IN THE SUPREME COURT

STATE OF ARIZONA

KANYE WEST; DONALD ANGLIN; KRISTIN ANGLIN; KELLI WHITEHEAD; BRITTANI QUALE; WILLIAM QUALE; RACHEL WALLACE-SASSARINI; PATRICK WALLACE-SASSARINI; KEITH GILBERT; MARILYN TUCK; MICHELE VRABEL; MARK RENBERG, Appellants, v. RASEAN CLAYTON, Appellee.	Supreme Court No. CV-20-0249 Maricopa County Superior Court Case No. CV2020-010553

MEMORANDUM

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The Judgment is unprecedented in its holding and would lead to catastrophic consequences for all future independent candidates for President if not reversed by this Court. Never before, to undersigned counsel's knowledge, has any court found that a presidential candidate should be kept off the ballot solely on the basis of his or her voter registration. The Judgment prevents the electors for independent candidates for President and Vice President from appearing on the November 2020 general election ballot, despite the fact that the campaign has already submitted nearly 58,000 signature of Arizona voters who want to see his name appear on the ballot.

I. KANYE WEST IS ELIGIBLE UNDER A.R.S. § 16-341(A)

Kanye West is fully eligible to appear on the ballot. He is not a member of any Arizona recognized party and A.R.S. § 16-341(A) was never meant to bar potential presidential nominees.

A. The Arizona Republican Party is Not a New or "Recognized" Party under A.R.S. § 16-341(A)

The trial court found that "no statutory definition, ***legislative history*** or case explains what the legislature meant by 'political party that is recognized pursuant to this title.'" Minute Entry at 4 (emphasis added). However, the legislative history and the precise terms chosen by the drafters, clearly elucidate the meaning of the term.

The critical language was added by a 1997 bill, SB 1003 (2nd Special Session). The Legislature modified an existing statute that, several subsections later, referred to an elector's membership in "a political party that is qualified to be represented by an official party ballot at the next ensuing primary election and accorded representation on the general election ballot." A.R.S. § 16-341(E) (prior version, after 1997 amendments). The language in then subsection E is clear and today would encompass the Arizona Democrat Party, the Arizona Libertarian Party, and the Arizona Republican Party. Appellee claims that the phrase "party recognized

pursuant to this title," added into subsection A in 1997 has precisely the same meaning as the language quoted above. But if this were the Legislature's intent, why would it have introduced an entirely new phrase to capture an identical concept? If it had meant to describe the same set of parties in subsection A as in subsection E, the Legislature would have made the phrasing coordinate. *France v. Industrial Commission of Arizona*, 248 Ariz. 369, ¶14 (App. 2020) ("[W]hen the legislature chooses different words within a statutory scheme, we presume those distinctions are meaningful and evidence an intent to give a different meaning and consequence to the alternate language.").

Indeed, what the Legislature did in its 1997 Amendment was to limit access for registered members of "new" parties, that is parties that utilized the "petition for recognition" process provided for in A.R.S. §§ 16-801 through 803 in that current cycle. Registered members of the "qualified to be represented parties," addressed in A.R.S. § 16-804 were not so limited. This distinction between members of freshly "established" parties and members of "new" parties is fairly typical of the Legislature and has been upheld by the Ninth Circuit. *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1088 (9th Cir. 2019) ("Under Arizona law, there are two types of political parties: 'established' parties and 'new' parties."). A similar example of this disparate treatment is that an established party member may not vote in another party's primary, but it is up to the established parties to decide whether new party members or unaffiliated voters can participate in their primaries. *See* A.R.S. § 16-467(B).

The language chosen in the 1997 Amendment to subsection A manifestly limited its restrictions to "recognized" or "new" party members, and as neither Mr. West nor any of his designated electors are (or ever have been) members of such a party, its prohibitions simply do not apply.

B. Mr. West is Not a Registered Member of Any Arizona Party

Even if the Arizona Republican Party were a "recognized" party for the purposes of A.R.S. § 16-341(A), Mr. West would still be eligibile. He is a registered voter associated with the *Wyoming* Republican Party[1], a party which is not a registered party in Arizona. Accordingly, Mr. West is not, nor ever has been, "a registered member of a political party that is recognized pursuant to [Title 16 of the Arizona Revised Statutes]." A.R.S. § 16-341(A). Therefore, Mr. West is eligible to be "nominated . . . other than by primary election." *Id.* The Supreme Court of Pennsylvania reached exactly this conclusion in rejecting a challenge to the candidacy of 2004 Independent Vice Presidential candidate Peter Miguel Camejo who was a registered member of the Green Party in the state of California. *In re Nader*, 580 Pa. 22, 46, 858 A.2d 1167, 1181 (2004) (abrogated on other grounds by *In re Vodvarka*, 636 Pa. 16, 140 A.3d 639 (2016)) (finding Pennsylvania had no "interest in prohibiting candidates who are members of a party in another state from running as independents in this Commonwealth.")

Arizona History is replete with presidential candidates whose Presidential party is different than the one listed on their home state political registration. The 1968 Arizona ballot for President featured the *Democratic* Governor of Alabama as the *American Independent Party* candidate. The 1980 Arizona ballot for President featured a *Republican* Congressman from Illinois as an *Independent* candidate. The 2016 and 2020 Arizona *Democratic* primary ballots featured an *Independent* Senator from Vermont. None of these candidates were held to their home state affiliation and neither should Mr. West.

[1] Wyoming requires voters to affiliate with a political party in order to participate in partisan primary elections. *See* Wyo. Stat. Ann. § 22-5-212. Therefore, what Plaintiff suggests is necessary for Mr. West to appear on the ballot in Arizona would disenfranchise him in his home state of Wyoming.

A.R.S. § 16-341(A) simply does not apply to bar independent Presidential candidates. The very first words of subsection A demonstrate the problem with doing so:

> **Any qualified elector** who is not a registered member of a political party that is recognized pursuant to this title may be nominated as a candidate for public office otherwise than by primary election or by party committee pursuant to this section.

A.R.S. § 16-341(A) (emphasis added). A "qualified elector" is defined as "[a] person qualified to register to vote pursuant to § 16-101 and who is properly registered to vote." A.R.S. § 16-121. In turn, a person qualified to register to vote a must be a "resident of the state" of Arizona. A.R.S. § 16-101. Mr. West—not a resident of Arizona and, therefore, not a qualified elector in this state—would not be subject to the statute, nor would anyone else except residents of Arizona. Read in this manner, the qualified elector requirement of Section 16-341(A) would prevent anyone who is not a resident of Arizona from running as an independent candidate for President in Arizona. Recognizing that it makes no sense to read the statute as limited to Arizona residents, Plaintiff argues that despite this fact West must be subject to the non-registration requirement or he cannot use the statute. In effect, they would read "qualified elector" out of the statute as applied to presidential candidates. This solution simply doesn't work since it expands the scope of the stature beyond its possible application. Rather, subsection A must be read in a way that avoids this absurd result, and, therefore, subsection A must apply the registration requirement only to offices for which the candidate will be "residents of the state" of Arizona, i.e., those other than the Presidency and Vice Presidency. Where a candidate for president is a member of a party in another state, the statute does not bar his candidacy.

Indeed, construing the Arizona statute to prevent some persons registered in another state from appearing as an independent candidate on the Arizona ballot, but

not others would run afoul of the sort of constitutional concerns that led the Ninth Circuit to invalidate other aspects of Arizona's presidential nomination system. *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008) (invalidating a residency requirement which created a "severe burden on Nader and his out-of-state supporters' speech, voting and associational rights"). The two parties in Minnesota, for example, are denominated "Republican" and "Democratic-Farmer-Labor" ("DFL"), which does not exist as a recognized party in Arizona. It would be absurd if Section 16-341(A) were to bar a Minnesota Republican like Tim Pawlenty from an independent candidacy, but not the Minnesota DFL's Amy Klobuchar.

II. KANYE WEST'S DESIGNATED ELECTORS ARE ELIGIBLE UNDER A.R.S. § 16-341(A)

While the minute order does not appear to rely Elector the disqualification, it notes that " [t]he status of his presidential electors, too is problematic." However, the Electors have registered as independents and there is nothing in the controlling statute, 16-341, which requires that in order to serve as Presidential Electors for Mr. West's ticket, the Arizona residents must not have been registered as members of a "recognized political party" at any time prior to the filing of the nominating petitions.

A. Nominees for Presidential Electors for an Independent Candidate Do Not Need to be Registered as Unaffiliated Candidates at the time the Petitions are first circulated.

Nothing in the text of A.R.S. §16-341(A) sets a deadline when a candidate for presidential elector must not be registered as a member of a registered party. Plaintiffs below argued that the provisions of A.R.S. §16-311(A) require that the electors no longer be registered as Republicans " on the date of the first petition signature on the candidate's petition." This argument fails for several reasons.

First, the terms of 16-311(A) do not apply here on their face. The sentence relied upon by Plaintiff provides: [a] candidate for partisan political office shall be

continuously registered with **the political party of which the person desires to be a candidate"** for the requisite period. The statute has no application here. The electors who have re-registered as unaffiliated are not seeking to be the candidate of a political party; they are running as unaffiliated electors and the statute does not apply to them by its plain terms. Nothing in the terms of 16-311(A) requires an elector who becomes unaffiliated to do so prior to petition circulation. It rather bars a person who is not a member of a registered political party from circulating a petition to be a candidate for that party.

Second, section 16-311(A) deals with qualifications for partisan primary elections. It does not deal with the ability of electors to get on the ballot for an independent presidential candidate which is governed by 341(A). If the legislature intended to impose a limit on eligibility under 16-341(A), it would have included that eligibility requirement in that section or the article in which it appears, not in an article dealing with entirely separate issues.

B. Nominees for Presidential Electors Need Not File Statements of Interest Under A.R.S. § 16-341(I).

The trial court did not reach the issue of 16-341(I). Presidential Electors are exempt from the requirement to file a Statement of Interest under A.R.S. § 16-341(I)(3). Subsection I, part 3 expressly excludes Candidates from the requirement to file a Statement of Intent prior to collecting valid signatures. However, because signatures are collected on behalf of the Electors who will appear on the ballot and not the Candidates on their own behalf, the only way to allow subsection I, part 3 to have any force at all is if it applies to both Candidates and their Presidential Electors on whose behalf the signatures are collected. Just as the nominees and nominated slate of electors for the recognized parties are not required to file statements of intent,

neither the Candidates nor their designated Presidential Electors are required to do so in this context.

Supporting this interpretation is the Secretary of State's handbook which provides the following exhaustive list of the requirements for an independent candidate. *See* Ariz. Sec'y of State, *Running for U.S. President in Arizona – Candidate Guide* (Sept. 13, 2019) available at azsos.gov/sites/default/files/Running%20for%20President%20Handbook.pdf. There is no listing of any requirement to file Statements of Intent.

III. KANYE WEST AND HIS ELECTORS CANNOT BE BARRED UNDER THE FEDERAL CONSTITUTION

Applying constitutional avoidance, this Court should not interpreting Arizona statues in a manner that would cause them to violate protections of the Federal Constitution or that undermines the public's interest in voting for their chosen presidential candidate .

A. A.R.S. § 16-341(A) Cannot Be Construed to Add Additional Unconstitutional Qualifications to Federal Office.

State law cannot add qualifications for holding federal office beyond those set forth in the Constitution. *See generally U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (striking down a state constitutional provision which barred persons who served certain number of terms in Congress from being on the ballot). Just last year, a district court struck down a California regulation requiring Presidential candidates to disclose federal tax returns. *Griffin v. Padilla*, 408 F.Supp.3d 1169, 1177–79 (E.D.Cal., 2019). This principle has also be expressly recognized by Arizona Courts: "A state legislature is without power to add 'qualification' requirements to a federal office." *State ex rel. Pickrell v. Senner*, 92 Ariz. 243, 246 (1962); *see also Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128, 135, ¶ 31 (2011) ("the state has no power to disqualify candidates from serving in federal office").

In *Campbell v. Hull*, 73 F. Supp. 2d 1081, 1084 (D. Ariz. 1999), the Arizona District Court invalidated several provisions of the predecessor to 16-341 and cite eight cases supporting the proposition that the Constitution does not permit states to require voters to change their party affiliation in order to sign petitions to nominate independents or minor party candidates. *Id.* at 1091-92 (citing, *inter alia, Libertarian Party of Nebraska v. Beermann,* 598 F.Supp. 57, 63 (D.Neb.1984) (noting that "many voters have no desire to change basic political affiliations, but neither do they vote a straight political ticket in general elections").

Plaintiff argues that the burden placed on both the Candidate and the Electors by their interpretation of 16-341 is insubstantial in comparison to the burden previously upheld in *Storer v. Brown,* 415 U.S. 724 (1974). However, the authority of *Storer* and its application here is substantially undercut by the above decisions which have repeatedly invalidated restrictions imposed by states on the process whereby independent candidates can appear on the ballot.

Indeed, any "burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze,* 460 U.S. 780, 793 (1983).

B. A.R.S. § 16-341(A) Does Not Prevent Individuals from Changing Their Mind and Supporting an Independent Candidate.

In a fact pattern that echoes that found impermissible in *Campbell v. Hull*, Plaintiff requests that this Court interpret A.R.S. § 16-341 to prevent the Defendant Electors casting their lot with an independent candidate. Plaintiff argues that if the Electors were registered as Republicans when they the first petitions were circulated, they cannot, unlike voters under *Campbell,* change their registration and serve as Electors for a third party. This reading of 16-341 tramples the electors' freedom of association rights ; they would be forbidden to support their preferred candidate

today because they supported someone else yesterday. Any state interests of "party stability" are not sufficiently compelling to justify this burden on free association. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 227 (1989).

IV. THE TRIAL COURT ERRED IN ENTERING THE INJUNCTION FOR OTHER REASONS.

The manner in which Plaintiff chose to file this litigation impinges on the Defendant's due process rights . While Plaintiff filed this suit within the statutory deadline , Defendants have been severely limited in their ability to defend this action based on the late date that Plaintiffs filed this suit and the looming deadline for the printing of ballots.

A. There is Insufficient Time for This Matter to Be Fairly Considered By the Courts.

There is simply insufficient time for this matter to proceed to a conclusion in a manner consistent with due process. "[T]he short time period allotted for actions challenging nomination petitions may not [be permitted to] deprive a defendant of his or her opportunity to present [a] case in opposition to that of the plaintiff." *Mandraes v. Hungerford*, 127 Ariz. 585, 587-88 (1981). Plaintiff is "compelling the court to 'steamroll through delicate legal issues in order to meet' the ballot printing deadlines." *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993).

Election contests, including nomination petition challenges, "are purely statutory and dependent on statutory provisions for their conduct." *Van Arsdell v. Shumway*, 165 Ariz. 289, 291 (1990). Thus, if the time available is insufficient, no matter whose fault it is, the challenge may not proceed.

B. Plaintiff Failed to Name Several Indispensable Parties.

Pursuant to A.R.S. § 16-351(C), the "board of supervisors and the recorder of each county . . . responsible for preparing the ballots that contained the challenged

candidate's name" are "indispensable parties to the action and shall be named and serves as defendants." However, here, Plaintiff has named, *e.g.*, the "Maricopa County Board of Supervisors," who are not a jural entity. *See*, *e.g.*, *Smillie v. Maricopa County Sheriff's Dep't*, CV 11-1320-PHX-NVW, 2011 WL 13175977, at *2 (D. Ariz. Dec. 28, 2011) ("Defendants Maricopa County Sheriff's Department and Maricopa County Board of Supervisors are dismissed as non-jural entities "). The judgment must be vacated because Plaintiff filed to name the actual members of the boards of supervisors and county treasurers.

C. Plaintiff's Action is Barred By Laches

Plaintiff could have brought this action earlier, but waited until the last minute with ballot printing deadlines looming. Plaintiff knew at least since August 20, 2020 that nomination petitions in support of Mr. West's candidacy were circulating, but waited for a week-and-a-half to file this action.

VI. CONCLUSION

The Court should vacate the judgment and order the Secretary of State to accept the petitions (which they are currently refusing to do absent a stay or reversal) and process the signatures submitted on behalf of Kanye West.

DATED this 4th day of September, 2020.

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