Order

Michigan Supreme Court
Lansing, Michigan

December 27, 2023

Elizabeth T. Clement,
Chief Justice

166470 & (122)(133)(134)(137)(138)(140)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY, and WILLIAM NOWLING,
Plaintiffs-Appellants,

v

SC: 166470
COA: 368628
Ct of Claims: 23-000137-MZ

SECRETARY OF STATE,
Defendant-Appellee,

and

DONALD J. TRUMP,
Intervening Appellee.

_____/

On order of the Court, the motions for immediate consideration are GRANTED. The motions of Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee; Professor Kurt T. Lash; Constitutional Accountability Center; and Citizens for Responsibility and Ethics in Washington to file briefs amicus curiae are GRANTED. The amicus briefs submitted on December 22, 2023 are accepted for filing. The application for leave to appeal the December 14, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

WELCH, J. (*dissenting*).

As I noted in an earlier appeal in this matter, "[w]hether a potential presidential candidate is constitutionally ineligible to appear on the ballot pursuant to the Insurrection Clause of the Fourteenth Amendment, US Const, Am XIV, § 3, and whether the judiciary can decide that question before an election are questions of monumental importance for our system of democratic governance." *LaBrant v Secretary of State*, ___ Mich ___, ___ (December 6, 2023) (Docket No. 166373) (WELCH, J., dissenting). While I disagreed with this Court's decision to not grant the appellants' earlier bypass application, the Court of Appeals moved with extraordinary speed to work through significant legal questions and promptly issued a thoughtful opinion. Considering the importance of the legal questions at issue and the speed with which the appellants and the judiciary have moved, I believe it is important for this Court to issue a decision on the merits.

The only legal issue properly before the Court is whether the Court of Claims and the Court of Appeals erred by holding that the Michigan Secretary of State lacks legal authority to remove or withhold former President Donald J. Trump's name from

Michigan's 2024 presidential primary ballot. I agree with the Court of Appeals that under MCL 168.614a and MCL 168.615a, the Secretary of State must place Trump on the primary ballot "regardless of whether he would be disqualified from holding office by" US Const, Am XIV, § 3. *Davis v Wayne Co Election Comm*, ___ Mich App ___, ___ (December 14, 2023) (Docket Nos. 368615 and 368628); slip op at 18. As the Court of Appeals correctly observed, "where the relevant statutes require the Secretary of State to place any candidate" who has been identified by the relevant political party "on the presidential primary ballot, and confers no discretion to the Secretary of State to do otherwise, there is no error to correct." *Id*. at 21.

Appellants argue that because the state has delegated to political parties the role of selecting primary candidates, this makes the political parties limited purpose state actors subject to the Fourteenth Amendment of the United States Constitution. See *Smith v Allwright*, 321 US 649 (1944) (holding that the Democratic Party of Texas was a state actor subject to the federal Constitution); *Terry v Adams*, 345 US 461 (1953) (holding that political-party-controlled primaries are subject to the Fifteenth Amendment); *Nixon v Condon*, 286 US 73 (1932) (concluding that the Fourteenth Amendment applies to the conduct of political parties using delegated government authority to conduct state primaries). The decisions in *Nixon*, *Smith*, and *Terry* each involved ballot access questions, and in each case, the United States Supreme Court held that a political party could not deny a voter access to the primary ballot box for discriminatory reasons. Appellants further argue that Michigan courts have recognized that *Nixon*, *Smith*, and *Terry* apply to Michigan political parties when they act as "agencies of the state" in the presidential primary process. See, e.g., *Grebner v Michigan*, 480 Mich 939, 940-941 (2007) (citing *Nixon*, *Smith*, and *Terry*); *Fifth Dist Republican Comm v Employment Security Comm*, 19 Mich App 449, 454 (1969) (citing *Smith*, characterizing a political party as a state actor subject to constitutional restrictions when it is entrusted by the state with a role in a primary election). On the basis of these cases, appellants argue that the political parties are state actors for purposes of putting forward candidates for the presidential primary, and thus, the political parties are subject to the United States Constitution.

If this premise is true, then political parties might have a constitutional obligation to ensure that proposed presidential primary candidates are constitutionally eligible to hold the office of President before submitting their names to the Secretary of State for inclusion on the primary ballot. But this does not affect the Secretary of State's limited role and authority under MCL 168.614a and MCL 168.615a in relation to presidential primary elections. Under MCL 168.614a(3) and MCL 168.615a(1) and (2), the Secretary of State must place names on the primary ballot based upon a survey of "individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination," MCL 168.614a(1), and a "list of individuals whom [the chairpersons of each political party] consider to be potential presidential candidates for that party," MCL 168.614a(2). The Secretary of State must also include on the primary ballot an "individual who is not listed as a potential presidential candidate under section 614a . . . if he or she

files a nominating petition with the secretary of state no later than 4 p.m. on the second Friday in December of the year before the presidential election year" and the nominating petition is valid. MCL 168.615a(2). While MCL 168.615a(1) permits the Secretary of State to withhold from the primary ballot the name of a potential presidential candidate if the candidate makes such a request in an affidavit filed "no later than 4 p.m. on the second Friday in December of the year before the presidential election year," the appellants have not cited any other provision of the Michigan Election Law, MCL 168.1 *et seq*., that gives the Secretary of State the discretion or legal authority to remove or withhold a potential presidential candidate's name from the primary ballot. While there may be some merit to the argument that political parties are limited purpose state actors who must comply with the United States Constitution when submitting candidate names as part of the presidential primary process, no political party is a party to this litigation.

The appellants have also notified this Court that on December 19, 2023, a majority of the Colorado Supreme Court held that Trump is disqualified from holding the office of President under Section Three of the Fourteenth Amendment of the United States Constitution and that therefore, under the Colorado Election Code, it would be wrongful for the Colorado Secretary of State to list him as a candidate on the Colorado Republican presidential primary ballot in 2024. *Anderson v Griswold*, ___ P3d ___; 2023 CO 63 (Colo, 2023). The Colorado Supreme Court's decision was preceded by a lengthy evidentiary proceeding in a trial court that developed the factual record necessary to resolve the complicated legal questions at issue. The legal effect of the decision from Colorado has been stayed for a short period, and Trump has indicated his intent to seek leave to appeal in the United States Supreme Court.

Significantly, Colorado's election laws differ from Michigan's laws in a material way that is directly relevant to why the appellants in this case are not entitled to the relief they seek concerning the presidential primary election in Michigan. As noted by the *Anderson* majority:

> The [Colorado] Election Code limits participation in the presidential primary to "qualified" candidates. § 1-4-1203(2)(a) ("[E]ach political party that has a *qualified* candidate . . . is entitled to participate in the Colorado presidential primary election." (emphasis added)); *see also* §§ 1-4-1101(1), -1205, C.R.S. (2023) (allowing a write-in candidate to participate in the presidential primary election if he or she submits an affidavit stating he or she is "qualified to assume" the duties of the office if elected). As a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a "qualified candidate" is the "statement of intent" (or "affidavit of intent") filed with the Secretary. *See* § 1-4-1204(1)(c) (requiring candidates to submit to the Secretary a notarized "statement of intent"); § 1-4-1205 (requiring a write-in candidate to file a notarized "statement of intent" in order for votes to be counted for that candidate and

> stating that "such affidavit" must be accompanied by the requisite filing fee). [*Id*. at __; slip op at 22-23.]

The appellants have identified no analogous provision in the Michigan Election Law that requires someone seeking the office of President of the United States to attest to their legal qualification to hold the office.

Under MCL 168.558(1), candidates for most political offices in Michigan must file with the Secretary of State an affidavit of identity. This affidavit must be submitted with a "nominating petition, qualifying petition, filing fee, or affidavit of candidacy for a federal, county, state, city, township, village, metropolitan district, or school district office in any election" (if applicable) and must be filed within one business day after officially being nominated for "federal, state, county, city, township, or village office at a political party convention or caucus . . . ." *Id*. The affidavit of identity must include "a statement that the candidate meets the constitutional and statutory qualifications for the office sought[.]" MCL 168.558(2). Under Michigan law, materially false statements in an affidavit of identity can be grounds for withholding a candidate's name from the ballot or removing a candidate's name from the ballot. But Trump is not seeking to appear on the primary ballot by way of a nominating petition under MCL 168.615a(2), and "[t]he affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States." MCL 168.558(1). While the wisdom and purpose of such a policy choice is open to debate, that debate rests with the Legislature.

Under MCL 168.558, MCL 168.614a, and MCL 168.615a, the Secretary of State is not legally required to confirm the eligibility of potential presidential primary candidates. She lacks the legal authority to remove a legally ineligible candidate from the ballot once their name has been put forward by a political party in compliance with the statutes governing primary elections. I would affirm the Court of Appeals' ruling on this issue, which still allows appellants to renew their legal efforts as to the Michigan general election later in 2024 should Trump become the Republican nominee for President of the United States or seek such office as an independent candidate. Finally, while not adopted by the Court of Appeals, I would also vacate the Court of Claims' analysis and application of the political question doctrine as unnecessary dicta considering the court's conclusions on the

merits as to the primary election and ripeness as to the general election.[1] For these reasons, I respectfully dissent.

[1] The Court of Appeals also held that the appellants' argument that former President Trump is legally ineligible to appear on the November 2024 general election ballot is not yet ripe for judicial review because he has yet to prevail in the Michigan presidential primary and has not received the official nomination of the Republican Party at the party's national convention. While I question whether, under the present circumstances, such a claim is unripe for judicial review until a candidate becomes the official nominee of a political party, the Court of Appeals' ruling on ripeness as to the general election ballot was not appealed to this Court.