

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

EMANI LOVE, *et al.*,

NO. 2:15-cv-11834

Plaintiffs,

HON. NANCY EDMUNDS

v

MAG. ELIZABETH A. STAFFORD

RUTH JOHNSON,

Defendant.

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DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant Ruth Johnson, through her attorneys, Bill Schuette, Attorney General for the State of Michigan and Erik A. Grill, Assistant Attorney General for the State of Michigan, and in support of her Motion for Reconsideration pursuant to Local Rule 7.1, states as follows:

1. Local Rule 7.1 provides where the movant demonstrates a palpable defect by which the court or parties have been misled and correcting the defect will result in a different disposition of the case.

2. Defendant Johnson filed a Motion to Dismiss (R. 16), in which she argued that each of the Plaintiffs' five causes of action failed to state a claim.

3. On November 16, 2015, this Court entered its Opinion and Order (R. 36), in which it denied the Motion to Dismiss.

4. This Court's Opinion and Order (R. 36) found that the Plaintiffs raised a cognizable privacy claim under the Fourteenth Amendment, but declined to address the substantive merit of the remaining claims, citing the principle of judicial restraint. (R. 36, ID# 325-326).

5. Defendant Johnson moves that this Court reconsider its Opinion and Order only as to whether to address the remaining claims.

6. Supreme Court and Sixth Circuit cases do not support the exercise of judicial restraint on a Rule 12 motion.

7. It is necessary for this Court to decide the merits of the Defendant's motion to dismiss as to each count of the complaint.

8. As a result, this Court's decision was based upon a palpable defect by which the Court was misled into exercising judicial restraint as to counts two through five.

9. Correcting the defect will prevent the parties from having to pursue costly and voluminous discovery as to claims that may not be facially viable.

10. Even if all of the claims are facially viable, determination of the Defendant's motion to dismiss on each of the claims may clarify the facts and issues this Court finds to be significant, and aid in preparing this case for summary judgment.

11. As a result, correcting the defect will result in a different disposition of the case.

12. Concurrence in this motion was sought on November 30, 2015, but concurrence was denied.

RELIEF REQUESTED

For these reasons and the reasons stated more fully in the accompanying brief, Defendant Ruth Johnson respectfully requests that this Honorable Court dismiss the claims against her in their entirety, together with any other relief the Court determines to be appropriate under the circumstances.

Respectfully submitted,

BILL SCHUETTE
Attorney General

/s/ Erik A. Grill

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Dated: November 30, 2015

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**BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR
RECONSIDERATION**

CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether it is necessary for this Court to rule on the Defendant's Motion to Dismiss regarding the sufficiency of Plaintiffs' Counts Two through Five?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988).

ARGUMENT

- I. **Because this Court declined to rule on Defendant's Motion to Dismiss regarding all of the claims in Plaintiffs' Complaint, the Defendants will be required to undergo discovery on claims that may be legally unsound, and the parties will not be able to tailor discovery to factual issues the Court may find significant for purposes of summary judgment. Reconsideration of the Motion to Dismiss with regards to Counts Two through Five is appropriate.**

Local Rule 7.1 provides for reconsideration where the movant demonstrates a palpable defect by which the court or parties have been misled and correcting the defect will result in a different disposition of the case. The Defendant is not asking this Court to revisit its determination on Count One of the Plaintiffs' Complaint concerning their claim alleging a violation of the right to privacy. Instead, Defendant is seeking to have this Court reconsider whether it should address all of the remaining claims.

This Court's November 16, 2015 order on Defendant's motion to dismiss declined to address dispositive arguments on four of Plaintiffs' five causes of action, citing judicial restraint. For that part of its Order, this Court relied upon *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional

questions in advance of the necessity of deciding them.”). It appears that this Court’s conclusion was that determination of the remaining four claims was not necessary in light of this Court having decided that Plaintiffs’ had stated a plausible claim in Count One.

However, a close reading of *Lyng* does not support the application of judicial restraint based upon finding one of multiple constitutional claims to be viable in a Rule 12 motion. To the contrary, the Supreme Court’s opinion in *Lyng* was made following a trial and entry of a permanent injunction. *Lyng*, 485 U.S. at 443. Moreover, shortly after reciting the principle of judicial restraint, the Supreme Court noted how that principle applied to the case it was addressing:

This principle required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. **If no additional relief would have been warranted, a constitutional decision would have been unnecessary and therefore inappropriate.**

Lyng, 485 U.S. at 445 (emphasis added). Thus, the Supreme Court’s holding in *Lyng* addressed only whether the lower courts should have proceeded to determine the constitutional issues without first determining whether resolution of those issues would have granted any

more relief to the respondent than they could have achieved only on their statutory claims. In other words, if the resolution of the constitutional claims would not change the outcome of the case, then there was no need to decide them.

That is not the situation here. Plaintiffs have raised multiple constitutional claims based upon separate and largely independent legal theories. Defendant's motion to dismiss advocated dismissal of each individual claim based upon distinct arguments about the legal insufficiency of those claims. In short, the Defendant has challenged the legal sufficiency of each of the Plaintiffs' causes of action, and is entitled to a determination of whether the Plaintiffs have stated plausible claims.

The resolution of the remaining counts absolutely does have an impact on the outcome of the case. While this Court's decision on Count One of the Complaint does result in the parties proceeding through discovery, the discovery required for each of the five claims is not necessarily identical. Unless this Court determines whether the remaining four counts state facially plausible claims, the parties will be

required to undergo costly discovery on causes of action for which the Plaintiffs have failed to state a claim.

Moreover, even if all of the claims were facially viable, determination of the Defendant's motion to dismiss on each of the claims may clarify the facts and issues this Court finds to be significant. That would allow the parties to focus their discovery on those points and thereby avoid unforeseen questions of fact that would preclude summary judgment. Consequently, resolution of the Defendant's motion to dismiss in regards to all the claims is necessary at this time.

The Sixth Circuit's application of *Lyng* in other cases similarly urges against declining to resolve constitutional issues brought in a Rule 12 motion unless the case can be fully adjudicated on more narrow grounds. In *United States v. Doyle*, 711 F.3d 729 (6th Cir. 2013), the Sixth Circuit declined to reach constitutional issues after determining that the district court committed clear error by failing to explain the reasons for its order. In both *United States v. Green*, 654 F.3d 637 (6th Cir. 2011) and *Terrell v. United States*, 564 F.3d 442 (6th Cir. 2009), the Sixth Circuit—citing *Lyng*—resolved potentially dispositive statutory questions before turning to constitutional questions. In *Coleman v.*

Mitchell, 268 F.3d 417, 432 (6th Cir. 2001), the Court declined to reach a constitutional issue where the petitioner's claim was procedurally barred on other grounds. Finally, in *United States v. Buchanan*, 904 F.2d 349, 354 (6th Cir. 1990), the Sixth Circuit concluded that it did not need to reach an issue of probable cause in light of its decision that exigent circumstances were not present. In each of these cases, the Sixth Circuit's invocation of *Lyng* was in the context of an issue that could be completely avoided by determining the case on more narrow grounds. Here, the other counts of the Plaintiffs' Complaint have not been determined at all, and the Court's determination of Count 1 did not resolve the issues in the other claims.

A determination of the plausibility of the remaining claims is also consistent with the precedent in the Eastern District. This Court's Opinion and Order cited *Caspar v. Snyder*, 77 F. Supp. 3d 616, 639 n.10 (E.D. Mich. 2015) in support of refraining from deciding other constitutional claims. However, in *Caspar*, the Court was addressing whether or not to issue a preliminary injunction. *Id.* Because the Court in *Caspar* had already decided to issue an injunction, and granted a temporary stay for the parties to "pursue an orderly appellate process,"

deciding the other constitutional claims would not have changed the outcome of the case at that time. *Caspar*, 77 F. Supp. 3d at 639 n.10, 645. But here, there was no injunction and no entitlement to an immediate appeal. Consequently, this Court should rule on the viability of the remaining claims.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendant Secretary of State Ruth Johnson respectfully requests that this Honorable Court reconsider its November 16, 2015 Opinion and Order and make a determination on the Defendant's Motion to Dismiss with regard to Counts Two through Five of the Plaintiffs' Complaint.

Respectfully submitted,

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Dated: November 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via U.S. Mail to all non-ECF participants.

/s/Erik A. Grill

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