

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

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ROBERT LABRANT, ANDREW  
BRADWAY, NORAH MURPHY and  
WILLIAM NOWLING,

Court of Appeals No. 368628

Court of Claims No. 23-000137-MZ

Plaintiffs-Appellants,

v

JOCELYN BENSON, in her official  
capacity as Secretary of State,

Defendant-Appellee.

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**The appeal involves a ruling  
that a provision of the  
Constitution, a statute, rule or  
regulation, or other state  
governmental action is invalid.**

**BRIEF OF APPELLEE SECRETARY OF STATE JOCELYN BENSON**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

On November 14, 2023, the Court of Claims issued a final Opinion and Order denying Plaintiffs-Appellants' request for declaratory relief. This Court has jurisdiction over Plaintiffs-Appellants' appeal as of right under MCR 7.203(A)(1).

**COUNTER-STATEMENT OF QUESTION PRESENTED**

1. Whether the Court of Claims correctly determined that Michigan Election Law does not authorize the Secretary of State to exercise discretion in determining who may be listed as a candidate in the presidential primary beyond the provisions of the statutes themselves?

Appellants' answer: No.

Appellee's answer: Yes.

Trial court's answer: Yes.

## CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

US Const, Am XIV, § 3 provides:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

MCL 168.614a provides:

(1) Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a. The secretary of state shall make the list issued under this subsection available to the public on an internet website maintained by the department of state.

(2) Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. The secretary of state shall make the lists received under this subsection available to the public on an internet website maintained by the department of state.

(3) After the issuance of the list under subsection (1) and after receipt of names from the state chairperson of each political party under subsection (2), the secretary of state shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election.



MCL 168.615a provides:

(1) Except as otherwise provided in this section, the secretary of state shall cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party. A presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state indicating his or her party preference if different than the party preference contained in the secretary of state notification and the secretary of state shall cause that presidential candidate's name to be printed on the appropriate presidential primary ballot for that political party. If the affidavit of a presidential candidate indicates that the candidate has no political party preference or indicates a political party preference for a political party other than a political party for which a presidential primary election will be held under section 613a, the secretary of state shall not cause that presidential candidate's name to be printed on a ballot for the presidential primary election. A presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state specifically stating that "(candidate's name) is not a presidential candidate", and the secretary of state shall not have that presidential candidate's name printed on a presidential primary ballot. A presidential candidate shall file an affidavit described in this subsection 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 or the affidavit is considered void.

(2) The name of an individual who is not listed as a potential presidential candidate under section 614a shall be printed on the ballot for the appropriate political party for the presidential primary election 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. The nominating petition shall contain valid signatures of registered and qualified electors equal to not less than 1/2 of 1% of the total votes cast in the state at the previous presidential election for the presidential candidate of the political party for which the individual is seeking this nomination. However, the total number of signatures required on a nominating petition under this subsection shall not exceed 1,000 times the total number of congressional districts in this state. A signature on a nominating petition is not valid if obtained before October 1 of the year before the presidential election year in which the individual seeks nomination. To be valid, a nominating petition must conform to the requirements of this act regarding nominating petitions, but only to

the extent that those requirements do not conflict with the requirements of this subsection.

(3) The names of the presidential candidates on each political party ballot shall be rotated on the ballot by precinct. Each ballot shall contain a space for an elector to vote uncommitted.

## INTRODUCTION

Plaintiffs filed suit against the Secretary of State requesting that the court declare former President Donald Trump ineligible to be placed on Michigan's presidential primary and general election ballots because he is disqualified under § 3 of the Fourteenth Amendment and enjoin the Secretary from doing so.

The court denied relief, concluding that the political question doctrine presently bars review of whether Mr. Trump is disqualified under the Fourteenth Amendment. In reaching this conclusion, the court determined that Michigan's statutory scheme does not confer discretion on the Secretary of State to refuse to place a candidate for President on the primary ballot for a reason other than one prescribed by statute. See MCL 168.614a, 168.615a. The Secretary agrees with the court's determination that the Secretary of State does not have that discretion.

The significance of the issues presented to this Court is not lost upon the Secretary. She takes her role as the State's chief elections officer with the utmost seriousness. And it is her duty to ensure that Michigan elections are conducted in accordance with the laws of this State and in a manner that preserves the integrity of the process. The Secretary does not dispute that allowing an unqualified candidate to appear on the ballot undermines that very process.

But the laws of this State have not conferred upon the Secretary the authority to determine a question of such magnitude. To be clear, the Secretary will comply with any order resolving the former President's eligibility to appear on Michigan's ballot. But until a court so decides, the Secretary takes no position on the federal constitutional issues raised in this case.

## COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The instant case is related to two other cases decided by the Court of Claims on the same day, which the Secretary will discuss briefly for context.

### ***Davis v Benson, Court of Claims No. 23-000128***

Robert Davis filed a complaint against the Secretary on September 15, 2023. Among other claims, Davis sought a declaration that Secretary Benson had a legal duty under article 11, § 1 of the Michigan Constitution to determine whether former President Donald Trump met the eligibility requirements to run for President of the United States under section 3 of the Fourteenth Amendment. (Defs' Appx, 23-000128 Opinion, pp 1-2.) Davis sought mandamus relief to compel the Secretary to issue a declaratory ruling declaring that Mr. Trump is ineligible to run as a candidate for President in Michigan's presidential primary. (*Id.*)

### ***LaBrant, et al v Benson, Court of Claims No. 23-000137***

On September 29, 2023, Plaintiffs Robert LaBrant, Andrew Bradway, Noah Murphy, and William Nowling filed the instant complaint against Secretary Benson. Plaintiffs requested that the Court of Claims enter a declaratory judgment declaring that Mr. Trump is ineligible to be placed on Michigan's presidential primary or general election ballot because he is disqualified under section 3 of the Fourteenth Amendment. (Defs' Appx, 23-000137 Opinion, p 17.) Plaintiffs further requested that the Court enjoin the Secretary from placing Mr. Trump on Michigan's presidential or general election ballots. (*Id.*)

***Donald J. Trump v Benson, Court of Claims No. 23-000151***

After being denied intervention in both the *Davis* and *LaBrant* cases, on October 30, 2023, Mr. Trump filed a complaint against Secretary Benson. Mr. Trump sought a declaration that the Secretary has no authority under Michigan law to refuse to include him as a candidate for President on Michigan's presidential primary ballot. (Defs' Appx, 23-000151 Opinion, p 38.) He also sought a declaration that the Secretary has no authority to exclude him from the ballot under federal law. (*Id.*) And finally, he requested that the Secretary be enjoined from refusing to place him on the ballot. (*Id.*)

**The Court of Claims orders the cases be heard together**

On October 9, 2023, the Court of Claims ordered the Secretary to respond in the *Davis* and *LaBrant* cases by October 16, 2023, and to address six specific questions relating to the Secretary's duties and the application of the Fourteenth Amendment. (Defs' Appx, 10/9/23 Order, pp 64-65.) The Secretary thereafter timely filed answers and briefs in the *Davis* and *LaBrant* cases. (Defs' Appx, 10/16/23 *LaBrant* Memo, pp 66-87.)

On October 25, 2023, the Court of Claims ordered that the Secretary's response to Mr. Trump's complaint be filed by November 2, 2023. (Defs' Appx, 10/25/23 Order, p 91.) The Secretary thereafter timely filed her answer and brief in that case. And on October 31, 2023, the court ordered that it would hear oral argument together in the three cases on November 9, 2023. (Defs' Appx, 10/31/23 Order, pp 95-98.)

### **The Court of Claims' November 14, 2023 opinions**

On November 14, 2023, the Court of Claims issued separate opinions in the three cases. In the *Davis* case, the court granted relief in the Secretary's favor, concluding that she did not have a legal duty to determine whether Mr. Trump was disqualified under the Fourteenth Amendment from running as candidate in the presidential primary. (Defs' Appx, 23-000128 Opinion, pp 2-3.)

In the instant case, the court denied Plaintiffs' request for declaratory and injunctive relief on the basis that the political question doctrine barred, at this time, review of whether Mr. Trump was disqualified under section 3 of the Fourteenth Amendment. (Defs' Appx, 23-000137 Opinion, pp 17-18.)

And in Mr. Trump's case, the Court of Claims granted his request for a declaration that the Secretary does not have the authority under state or federal law to determine whether Mr. Trump is disqualified under the Fourteenth Amendment from running in the presidential primary but denied his similar request for relief directed at the general election to be held in November 2024 as those claims were not ripe. (Defs' Appx Vol 1, 23-000151 Opinion, pp 39-40.)

### **Post-judgment proceedings**

The *LaBrant* Plaintiffs filed their claim of appeal in this Court on November 15, 2023. The next day, Plaintiffs filed an emergency application for bypass in the Michigan Supreme Court along with motions for immediate and expedited consideration. The bypass application was docketed as Case No. 166373, but has since been denied.

Mr. Trump moved to intervene in the instant appeal on November 17, 2023, and in the bypass application on November 20, 2023. This Court granted the motion to intervene in the instant appeal on November 20, 2023. And on November 22, 2023, this Court issued an order consolidating the instant appeal with Docket No. 368615,<sup>1</sup> ordered expedited briefing, and stated that it would hear the cases without oral argument and that the cases would be submitted to the panel by December 8, 2023.

### **Impending primary election deadlines**

The presidential primary will be held on February 27, 2024. Michigan's 83 Boards of County Election Commissioners are responsible for preparing and printing ballots for the election. MCL 168.689. Absent voter ballots must be available, no later than the 45th day before the November General Election, or **January 13, 2024**. This deadline for distribution of absent voter ballots is governed by the Federal Military and Overseas Voters Empowerment Act (MOVE Act), 52 USC 20302(a)(8), Michigan Election Law, MCL 168.714 and 759a, and Michigan's Constitution, art 2 § 4.<sup>2</sup>

To meet that date, the primary ballot must be finalized by the beginning of January so that county clerks have time to first prepare proof ballots, MCL 168.711,

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<sup>1</sup> Docket Number 368615 is an appeal by Robert Davis from a decision by the Wayne Circuit Court, No. 23-012484-AW, rejecting Davis's claims that the Wayne County Election Commission has a duty to independently determine whether the presidential primary candidates certified by the Secretary of State for the presidential primary election, including Mr. Trump, were properly certified.

<sup>2</sup> See February 27, 2024, Presidential Primary Dates, available at [Election Calendar of Dates \(michigan.gov\)](https://www.michigan.gov/electioncalendar).

and then to print and distribute ballots. MCL 168.713 (requiring county boards to deliver absent voter ballots to the county clerk at least 47 days before the primary election); MCL 168.714 (requiring county clerks to deliver absent voter ballots to the township and city clerks at least 45 days before the primary election). This means that court proceedings and any appeals must conclude well-before January 13 to ensure the timely delivery of absent voter ballots to Michigan voters.

### STANDARD OF REVIEW

“Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion.” *Barrow v Detroit Election Comm*, 305 Mich App 649, 662 (2014) (cleaned up). This Court reviews a trial court's grant or denial of an injunction for abuse of discretion. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 28 (2008), citing *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217 (2001).

### ARGUMENT

**I. The Secretary of State is not authorized to disqualify a candidate for President under section 3 of the Fourteenth Amendment.**

In the lower court, other than the question related to the Secretary’s authority to disqualify, the Secretary did not advance an affirmative position on the significant questions raised by the application of section 3 of the Fourteenth Amendment to the candidacy of Mr. Trump. (Defs’ Appx, *LaBrant* Memo, pp 71-77.) Consistent with that posture, the Secretary does not have a position on appeal



regarding the Court of Claims' determination that the disqualification question was unripe and unreviewable under the political question doctrine. But, to the extent questions regarding the Secretary's authority arise on appeal, the Secretary restates the argument she made below.

**A. The Secretary has limited authority to determine who should be listed as a candidate in the presidential primary.**

The Court of Claims correctly held that "Michigan's Constitution of 1963, art 2, § 4 and MCL 168.614a and 168.615a prescribe the manner a person may have their name placed on the Michigan presidential primary ballot and in so doing direct the actions the Secretary of State shall take." (Defs' Appx, 23-000137 Opinion, p 17.)

The US Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." US Const art I, § 4, cl 1. This provision is known as the "Elections Clause." The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. *Arizona v Inter Tribal Council of Ariz, Inc*, 570 US 1, 8 (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Id.*

Similar to the Elections Clause, the "Electors Clause" of the US Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." US Const art II, § 1, cl 2.

Congress can “determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” US Const art II, § 1, cl. 4. Congress has set the time for appointing electors as “the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” 3 USC 1.

Under the Michigan Constitution, the Legislature “shall enact laws to regulate the time, place and manner of all . . . elections[.]” Const 1963, art 2, § 4(2). The Legislature delegated the task of conducting proper elections to the Secretary of State, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9. See also, MCL 168.31(1), MCL 168.21.

The Legislature has prescribed the manner in which candidates for the Office of President obtain ballot access in Michigan. With respect to obtaining access to the presidential primary ballot, under MCL 168.614a(1), the Secretary creates a list of candidates from national news media sources:

Not later than 4 p.m. of the second Friday in November of the year before the presidential election, *the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a. . . .* [Emphasis added.]

The Secretary performed this function and published her list of candidates on November 13, 2023.<sup>3</sup> And under subsection 614a(2), the chairpersons for the major

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<sup>3</sup> See Secretary Benson releases 2024 presidential primary candidate list, available at [Secretary Benson releases 2024 presidential primary candidate list \(michigan.gov\)](#) (accessed December 6, 2023.)

political parties in Michigan file a list of candidates with the Secretary after she issues her list:

Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. . . .

All names of the candidates identified under § 614a will then be placed on the presidential primary ballot unless a candidate withdraws.<sup>4</sup> MCL 168.615a (“Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party.”) (Emphasis added). The winning candidate for each party is then certified by the Board of State Canvassers. MCL 168.616a.

However, barring court action, the names of which candidates for President will actually appear on the November general election ballot is ultimately a determination made by the major political parties through their respective fall state conventions. See, e.g., MCL 168.42, 168.591, 168.619. This process usually results in the winners of the Michigan presidential primary election being nominated by the parties as their candidates for November, but that is not a forgone result.

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<sup>4</sup> A person who is not identified as a candidate under either method described in § 614a(1)-(2), may seek to access the ballot by timely filling a nominating petition containing sufficient valid signatures of registered voters. MCL 168.615a(2). No petitions were filed with regard to the 2024 presidential primary.

The Court of Claims observed as much stating, “[u]nder th[ese] requirements, while the Secretary is mandated to act, she retains discretion as to what media sources to consider when choosing which candidates to list on the notices she provides to the respective political parties under MCL 168.614a. However, the ultimate decision is made by the respective political party, with the consent of the listed candidates.” (Defs’ Appx, 23-000137 Opinion, p 23.)

**B. The Secretary is not authorized to determine the eligibility of a presidential primary candidate for purposes of section 3 of the Fourteenth Amendment.**

The US Constitution imposes qualifications for the Office of President. See, e.g., US Const, art II, § 1, cl 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”) But no language in §§ 614a, 615a, or any other section of the Michigan Election Law requires or authorizes the Secretary to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected.

In contrast, the Legislature has incorporated eligibility requirements for various offices into the Michigan Election Law, including federal offices, see, e.g., 168.51, 168.71, 168.91, 168.131, 168.161, 168.281, and has required these candidates to file “affidavit[s] of identity,” which include a statement that a candidate “meets the constitutional and statutory qualifications for the office

sought,” MCL 168.558(1)-(2).<sup>5</sup> Candidates who fail to complete a certificate of identity or supply false information are prohibited from appearing on the ballot. *Moore v Genesee Cty*, 337 Mich App 723, 731 (2021). The Legislature chose, however, to expressly exclude candidates for President from compliance with the affidavit of identity requirement, likely because the Legislature expects the parties to police the qualifications and eligibility of their candidates. MCL 168.558(1) (“The 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.”).

There simply is no statute in the Michigan Election Law that expressly imposes upon the Secretary a duty to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected. Nor can such a duty be implied from any statute, particularly where the Legislature expressly relieved presidential candidates from making any affirmation that they meet the qualifications for that office. See MCL 168.558(1). The Legislature’s drafting choice strongly suggests that the Secretary has neither the duty nor the authority to prohibit a presidential candidate who lacks the constitutional qualifications from appearing on a primary or general election ballot. See *People v Lewis*, 503 Mich 162, 165-66 (2018) (“[W]hen the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional.”). And while the Secretary has the “inherent authority to

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<sup>5</sup> There is an eligibility requirement for presidential electors. See MCL 168.41, Const 1963, art 2, § 3.

take measures to ensure that voters [are] able to avail themselves of the constitutional rights established” in article 2, § 4 of the Michigan Constitution, *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020), nothing in that article suggests she has the authority to modify the largely ministerial process of identifying and accepting a slate of presidential candidates to be voted upon at the presidential primary (or at the November election).

Further, whether the Fourteenth Amendment bars Mr. Trump from appearing as a presidential candidate on Michigan’s ballots is a federal constitutional question of enormous consequence. Michigan courts have held that administrative agencies generally do not have the power to determine constitutional questions. *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 710 (2022), citing *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642 (1980). See also *Dation v Ford Motor Co*, 314 Mich 152, 159 (1946). And here, where the Legislature has not authorized or required the Secretary to determine or confirm whether candidates for President are qualified and eligible to serve, she has no authority to determine this constitutional question.

It has been suggested that article 11, § 1 of the Michigan Constitution, which requires state officers to take an oath in which they “swear (or affirm) that [they] will support the Constitution of the United States,” obligates the Secretary to resolve the Fourteenth Amendment question otherwise she is not supporting the US Constitution. But the text of § 3 does not speak directly to whether the Secretary or any other state official must prohibit a candidate for the Office of President from

appearing on a state's ballot when state law confers no authority on that official to evaluate presidential candidates' qualifications for office. And article 11, § 1 does not somehow authorize the Secretary to determine a constitutional question she is otherwise not required or authorized to resolve. Moreover, the Secretary simply has no administrative process for making the legal—let alone factual—determinations that would need to be made concerning the application of § 3. There is no statutory vehicle that provides either a citizen with the right to initiate such an action or for the participation of the impacted candidate, who would presumably be entitled to some process. See, e.g., *Greene v Raffensberger*, 599 F Supp 3d 1283 (ND Ga 2022) (discussing plaintiff's due process concerns in case involving disqualification under § 3).

For these reasons, the Secretary does not have the authority to decide whether section 3 of the Fourteenth Amendment renders Mr. Trump eligible or ineligible to be placed on the ballot. If a court ultimately concludes that Mr. Trump is ineligible, the Secretary will certainly abide by that decision.

### **CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth above, the Court of Claims correctly concluded that Defendant-Appellee Secretary of State Jocelyn Benson does not have the authority to disqualify a candidate from the presidential primary ballot where the statutory scheme controls access to the ballot.

Respectfully submitted,

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### WORD COUNT STATEMENT

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