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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

RASEAN CLAYTON,

Plaintiff,

vs.

KANYE WEST, et al.,

Defendants.

Case No. CV2020-010553

REPLY IN SUPPORT OF APPLICATION FOR INJUNCTION

(Assigned to the Honorable Scott McCoy)

Although Defendants string various and sometimes contradictory arguments together to confuse the issues here, there is no dispute that Kanye West and his putative presidential electors told petition signers that they were signing petitions for independent candidates, using the process set out in Arizona law for independent candidates, when they were, in fact, not independent candidates. The bottom line of Defendants' Response is that the law—which allows only persons "who are **not** registered members" of a recognized political party to use § 16-341's nomination petition procedures—should not apply to them. West is wrong, the law is clear, and the Court should forbid West and his putative electors from appearing on the ballot.

West's various arguments to escape § 16-341's text are flawed for several reasons explained below, but two stick out:

First, West now contends (at 7, 9-10) that his putative electors are eligible under § 16-341 because, on August 31 and September 1, they re-registered as having "no party preference." *See* Opp. Exs. B-L. The legislature anticipated and prohibits this shell game: "A candidate for partisan public office shall be continuously registered with the political party of which the person desires to be a candidate beginning no later than the date of the first petition signatures on the candidate's petition through the date of the general election at which the person is a candidate." A.R.S. § 16-311(A). The first petitions were signed before August 31. West's electors' late registration does not defeat Plaintiff's claims.

Second, West contends (at 11-12) that, if applied to West and his electors as written, § 16-341 imposes an unconstitutional burden. But, in a case that is directly on point, the United States Supreme Court rejected West's argument. *See Storer v. Brown*, 415 U.S. 724 (1974). In *Storer*, the Court had "no hesitation" upholding a substantively identical (though much more restrictive) ballot-access "requirement that the independent candidate not have been affiliated with a political party for a year before the primary." *Id*. at 732-33. The restriction serves a "compelling" state interest and "outweigh[s] the interest the candidate and his supporters may have in

making a late rather than an early decision to seek an independent ballot status." *Id*. at 736. West's constitutional arguments fail.

I. The putative electors are not qualified to be on the ballot.

A. The putative elector candidates are not qualified to be nominated via nomination petition under § 16-341.

As explained in the Application, 10 of 11 of West's candidates for the office of presidential elector cannot be nominated via nomination petition under § 16-341 because they are not candidates who are "not registered members" of a recognized political party. Section 16-341(A) states who may use the procedures in that section, and West's putative electors do not qualify. West argues that even if unqualified when the petitions were being gathered, the electors are qualified now because, two days ago, they "reregistered as independents" (at 7, 9-10). This argument fails.

The putative electors' post-lawsuit re-registration may change their registration going forward but it does not qualify them retroactively to seek nomination signatures as independents when they were not independents. The law requires candidates gathering petitions to maintain their registration from the first petition signature through the election:

> A candidate for partisan public office shall be **continuously registered** with the political party of which the person desires to be a candidate beginning **no later than the date of the first petition signature** on the candidate's petition through the date of the general election at which the person is a candidate.

A.R.S. § 16-311(A) (emphasis added). Under this provision, the putative electors have disqualified themselves.

First, most of the putative electors (10/11) were registered as Republican on "the date of the first petition signature." They changed two or three days ago, after this lawsuit was filed and after most of the signatures were gathered.

Second, the office of presidential elector is unquestionably a "partisan public office." The petitions West circulated told petition-signers they were signing to "nominate" the eleven individuals "as candidates for the office of Presidential

Elector." *See* Compl. Ex. B; Reply **Ex. A**. *See also* A.R.S. § 16-311(E) (listing "office of presidential elector" along with other public offices); A.R.S. § 16-341(C), (G), (J) (same). Indeed, on the general ballot, Arizona law requires this office to be the very first one listed in the "Partisan Ballot" section of the ballot: "Partisan Ballot . . . At the head of each column shall be printed in the following order the names of **candidates for: 1. Presidential electors** . . . ." A.R.S. § 16-502(B) (emphasis added).

Accordingly, the putative electors were not qualified under § 16-341(A) to circulate nomination petitions when their petitions were first signed and § 16-311(A) prevents their litigation-driven re-registration from changing that retroactively. This is not "hypertechnical," (Opp. at 1), it is precisely the kind of gaming the legislature intended to prevent. *See* 2017 Ariz. Sess. Laws Ch. 161 § 1 (S.B. 1200, 1st Reg. Sess.), Feb. 16, 2017 Sen. Judiciary Comm., at 15:20-26:00, (Rep. Kavanagh: bill intended to correct "gaming" of the system and "prevent people from getting around the law"), *available at* *http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18787*. Such provisions promote the "integrity of the various routes to the ballot," *Storer*, 415 U.S. at 733, and "Arizona's asserted interests in preventing voter confusion, ballot overcrowding, and frivolous candidacies." *Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085, 1093 (9th Cir. 2019).

B. The putative electors' petitions are also invalid because no "statement of interest" has been filed.

West concedes that no statement of interest has been filed. Instead, West contends (at 8-9) that the requirement does not apply to candidates for the office of presidential elector because it also does not apply to "Candidates for president or vice president of the United States." A.R.S. § 16-341(I)(3).

This argument fights the text: § 16-341(I)(1)-(3) exempts specific offices from the "statement of interest" requirement, including "candidates for president or vice

president of the United States." Any other "person who may be a candidate for office pursuant to this section" must file the statement and any petitions signed beforehand "are invalid." *Id*. A "candidate for office of presidential elector" is not a "candidate for president." Although West argues that the two are melded into one for this purpose, if the legislature intended to also exempt the elector candidates, it would have said so. It knew how: Section 16-341 references that office by name **eleven** times. *See* A.R.S. § 16-341(C), (G), (J).

West also argues (at 8) that his putative electors must be treated the same as electors of recognized parties, who do not file statements of interest. But those electors are not "nominated" via nomination petitions through A.R.S. § 16-341; they are appointed by the chairperson of the recognized party's state committee through A.R.S. § 16-344. By the plain terms of the statute, the requirement to file a statement of interest (which informs possible signers about the person's candidacy) does not apply to them. *See* A.R.S. § 16-341(I) ("a person who may be a candidate for office pursuant to this section shall file a statement of interest"). West's putative electors were required to file that statement.

West cites (at 8-9) a Secretary of State publication as evidence that the statement is not required because the statement is not included in a list of required documents. The Court should put little weight on this. The quoted portion is from an unofficial "Candidate Guide," not the Procedures Manual, which is approved by the Governor and the Attorney General. It is only the Manual that has the force of law under A.R.S. § 16-452. *See also* A.R.S. § 12-910(E) (court decides questions of interpretation "without deference to" agency determinations).

II. Kanye West is not eligible under § 16-341.

Chapter 3 of Title 16 of the Arizona Revised States is entitled "Nominating Procedures." As its name indicates, this chapter provides the procedures for political candidates to be nominated for the ballot. The main method is the party primary. *See, e.g.*, A.R.S. § 16-301, -302. Article 5, which is entitled "Nomination Other Than By

Primary," provides a limited set of alternative routes: nomination petitions (§ 16-341), delegate conventions (§ 16-342); filling vacancies caused by death, incapacity, or withdrawal of the candidate (§ 16-343); and appointment of presidential electors by the state chairmen of qualified political parties (§ 16-344).

Kanye West is seeking to be nominated under § 16-341. This section allows independent or minor party candidates – i.e., candidates who had no primary available to them – to be nominated if they gather enough valid signatures. But West is not an independent candidate. He is a registered Republican. He therefore cannot qualify for the ballot under § 16-341, which is for independent or minor party candidates.

West concedes that he is a registered Republican and that he is seeking nomination under § 16-341. These difficult facts cause him to make an argument that is fundamentally inconsistent: he claims to be "ELIGIBLE UNDER A.R.S. 16-341(A)," but also that "the Court cannot apply the requirements of A.R.S. § 16-341(A)." *See* Opp. 3, 6. He cannot have it both ways.

A. The location of West's Republican registration is irrelevant.

West claims (at 4) that his registration as a Republican in Wyoming does not matter because he is not a member of the "Arizona Republican Party." But this interpretation would allow any Republican or Democrat from anywhere in the country (other than Arizona) to be nominated as an Independent under § 16-341. And that is contrary to the statute's clear meaning and the structure of Arizona's statutes regulating nomination procedures.

Moreover, West sets up an impossible test. Arizona's voter registration forms do not offer a voter the choice to register as a member of the "Arizona Republican Party." Instead, the voter registration form allows a voter to register as a "Republican." *See* Arizona Voter Registration Form, https://azsos.gov/sites/default/files/2019_az_voter_registration_form.pdf; Compl. Ex. D, E (showing filled-out registration forms). Similarly, West is not registered as a "Wyoming Republican." Instead, he is registered as a "Republican." *See* Compl. Ex. C.

West concedes (at 4) that Section 16-341 prevents candidates "who had the opportunity to appear on the ballot as representatives of their own parties . . . but did not seek that nomination of their party from circumventing the parties' nominating process." West asserts, without any support, that this purpose is limited to Arizona candidates and Arizona parties. But he provides no reason why Arizona has any less interest in preventing circumvention by presidential candidates. West is a Republican. He chose not to seek his parties' nomination in the presidential preference election. *See* A.R.S. § 16-241. Having made that choice, he cannot be nominated as an independent.

B. Republicans (and Democrats) cannot use § 16-341.

West next argues (at 5) that the limitation in § 16-341 does not apply to him because the Republican Party is not a recognized party in Arizona. But Arizona law provides several routes for parties to obtain recognition, *see* A.R.S. § 16-802, -803, -804, and § 16-341's general reference to recognized parties plainly encompasses parties recognized through any of these routes. *See also Browne v. Bayless*, 202 Ariz. 405, 407, ¶ 5 (2002) (referring to the category of "recognized political parties" and citing A.R.S. § 16-804, the route by which the Republican Party is recognized).

More importantly, West's argument makes no sense and has been rejected by the Supreme Court. Apparently, West believes that the major parties – the Republicans and Democrats – are not "recognized," and so the nomination procedures of § 16-341 are available to them, but not to members of minor parties. That is obviously contrary to the purpose of § 16-341 and the structure of the nominating statutes. And it is directly contradicted by the Supreme Court's statement, regarding § 16-341, that "Republicans, Democrats, Libertarians, and various other qualified party politicians cannot use the nominating procedure other than by primary election. *See* A.R.S. § 16–341(A) and (B).." *Clifton v. Decillis*, 187 Ariz. 112, 115 (1996).

C. West's statement to the Federal Election Commission that he is running for President as a member of the "Birthday Party" does not change the fact that he is a registered Republican.

A "registered" Republican or Democrat cannot be nominated by petition under § 16-341(A). The statutory analysis turns on "registration," an easily discernible fact – nothing else is relevant. A Republican cannot be nominated by petition merely by telling someone he is really an independent.

West points the Court to a filing he submitted to the Federal Election Commission listing his party as "BDY," which apparently stands for the "Birthday Party." Opp. Ex. A. But § 16-341 does not care about what West tells the Federal Election Commission, or anyone else, about his party affiliation. It cares only about his registration. And it is an uncontested fact that West is a registered Republican.

D. Section 16-341(A) applies to presidential candidates and West's contrary claim would defeat his attempt to be nominated under § 341(A).

West also argues that § 16-341(A) does not apply to him. But if that were true, then he could not seek the nomination under § 16-341(A). Section 16-341(A) is the gateway to the nomination by petition procedures in the rest of § 16-341. If, as West contends (at 6), "the Court cannot apply the requirements of A.R.S. § 16-341(A) to independent Presidential nominees," then the Court cannot make the nomination procedures of § 16-341 available to them, either.

West does accurately note one problem with the statute. The statute makes nomination by petition available only to a "qualified elector." *Id.* Other statutes state that a qualified elector must be an Arizona resident. *See* A.R.S. §§ 16-101, -121. For most public offices in Arizona, limiting § 16-341 to Arizona residents is not a problem, because only Arizonans may be governor, attorney general, etc. But a non-Arizonan can be president, and it would be problematic to allow presidential candidates from Arizona to be nominated by petition while foreclosing that option to non-residents.

The right solution is not to use the statutory definition of "qualified electors" when interpreting § 16-341(A) in the context of presidential candidates. This does the

least violence to the statute, because the term "qualified elector" is not central to § 16-341. And it allows the statute to apply to presidential candidates, consistent with the rest of the statute. *See* A.R.S. § 16-341(G) (referring twice to "the presidential candidate").

By contrast, West proffers an interpretation that creates more problems than it solves. He argues that subsection A should not apply to presidential candidates. But there is no statutory basis for this argument, which is contrary to subsection G's reference to "presidential candidates" and the decisions from the Arizona Supreme Court and the Ninth Circuit applying the statute in the context of presidential candidates. *See Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008); *Browne v. Bayless*, 202 Ariz. 405 (2002). West also suggests that applying § 16-341 to him would result in an impermissible extra-territorial effect, but there is nothing extra-territorial about Arizona regulating the methods for candidates to appear on its ballots.

Ultimately, the Court does not need to resolve this statutory conundrum. If subsection A does not apply, then it does not permit West to "be nominated as a candidate for public office otherwise than by primary election." A.R.S. § 16-341(A). Thus, the Court need only recognize that West's argument cannot save his candidacy.[1]

III. The United States Supreme Court has already rejected West's constitutional arguments.

West makes two interrelated constitutional claims that, if applied to West, § 16-341 impermissibly burdens constitutional rights by imposing too high a hurdle for independent candidates to access the ballot. These arguments are meritless and are foreclosed by longstanding, on-point and binding precedent.

To decide constitutional challenges to ballot-access restrictions, courts apply the *Anderson-Burdick* balancing framework. *See Ariz. Libertarian Party*, 925 F.3d at

[1] West cannot dispute that he is a candidate – that is how he has repeatedly represented himself to Arizona's elections officials. *See* Reply Ex. B (9/2/2020 letter describing West "as a candidate for President of the United States"); Reply Ex. C at 1 (8/18/2020 letter signed as "Kanye West[,] Candidate for President of the United States"), 2 (West's Nomination Paper, stating he is a "candidate for the office of President").

1085 (discussing *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992)). The framework is a "'sliding scale'—the more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny." *Ariz. Libertarian Party*, 925 F.3d at 1085 (citation omitted).

Aside from generally describing some of this caselaw, West does not apply the framework to the ballot-access regulation at issue here or explain why the state's interest is outweighed by West's interest in a last-minute access to the ballot. Any such effort would be futile because the Supreme Court foreclosed the claims in *Storer v. Brown*, 415 U.S. 724. Although West does not cite the case, it is decisive.

In *Storer*, the Court held that a state could impose a "requirement that the independent candidate not have been affiliated with a political party for a year before the primary." 415 U.S. at 733. The state had a compelling interest in "maintaining the integrity of the various routes to the ballot," and "involves no discrimination against independents." *Id*. The law helped prevent "independent candidacies prompted by short-range political goals, pique or personal quarrel," and imposed a "substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party." *Id*. at 735. These compelling state interests easily outweighed the "interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status." *Id.* The state did not have to invite late-stage chaos "merely in the interest of particular candidates and their supporters having instantaneous access to the ballot." *Id*.

West cannot overcome *Storer*. The burden on the candidate there (a one-year restriction on switching registration) is substantially more restrictive than Arizona imposes. Potential candidates can change party all they want, so long as they change their registration by the date they begin collecting petition signatures and leave it alone until election day. A.R.S. § 16-311(A). And Arizona's interest is no less significant than the one that the Court found "compelling" in *Storer*. *See Ariz.*

Libertarian Party, 925 F.3d at 1093 ("Arizona's asserted interests in preventing voter confusion, ballot overcrowding, and frivolous candidacies are important interests" and justified burdens on third-party ballot access). West's "interest" in "having instantaneous access to the ballot" does not come close to matching the state's interest in the integrity and stability of its political system. *See Storer*, 415 U.S. at 736.

There is also no question that *Storer* remains good law. It is a precursor to and foundation for the *Anderson-Burdick* framework. *See, e.g.*, *Burdick*, 504 U.S. at 433, 437 (quoting approvingly from *Storer*); *Anderson*, 460 U.S. at 788, 789, 802-03 (same, including that "[o]ur evaluation of [the state's] interest is guided by" *Storer* and another case). Modern cases frequently consult *Storer* in deciding ballot-access challengers. *See Ariz. Libertarian Party*, 925 F.3d at 1091-93.

Campbell v. Hull, 73 F. Supp. 2d 1081 (D. Ariz. 1999), does not help West. In that case, the court applied the *Anderson-Burdick* framework to assess aspects of a prior version of § 16-341. After examining the burdens imposed, the court struck down "the requirement that signors of nomination petitions not be members of qualified political parties." *Id*. at 1093. The Court noted that no other state imposed such a restriction, and that numerous cases had held that voters could not be forced to "change their party affiliation in order to nominate independents." *Id*. at 1090, 1091. The restriction imposed "severe" burdens: it dramatically shrunk the pool of voters who could sign nomination petitions (excluding 86% of the electorate) and made it substantially more difficult and costly to obtain signatures.

West's argument is nothing like *Campbell*. There is not extensive case law striking down similar restrictions (to the contrary, there is *Storer* and other cases affirming limits on ballot access, such as *Arizona Libertarian Party*), and there is no limit on the pool of the electorate who could sign a valid petition. The only burden is a very modest one: change your registration **before** seeking out petition signatures. The fact that the putative electors managed to re-register within two days of this lawsuit shows how modest this burden is.

Finally, West argues (at 12-13) that § 16-341 may not constitutionally force the putative electors to change their registration in order to support West. This transparent effort to cram West's case into the *Campbell v. Hull* box is not persuasive. The restriction at issue here is a modest limit on becoming a *candidate* for office printed on the ballot (as in *Storer*), not a *voter* supporting a candidate (as in *Campbell*). Of course, states impose all kinds of limits on a candidate for the office of presidential electors that would not be imposed on a regular voter. *See* A.R.S. § 16-212(B)-(C) (requiring presidential electors to cast electoral college votes for candidates with highest number of votes, and removing elector from office if she fails to do so); *Chiafolo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (state may force presidential elector to vote in electoral college as required, "on pain of penalty").

IV. West's miscellaneous arguments fail.

West also argues that the timing of this lawsuit deprived him of due process, complaining that Plaintiff should have sued him earlier. But he cites no case rejecting an election challenge on this theory, and it is his last-minute attempt to get on the ballot that prompted this emergency challenge. West registered his first circulator on August 24, 2020, just 15 days before the ballot printing deadlines. Plaintiff responded promptly, suing on August 31, a week after that first registration. Thus if laches applies, it applies to his belated challenge to the constitutionality of A.R.S. § 16-341, not Plaintiff's timely defense of Arizona's election laws.

Finally, West complains that Plaintiff named each county board of supervisors as a whole, rather than the individual members. But the statute says to name the "board of supervisors," not individual members. A.R.S. § 16-351(C).

CONCLUSION

The Court should grant the application for injunctive relief and (1) enjoin the Secretary of State from accepting West's signatures, and (2) enjoin the county defendants from including West and his putative electors on the ballot.

DATED this 3rd day of September, 2020.

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