Order

Michigan Supreme Court
Lansing, Michigan

September 14, 2022

Bridget M. McCormack,
Chief Justice

164564 & (46)(47)(49)(50)(51)
(53)(56)

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

ROBERT DAVIS,
Plaintiff-Appellee,

v

SC: 164564
COA: 361544
Wayne CC: 22-005386-AW

HIGHLAND PARK CITY CLERK and
HIGHLAND PARK ELECTION COMMISSION,
Defendants-Appellees,

and

HIGHLAND PARK CITY COUNCIL,
Intervening Defendant-Appellant.

_____/

On order of the Court, the motions for immediate consideration and to file briefs amicus curiae are GRANTED. The application for leave to appeal the June 2, 2022 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The motion to dismiss application and the motion to strike are DENIED.

VIVIANO, J. (*concurring*).

I agree with the denial order in this case because appellant Highland Park City Council lacks standing to appeal. I write, however, because the underlying legal issue has caused great confusion and resulted in numerous candidates being kept off the ballot. Statutory requirements for appearing on ballots must be followed, but those requirements should be clear and easy to understand. As shown by this case, the confusion caused by the recent amendment of MCL 168.558(2) threatened the democratic process by nearly depriving the city of Highland Park's legislative body of sufficient membership to govern. I strongly encourage the Legislature to correct this problem before the next election cycle.

Plaintiff Robert Davis brought the present case to challenge the eligibility of Carlton Clyburn, Jr., to be on the August 2022 primary ballot for Highland Park mayor. Like other local offices in Highland Park, the mayoral office is officially designated as nonpartisan. In seeking the office, Clyburn was required by MCL 168.558(2) to file an affidavit of identity (AOI). The AOI was required to contain, among other things, "the candidate's political party or a statement indicating no party affiliation if the candidate is running without political party affiliation[.]" The party-affiliation requirement was put in place in 2021. See 2021 PA 158.[1] The AOI form provided by the Secretary of State's office, however, predated this amendment and has not been updated. In the relevant space, the form asked for the following information: "political party, if a partisan office. if running without party affiliation list 'No Party Affiliation.' " Clyburn, like many other candidates running for nonpartisan office—including numerous judicial candidates—left this space blank, apparently in the belief that it was inapplicable to him because he did not have the option of running with party affiliation for the office of mayor.

Davis sought mandamus relief against the Highland Park City Clerk and the Highland Park Election Commission to keep Clyburn off the ballot, claiming that his AOI was defective under MCL 168.558(2) because it did not contain any statement that Clyburn was running without party affiliation. The Highland Park City Council (the City Council) was allowed to intervene as a defendant over plaintiff's objection. The trial court disagreed with plaintiff on the merits and denied mandamus, but the Court of Appeals reversed in an unpublished opinion. *Davis v Highland Park City Clerk*, unpublished opinion of the Court of Appeals, issued June 2, 2022 (Docket No. 361544). The Court of Appeals concluded that MCL 168.558(2) applied to candidates running for nonpartisan offices. Clyburn failed to comply with this provision because his silence on the form—i.e., his failure to state that he was running with no party affiliation—did not satisfy the statutory requirement that he "state something affirmatively . . . ." *Id.* at 4.

After the decision keeping him off the ballot, Clyburn attempted, for the first time, to intervene in this case—he had not been a party to the proceedings in either of the lower courts—and sought leave to appeal here. We denied this 11th-hour effort to intervene, as it came at a point when it seemed impossible to grant him the relief he sought, i.e., placement on the primary ballot, which the Secretary of State needed to certify by June 3. See MCL 168.552(14). We dismissed the application for leave to appeal, as no party to the case had, at that point, sought leave to appeal. About three weeks later, well after the date on which the Secretary of State was required to certify candidates for the August ballot, see MCL 168.552(14), the City Council filed the present application for leave to appeal, challenging the Court of Appeals' decision. In its application, the City Council notes that local officials kept numerous other candidates for the city's nonpartisan offices

[1] 2021 PA 158 also added a number of other requirements regarding what an AOI must contain, but only the party-affiliation requirement is relevant for purposes of this appeal.

(not parties to this case) from the ballot because those candidates—10 of the 14 candidates, in fact—had, like Clyburn, failed to write on the AOI that they were running without party affiliation.

I believe a denial of leave is appropriate in this case because the City Council lacks appellate standing. A party can appeal if it is aggrieved from a decision by a lower court; that is, it "must have suffered a concrete and particularized injury" based on the decision below. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291 (2006). "A party who could not benefit from a change in the judgment has no appealable interest." *Id*. at 291 n 2 (quotation marks and citations omitted).

It is true, as Justice WELCH notes in dissent, that the City Council was allowed to intervene in this action below and took a position contrary to the conclusion reached by the Court of Appeals. But these facts do not supply an injury suffered by the City Council, and a judgment in this case reversing the Court of Appeals would not supply a benefit to the City Council. Because Clyburn is the only candidate plaintiff has challenged in this appeal, a decision from this Court could not now order the other candidates to be placed on the ballot. Those candidates are not parties here, nor do they appear to be in privity with the City Council—and it is not even clear whether they still desire to stand for office in the election. Cf. *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, ___ Mich ___, ___ (2022) (Docket Nos. 161628 and 161650); slip op at 6-12 (explaining the limited circumstances in which a nonparty can be bound by a judgment under the principles of res judicata or collateral estoppel). For that reason, no decision in this case would prevent there being vacancies on the City Council resulting from local officials' removal of candidates for the council. And even so, the Highland Park City Charter provides the council with the power to fill vacancies, including (in some circumstances) by calling a special election. Highland Park Charter, § 4-13. Even with reduced numbers after the upcoming election, it appears the City Council will have a quorum to conduct business. *Id*. at § 5-3. Thus, I cannot see how the Court of Appeals' decision to keep Clyburn off the ballot has caused a sufficient injury to the City Council to provide it standing to appeal.

But while the City Council lacks standing to pursue this relief, it has raised a significant issue that deserves prompt attention. As Justice WELCH explains in her dissenting statement, numerous candidates for judicial office—which is nonpartisan—had their AOIs challenged, and at least one has been kept off the ballot as a result. The confusion did not start with these candidates—in fact, it appears the source of the confusion preceded the enactment of the relevant statutory language in 2021. Before the language was passed, the Bureau of Elections in August 2021 proposed a rule for AOIs that suggested that it needed this information—but only for partisan candidates. The proposed rule that would have required the candidate to provide the following:

> (e) If the candidate seeks nomination or election to a partisan office, he or she must include the following:
>
> (i) The name of the political party with which the candidate is affiliated.
>
> (ii) If seeking nomination or election to a partisan office without being affiliated with a political party, the candidate must indicate "no party affiliation" using these or similar words or phrases. [Mich Admin Code, Proposed R 168.3(1).]

As is plain from the text, the rule would have applied only to partisan offices, not the nonpartisan offices like Clyburn and others were seeking.

After the amendment of MCL 168.558(2) was passed in late 2021, the Bureau of Elections decided to drop its proposed rule because it would have been "redundant" given the new statutory language. Further, as noted in a letter to the Secretary of State from an administrative director in March 2022, officials involved in the rulemaking process concluded that the language in the statute was "similar" to that in the proposed rule and that "the statute accomplishes the same purpose as the original proposed language." Thus, the proposed rule was scotched. Notably, the Secretary of State's office did not update its AOI form after the amendment.

Turning to the text of MCL 168.558(2) and other relevant statutes, there was good reason for the Bureau of Elections' apparent belief that the new language applied only to candidates for partisan office. On one hand, the Court of Appeals was correct that the literal scope of the key phrase—"the candidate's political party or a statement indicating no party affiliation if the candidate is running without political party affiliation"—is broad enough to cover candidates for nonpartisan offices. Such candidates do run without being affiliated with a political party. On the other hand, the broader statutory framework suggests that the Legislature used the phrase "without political party affiliation" to refer only to candidates running for partisan office or for this Court. In order to be placed on the ballot, such candidates must file a "qualifying petition," which is defined as "a nominating petition required of and filed by a person to qualify to appear on an election ballot as a candidate for office without political party affiliation." MCL 168.590(1). Critically, only candidates for partisan office or for this Court may file a qualifying petition. See MCL 168.590(2) ("A person may file a qualifying petition for a partisan office or office of justice of the supreme court. A filing fee shall not be tendered instead of a qualifying petition."). Thus, to appear on the ballot as "a candidate for office without political party affiliation," a candidate must file a qualifying petition, but the candidate can file that petition only for partisan offices and for the office of justice on this Court. It seems to follow that a candidate for a nonpartisan office *cannot* take the steps

necessary to file as "a candidate for office without political party affiliation."[2] Instead of a qualifying petition, the Legislature has provided for a different nominating petition and a different primary for nonpartisan offices. MCL 168.544a.

In this manner, the Legislature appears to have distinguished between candidates for nonpartisan office and candidates for partisan office (or this Court) who are running without political party affiliation. The manner in which candidates gain access to the ballot differs for these two groups. Why, then, would MCL 168.558(2) nevertheless be read to require a candidate to list himself or herself as running "without political party affiliation"? Such a requirement could only cause confusion, as it would indicate to the officer receiving the affidavit—which is filed with the qualifying petition, see MCL 168.558(1)—that the candidate was seeking access to the ballot by filing a qualifying petition, which candidates for nonpartisan office cannot do. Moreover, the affidavit is part of the process for appearing on a ballot. But on the ballot, "the names of the several nonpartisan offices to be voted for shall be placed on a separate portion of the ballot containing no party designation . . . ." MCL 168.699. In other words, simply by filing for a nonpartisan office, a candidate is placed on the nonpartisan portion of the ballot where—given the nature of the type of office being sought—no partisan designation is even possible. Because the placement of a nonpartisan office is on an entirely separate section of the ballot where no party designation may appear, it makes little sense to require a candidate to designate on the affidavit that he or she is running without party designation. Such a separate designation does, however, make sense for partisan offices appearing on the partisan ballot. These offices will not be placed on the partisan primary ballot (which only involves candidates from the major political parties), but will need to be specially shown on the general-election ballot as running without political party affiliation.

Thus, read in light of the full statutory framework, a strong argument could be made that the reference in MCL 168.558(2) to a "candidate . . . running without political party affiliation" pertains only to candidates for partisan offices and for this Court. A candidate running for a nonpartisan office is, by definition, incapable of running with political party affiliation for purposes related to placement on the ballot. It would therefore be redundant, at best, to require candidates for nonpartisan offices to state in the affidavit that they are running without political party affiliation. This conclusion finds support in the statutory context, which must be consulted when interpreting the scope of

[2] As explained below, the office of justice on the Michigan Supreme Court is nonpartisan. This office was apparently nevertheless included in MCL 168.590 because candidates can be nominated by political parties.

MCL 168.558(2) so that we can "make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ Hosps, Inc v Casey*, 499 US 83, 101 (1991).[3]

Finally, because I believe the Legislature should revisit and clarify this statute, it is worth noting another wrinkle that has become apparent with regard to candidates for this Court. This office is somewhat anomalous in that it is nonpartisan but candidates can receive nominations by political parties. See Const 1963, art 6, § 2; MCL 168.392. Incumbent justices are entitled to placement on the ballot if they file an affidavit of candidacy. Const 1963, art 6, § 2; MCL 168.392a. All candidates appear on the nonpartisan section "containing no party designation . . . ." MCL 168.393. In this context, particularly because of the party nominations, it is clear why the Legislature might have thought it advisable to treat unaffiliated candidates for this Court together with unaffiliated candidates for partisan offices. Both types of candidates need an alternative way to gain access to the ballot since they do not have the option of gaining access to the ballot through either a partisan or nonpartisan primary. But, especially in light of the confusion surrounding MCL 168.558(2), this statutory framework raises

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[3] Justice WELCH has offered other reasons for this conclusion concerning MCL 168.558(2), including additional ways the statutes distinguish between partisan and nonpartisan offices. See, e.g., MCL 168.540 (providing that nonpartisan primary elections will not be held "[i]f, upon the expiration of the time for filing petitions for any nonpartisan primary election, it shall appear that as to any office on any nonpartisan ticket there are not to exceed twice the number of candidates as there are persons to be elected"). I question, however, her interpretation of MCL 168.550. That provision states:

> No candidate shall have his name printed upon any official primary election ballot of any political party in any voting precinct in this state unless he shall have filed nominating petitions according to the provisions of this act, and all other requirements of this act have been complied with in his behalf, except in those counties qualifying candidates upon the payment of fees.

Justice WELCH has observed that this language indicates that candidates for *nonpartisan* office cannot be kept off the ballot by failing to comply with the AOI requirement at issue here. *Davis v Highland Park City Clerk*, ___ Mich ___, ___; 974 NW2d 550, 550 (2022). This conclusion may prove too much, as it might suggest that a nonpartisan candidate's failure to comply with any statutory requirement is not grounds for keeping him or her from the ballot. Moreover, MCL 168.558 includes its own provision on the consequences of noncompliance in Subsection (4), which appears to indicate that a noncomplying candidate cannot be certified for the ballot. See MCL 168.558(4) ("An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section . . . ."). In any event, I agree with Justice WELCH that the overall statutory framework is confusing and merits examination.

concerns about how candidates for this Court are to fill out their AOIs. These candidates seek a nonpartisan office, yet MCL 168.590 suggests that they must comply with the requirement in MCL 168.558(2) that they provide a statement that they are running without party affiliation. This would appear to be contrary to the Bureau of Elections' apparent position that the party-affiliation requirement only applies to candidates for partisan office.[4] If the requirements applicable to candidates for this office are to differ from the requirements applicable to all other candidates for nonpartisan offices, the Legislature should make that clearer in the statute.[5]

For these reasons, while I concur in the denial order here, there remains much work to be done in this area. And because the statute is unclear—perhaps verging on true ambiguity—the best course is for the Legislature to clarify its intent.

WELCH, J. (*dissenting*).

I write separately to express my continued dissatisfaction with how this case was resolved on the merits. I dissented from the Court's June 7, 2022, order denying Carlton

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[4] Either way, it presents a conundrum for candidates for Supreme Court justice in light of the possible ways in which candidates for this Court may file and run for office. A statement of "no party affiliation" would be somewhat misleading, since such candidates may seek a partisan nomination and, at least to that extent, may be thought of as having some affiliation with a political party. But, if read as requiring a candidate to state a party affiliation in order to make clear that the candidate does not intend to file a qualifying petition, such a statement would also be somewhat misleading. After being nominated by a party, candidates for Supreme Court justice run without a party designation on the nonpartisan section of the ballot, and the judicial canons closely regulate the political conduct of judges and candidates for judicial office. See, e.g., Code of Judicial Conduct, Canon 7(A) (prohibiting judges or judicial candidates from holding any office in a political party or making speeches on behalf of or endorsing a nonjudicial candidate, but allowing them to attend political gatherings and contribute to a political party).

[5] Further, to the extent it suggests that all candidates for this office must file a qualifying petition, MCL 168.590 arguably runs afoul of Const 1963, art 6, § 2, which allows incumbent justices to be placed on the ballot by simply filing an affidavit of candidacy. The qualifying-petition process, by contrast, requires the collection of numerous signatures from across the state. MCL 168.590b. For incumbents, at least, it is hard to see how the qualifying-petition process squares with the Constitution. It seems, therefore, that the best reading of MCL 168.590 is that it applies to candidates for this office who are not incumbents and who were not nominated by a party.

Clyburn, Jr.'s[6] motion to intervene and to dismiss his application for leave to appeal in Docket No. 164490. *Davis v Highland Park City Clerk*, ___ Mich ___ (2022) (WELCH, J., dissenting). The concerns I raised in June remain unresolved. I continue to question whether mandamus relief was properly granted in this case, because it remains unclear to me that there was a clear legal mandate, as a matter of law, for the affected candidates to explicitly declare "no party affiliation" on the affidavit of identity (AOI) required by MCL 168.558 given that the candidates were not seeking partisan office and there was no partisan primary within the jurisdiction at issue. Compare MCL 168.558(2), (4) with MCL 168.550. In fact, the lack of clarity regarding how to properly fill out an AOI for nonpartisan candidates seems evident given the fact that at least six different judicial candidates seeking nonpartisan office also had their AOIs challenged or called into question on the basis that they had improperly filled out the document. See, e.g., *Belcoure v Benson*, unpublished order of the Court of Claims, entered August 19, 2022 (Case No. 22-000111-MB) (granting mandamus relief and ordering that judicial candidate Roney Haywood be removed from the ballot because he left the declaration-of-party-affiliation line on his AOI blank); *Davis v Benson*, unpublished order of the Court of Claims, entered September 2, 2022 (Case No. 22-000125-MM) (denying mandamus relief and holding that LaKena Crespo's statement of "N/A" satisfied the declaration-of-party-affiliation requirement in MCL 168.558(2)); *Slavens v Benson*, unpublished order of the Court of Claims, entered September 2, 2022 (Case No. 22-000141-MZ) (granting declaratory relief keeping incumbent Judge Slavens on the ballot because his AOI was filed before the amendment of MCL 168.558(2) requiring a declaration of party affiliation took effect and evidence showed that two copies had been filed with the Secretary of State); *Fresard v Benson*, unpublished order of the Court of Claims, entered September 2, 2022 (Case No. 22-000143-MZ) (applying laches as a basis not to order removal of three incumbent judicial candidates from the ballot despite their having left the declaration-of-party-affiliation line blank on their AOIs).

There are many ways in which the Michigan Election Law, MCL 168.1 *et seq*., treats elections for partisan offices differently from elections for nonpartisan offices, and it is unclear how MCL 168.558(2) and (4) interact with these other areas of the Election Law. For example, MCL 168.540 provides:

> If, upon the expiration of the timing for filing petitions for any nonpartisan primary election, it shall appear that as to any office on any nonpartisan ticket there are not to exceed twice the number of candidates as there are persons to be elected, then the officer with whom such petitions are filed shall certify to the proper board of election commissioners the

[6] Clyburn is one of several prospective candidates who were disqualified from appearing on the November 2022 election ballot in the city of Highland Park as a result of a lower court's decision in this case. Clyburn is currently a member of the Highland Park City Council who decided to run for mayor rather than seek reelection as a councilperson.

> names of such candidates whose petitions have been properly filed and such candidates shall be the nominees for such offices and shall be so certified. As to such offices, there shall be no primary election and such offices shall be omitted from the primary ballot.

Moreover, it is far from clear whether the requirement in MCL 168.558(2) that a candidate state "no party affiliation if the candidate is running without political party affiliation," such as running as an independent in an election for partisan office, is the same thing as a candidate who cannot run with a stated party affiliation as a matter of law, such as a candidate for a judgeship or another nonpartisan elected office. Accordingly, I continue to question whether there was a clear legal duty for the local clerk to disqualify Clyburn or other similarly situated candidates from the ballot for this election cycle and whether such a duty was ministerial in nature. See *Davis*, ___ Mich at ___ (WELCH, J., dissenting).

I also disagree with plaintiff's arguments that the Highland Park City Council (the Council) does not have standing to seek review the Court of Appeals' ruling. "In order to have appellate standing, the party filing an appeal must be 'aggrieved.' " *Manuel v Gill*, 481 Mich 637, 643 (2008). See also Const 1963, art 6, § 1.

> An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Manuel*, 481 Mich at 643-644, quoting *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292 (2006)].

"A party who could not benefit from a change in the judgment has no appealable interest." *Manuel*, 481 Mich at 644 (quotation marks and citations omitted). This suggests that a party who could benefit from a change does have an appealable interest. We have recognized that even a party that prevailed in the Court of Appeals can have an appealable interest if a change in the final judgment would benefit that party. *Id*. at 643-645. In *Manuel*, the Court of Appeals had affirmed dismissal of the plaintiffs' contract claim on different grounds, but the Court of Appeals further held that the dismissal would be without prejudice to the contract claim being filed anew in the Court of Claims in a new lawsuit. *Id*. at 644-645. We held that a change in the Court of Appeals judgment, such as reinstating dismissal with prejudice, could benefit the defendant, and thus the defendant had appellate standing. *Id*. at 645.

In this case, from a procedural standpoint, the Council was permitted to intervene in the trial court over plaintiff's objection, but plaintiff did not appeal that ruling. The trial court denied plaintiff's request for mandamus relief, and thus plaintiff was an

aggrieved party entitled to an appeal by right under MCR 7.203(A). The Council was the only party that participated in the proceedings before the Court of Appeals as an appellee defending the trial court's denial of mandamus relief; neither of the named defendants filed briefs in the Court of Appeals. The Court of Appeals reversed the trial court and granted plaintiff the mandamus relief he sought as to Clyburn. *Davis v Highland Park City Clerk*, unpublished per curiam opinion of the Court of Appeals, issued June 2, 2022 (Docket No. 361544). The Court of Appeals, as a result, directed the trial court to instruct the Highland Park City Clerk and the Highland Park Election Commission "to not place Clyburn on the ballot for the August 2022 primary election for Mayor of Highland Park." *Id.* at 4. This occurred even though there was never going to be a primary election in the city because there were not more than twice the number of candidates as there were vacancies for the office of mayor. See Highland Park City Charter, § 12-5; MCL 168.540. Within a week of the Court of Appeals' decision, Clyburn filed a motion to intervene as an appellant before this Court and filed a proposed application for leave to appeal. The Court denied Clyburn's request to intervene and dismissed his application over my dissent. *Davis*, ___ Mich ___. The Council then filed a timely application for leave to appeal in this Court, but the Council did not request expedited review, nor did it request a decision by a specific date.

Following the Court of Appeals' ruling, several other candidates for nonpartisan offices within Highland Park were decertified from the ballot for having made the same alleged mistakes as Clyburn.[7] The Council has informed us that because of this, there will not be enough potential candidates on the ballot to fill the vacancies on the Council to a level that would provide the Council with the quorum necessary to conduct official business and that other offices within the city might go unfilled. While the Council was not the direct subject of the mandamus relief that was granted, the legal effect of the Court of Appeals' decision has led to an untenable situation in which the elected legislative body of the City may lack sufficient membership to form a quorum and conduct official city business. A timely reversal of the Court of Appeals' judgment could result in the previously disqualified candidates being reinstated before the ballots for the November election are printed. This, in turn, would ensure that the Council, as a governmental body, will have enough members to conduct official business following the November election. The Council does stand to benefit from a change in the Court of Appeals' judgment, and therefore, it is my belief that the Council has appellate standing to seek leave to appeal as an aggrieved party.

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[7] While it is understandable for our courts to expect candidates whose candidacy is adversely affected by a legal determination to retain counsel and take legal action to defend their position on the ballot, this Court's previous denial of Clyburn's request to intervene in this case as an appellant, despite the Court of Appeals ordering that he be removed from the ballot, could have discouraged other nonpartisan Highland Park candidates who were disqualified from the ballot as a result of the Court of Appeals' decision from seeking relief through litigation.

For these reasons, I respectfully dissent from the Court's order.

BERNSTEIN, J., joins the statement of WELCH, J.