaintiff's complaint seeks a simple declaratory judgment. Did the defendant fulfill his responsibilities under Virginia law or not?

LEGAL STANDARD

3. Virginia is a notice pleading state. The key is adequate notice on the basis for the claim. As long as the claim contains sufficient allegations of material fact so as to inform the Defendant of the nature and character of the claim, it will withstand a demurrer. *VAP Union Square, L.L.P. v. Cardinal Point, Inc.*, 91 Va. Cir. 134, 2015 WL 13050055, at *2 (2015). A demurrer "admits the truth of all material facts" alleged in the complaint, including "those expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts alleged." *Harris v. Kreutzer*, 271 Va. 188, 195 (2006). A complaint's factual allegations are to be "considered in the light most favorable to the plaintiff." *Welding v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 226 (2001). A pleading will survive demurrer if the 'factual allegations pled and the reasonable

inferences drawn therefrom are sufficient to state a cause of action.” *Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors*, 286 Va. 38, 44 (2013).

ARGUMENT

I. Plaintiff has stated a claim under Virginia Code 24.2-103 and 8.01-184.

4. Virginia Code 24.2-103 requires the defendant to “ensure that major risks to election integrity are (i) identified and assessed and (ii) addressed as necessary to promote election uniformity, legality, and purity.” Defendant alleges “...there is no requirement under Title 24.2 of the Virginia Code that requires, or even permits, the Defendants to inspect whether an individual is a “natural born citizen.” Yet that is an eligibility requirement under Federal law. While it may be true that the definition of that eligibility requirement may be lost to time, the requirement remains, mandating that we seek its meaning. Plaintiff called the Virginia Board of Elections prior to filing this complaint and asked if an assessment had been done on Mrs. Harris’ eligibility as a natural born citizen. The response was, she was born in Oakland, California. She’s a natural born citizen. The response belies the depth of assessment that the Virginia Board of Elections made on this issue of national import.

5. Virginia Code 24.2-103 requires the Chairman of the Virginia Board of Elections to ensure that major risks to election integrity are identified, assessed and addressed as necessary to promote election uniformity, legality, and purity. Although it is manifestly

evident that the statute does not spell out each and every area of legality which the Chairman is enjoined to assess, whether a candidate is eligible for the office for which they are on the ballot is an obvious issue of legality which, by the reasonable man hypothesis, would be presumed to be included. The Chairman knew, or could reasonably be expected to know, that there was controversy and uncertainty surrounding this issue. It has been an issue of national debate in every presidential election since 2008. After Ted Cruz' candidacy, Newsweek opined that Prince Archie, born to a U.S. citizen mother, could one day run for U.S. President if he satisfied the age and residency requirements. The fact that such opinions are met with widespread approval is an indication of the degree this constitutional requirement has become a nullity. Plaintiff seeks a declaratory judgment as to defendant Brink's failure to uphold Virginia election law.

6. Receipt from respective political parties of names of candidates does not absolve Defendant of his positive duty under Virginia Code 24.2-103 to ensure that major risks to election integrity are identified, assessed, and addressed. This responsibility under law stands alone, and is neither amplified nor diminished by other responsibilities under election law.

7. Defendant maintains declaratory judgment requiring action is not an appropriate cause of action in this case or one that exists under Virginia law. Contrary to defendant's assertion, the Supreme Court of Virginia has observed that, in addition to the declaration, "coercive relief may be demanded - that is, the rights of the parties may not only be

determined, but they may be enforced, in the one action.” *Winborne v. Doyle*, 190 Va. 867, 871-72, 59 S.E. 2d 90, 93 (1950).

8. Defendant asserts declaratory judgment is inappropriate in seeking an adjudication of Defendant’s obligations rather than of the parties’ rights. Such assertion runs counter to a basic use of the declaratory judgment of ascertaining rights without risk of injury on another or oneself. “The most useful field for the declaratory judgment is as a preventative relief, that is for use in those cases where there has been no injury and therefore no right of action exists under common law, but in which there is an actual controversy and the parties are desirous of ascertaining what their rights, powers, privileges or immunities are without running the risk of inflicting an injury on another or of suffering loss.” Martin P. Burks, COMMON LAW AND STATUTORY PLEADING AND PRACTICE section 192, at 309 (4th ed. 1952 and 1961 supp.), *Accord Am. Natl. Bank and Tr. Co v Kushner*, 162 Va. 378, 386, 174 S.E. 777, 780 (1934) (“Preventative relief is the moving purpose.”) Plaintiff seeks declaratory judgment in lieu of and precedent to mandamus. “A writ of mandamus may be issued only when there is a clear right to relief sought, a legal duty to perform the requested act, and no adequate remedy at law.” *Ancient Art Tattoo Studio v. City of Virginia Beach*, 263 Va 593, 597, 561 S.E. 2d 690, 692 (2002). As such, plaintiff seeks to ascertain their rights to mandamus by removing the uncertainty of defendant’s obligations under law, a critical uncertainty being whether defendant’s obligation under the law is a purely ministerial duty or a discretionary duty. Does the law permit Defendant’s discretion to, in his own judgment, determine Mrs. Harris’ Constitutional eligibility on an issue where no authoritative

judgment as to the meaning of the term “natural born citizen” has been given and on which there is widespread uncertainty and controversy? Such discretion would be reasonable where the meaning of the eligibility requirement is clear, such as age and residency. Permitting discretion on the natural born citizen clause would imbue the Chairman with powers and authorities nowhere given in law - Constitutional interpretation. Moreover, plaintiff alleges significant information exists in the public domain raising substantial questions on Mrs. Harris’ eligibility on which authoritative judgment has been provided, such information having been provided to the Defendant in Plaintiff’s exhibits. Plaintiff contends, and seeks judgment, that Defendant has an obligation under law to assess and address that information.

9. Defendant asserts Plaintiff’s actions are barred by sovereign immunity. In so asserting, Defendant dismisses the distinction made in *James v Jane*, 221 Va. 43 (1980) between immunity of the State and officials and employees of the State. “We make a distinction between the sovereign Commonwealth of Virginia and its employees, and local government agencies and their employees. And we have specifically held that the latter do not enjoy government immunity and are answerable for their own acts of simple negligence.” Additionally, “Even when a governmental employees actions are entitled to immunity, the employee is still not protected from liability for a breach of a ministerial duty or for gross negligence.” *Colby v. Boyden*, 241 Va at 128-29, 400 S.E. 2d at 186-87.

10. Defendant asserts Virginia Code section 8.01-184 is not applicable to the Commonwealth, citing *Cuccinelli v. Rector and Visitors of the Univ of Va*, 283 Va. 420,

427-28, 722 S.E. 2d 626, 630-31 (2012). The defendant in this case is not a Commonwealth agency, but rather an employee, Robert H. Brink, said employee of the State, as previously discussed, being answerable for his own acts of commission or omission under law.

11. Defendant asserts the doctrine of laches bars Plaintiff's claim. Plaintiff had no cause for assertion of a case or controversy until he observed Mrs. Harris' name on the ballot. Early voting in Virginia began on 18 September, 2020. Plaintiff voted 19 September, 2020. Plaintiff filed his complaint on 28 September, 2020. Defendant's claim of lack of diligence due to previous action by the Democratic party in announcing their choice for Vice President has no bearing on a complaint against the Defendant for not fulfilling his obligations under law prior to putting said nominee on the ballot. In fact, Plaintiff could not know, with any assurance, prior to voting if the Defendant had or had not attempted to assess Mrs. Harris' eligibility. It was only on the day the complaint was filed, before filing, that Plaintiff called the State Board of Elections to inquire what assessment had been accomplished, Plaintiff being told that she was born in Oakland, California. She's a natural born citizen.

12. Defendant asserts grant of relief to Plaintiff a few days before a general election "would promote confusion among election officials and candidates, would threaten the integrity of elections in Virginia, and sets the precedent that candidates may seek relief at any time of their choosing, regardless of the statutory requirements imposed by the General Assembly." As to the integrity of elections, Plaintiff alleges Defendant's failure

to ensure major risks to election integrity are identified, assessed, and addressed is the precipitating issue which threatens the integrity of elections in Virginia. As to promoting confusion, Plaintiff will so stipulate, but maintains such confusion is preferable to installing a candidate to office of questionable eligibility. As to precedent setting, Plaintiff maintains that, had the Defendant fulfilled his obligations under the law, then we would not be at this juncture where the “final repository,” the people, are forced to defend the Constitution and the rule of law.

Respectfully Submitted

HAROLD R. GIELOW

PRESIDENT RURAL AND RED PAC

By: _____