A23-1354

State of Minnesota

In Supreme Court

Joan Growe, Paul Anderson, Thomas Beer, David Fisher, Vernae Hasbargen, David Thul, Thomas Welna, and Ellen Young,

Petitioners,

v.

Steve Simon, Minnesota Secretary of State,

Respondent,

v.

Republican Party of Minnesota,

Respondent.

RESPONDENT REPUBLICAN PARTY OF MINNESOTA'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Respondent Republican Party of Minnesota ("RPM") submits the following briefing in accordance with this Court's Order dated October 20, 2023. The Minnesota Supreme Court's decision in *Oines v. Ritchie*, No. A12-1756 (Minn. filed Oct. 18, 2012) reaffirms the RPM's conclusions—the Secretary of State does not have the power to remove a presidential candidate from a ballot based on Section 3 of the Fourteenth Amendment, Minn. Stat. § 204B.44 does not apply to presidential candidates, and Congress alone is responsible for evaluating presidential disability under Section 3. Additionally, *Oines* suggests that laches may apply to the Petition due to the Petitioners' unreasonable delay.

ARGUMENT

I. *Oines* requires that the Petition be dismissed.

As provided in RPM's briefing: "Minn. Stat. § 204B.44 does not provide a mechanism to challenge presidential candidate's eligibility because under Minnesota law, *a presidential candidate does not 'file' for office with the State.*" RPM Br. at 10. *Oines* confirms this. Additionally, *Oines* confirms that Congress alone has the authority to review a presidential candidate's ability to hold office. No. A12-1756 at 4. The 2015 amendments to Minn. Stat. § 204B.44 do not compel a different result. Lastly, Minn. Stat. § 204B.44(a)(4) does not relieve Petitioners' standing deficiency.

a. Oines affirms that Congress has the exclusive authority to review a presidential candidate's ability to hold office.

Oines reinforces the RPM's argument that Congress has the exclusive authority to apply and enforce Section 3 of the Fourteenth Amendment. RPM Br. at 3-5; 3 U.S.C. §

15. Indeed, *Oines* forecloses Petitioners' assertion that the State, through the judiciary or the Secretary of State, has the authority to remove a presidential candidate from a ballot.

Oines presents an irreconcilable dilemma for Petitioners: either as Petitioners assert, Article II and Section 3 are the same and thus the Petition should be dismissed, or, as RPM asserts, a Section 3 disability is distinguishable from Article II eligibility and outside the scope of § 204B.44. In either case, this Court lacks authority to hear this matter. In *Oines*, the Court dismissed a § 204B.44 petition, in part,[1] because the Court lacked authority to determine a presidential candidate's eligibility under Article II and explained that "under federal law it is Congress that decides challenges to the qualifications of an individual to serve as president." *Oines*, No. A12-1756 at 4.

However, Petitioners assert that "[n]o basis exists for distinguishing age and citizenship requirements from insurrection disqualification." Pet. Br. at 11. Assuming, *arguendo*, Petitioners' position,[2] then *Oines* requires the same result: dismissal. That is, if determination of Article II eligibility criteria is no different than a determination of Section 3 disability, then *Oines*' pronouncement that "under federal law it is Congress

[1] The *Oines* Court dismissed the § 204B.44 petition on laches and on grounds that § 204B.44 did not provide the Court authority to determine presidential qualifications. To the extent that the *Oines* opinion on the § 204B.44 issue is viewed as *dictum*, that opinion is nevertheless entitled to "much greater weight" because the Court expressed an opinion "on a question directly involved . . . though not entirely necessary to the decision." *State v. Rainer*, 103 N.W.2d 389, 396 (Minn. 1960).

[2] As argued in RPM's briefing, Section 3 disability is distinguishable from eligibility criteria. And this distinction presents an even more compelling reason for this Court to dismiss this Petition—Section 5 of the Fourteenth Amendment delegates Section 3's enforcement to Congress. Although Article II's enforcement also remains with Congress, Article II has a less clear delegation of authority.

that decides challenges to the qualifications of an individual to serve as president" equally applies and requires the same outcome. *Oines*, No. A12-1756 at 4. In short, *Oines* shines a bright light on Petitioners' self-defeating arguments.

b. The 2015 amendments to Minn. Stat. § 204B.44 do not disturb Oines.

Minnesota statutes section 204B.44 does not apply to presidential candidates because presidential candidates do not file an affidavit of candidacy. *See* RPM Br. at 9-15. *Oines* confirms this. In dismissing the § 204B.44 petition on grounds that § 204B.44 does not extend to reviewing a presidential candidate's qualifications, the Court explained that "candidates for president or vice president of the United States are specifically exempted from the requirement of filing an affidavit of candidacy that demonstrates their eligibility for the office sought." *Oines*, No. A12-1756 at 4. This was clear to the Court even before the Minnesota Legislature clarified and affirmed that § 204B.44 did not extend to determinations of presidential eligibility. The 2015 amendments to § 204B.44 that followed the *Oines* decision provided no change in the law on this point. Accordingly, *Oines* compels the same result.

Minnesota statutes section 204B.44 was amended in 2015, in part and as relevant here, to add language to § 204B.44(a)(1) to clarify that a challenge to placement of a name on a ballot "include[d] the placement of a candidate on the official ballot who is not eligible to hold the office for which the candidate has filed." SF 455, § 31, 89th Leg., Reg. Sess. (Minn. 2015) (enacted) ("2015 Amendment"). This language affirmed the Court's ruling in *Oines*—that § 204B.44 only extends to candidates who have "filed" for office.

As explained in RPM's briefing, including the language "for which the candidate has filed" clarified that eligibility determinations under § 204B.44 are limited to candidates which "file[]" for office. This clarifying language necessarily excludes presidential candidates because, as *Oines* and the plain text of Minnesota law provide, presidential candidates do not "file" for office in the state. RPM Br. at 10.

This clarification is consistent with other statutes governing *state* candidates which were simultaneously amended with the 2015 Amendment. SF 455, § 20, 89th Leg., Reg. Sess. (Minn. 2015) (enacted); Muller Br. at 21 ("But the 2015 bill made several amendments relating to qualifications challenges that appear only to relate to state offices. *See, e.g.*, Minn. Laws Ch. 70 (2015), § 20 (amending § 204B.06 to allow judicial review under § 204B.44 "[f]or an office whose residency requirement must be satisfied by the close of the filing period"); § 21 (amending § 204B.13 to handle vacancies that arise from § 204B.44 for offices under primaries under Minn. Stat. §§ 204D.03 & 204D.10, not § 204A.11, which relates to presidential primaries")).

Further, the 2015 legislative enactments do not exist in a vacuum—the Minnesota Legislature regularly responds to this Court's election-related decisions. For example, the 2015 amendments also revised Minn. Stat. § 204B.13 to eliminate its reference to Minn. Stat. § 204B.12 which was undoubtedly a direct response to *Martin v. Dicklich*, a case where the Court addressed a candidate's withdrawal from office and stated that "[w]hen read together, we conclude that sections 204B.12 and 204B.13. . . are ambiguous." 823 N.W.2d 336, 344 (Minn. 2012); SF 455, § 21, 89th Leg., Reg. Sess. (Minn. 2015) (enacted). Or, take the other amendment to § 204B.44 that required a § 204B.44 petition

be served "on all candidates for the office" challenged by the petition, which followed *Fosle v. Ritchie*, where service on candidates of competing § 204B.44 petitions was the primary issue. 824 N.W.2d 618, 622 (Minn. 2012); HF 2668, § 1, 88th Leg., Reg. Sess. (Minn. 2014).

Against this backdrop, it becomes clear that the Legislature was listening to this Court. And when this Court made its ruling in *Oines*, the Legislature chose to respond by affirming that decision. Indeed, the Legislature could have expressly provided an "*Oines*-fix": the Legislature could have omitted the "for which the candidates has filed" portion of the added language to provide a more expansive clarification. Or, the Legislature could have attempted to require presidential candidates to file an affidavit of candidacy to bring them within the purview of § 204B.44. But the Legislature did not do so. At most, the Legislature affirmed *Oines*; at a minimum, the Legislature left *Oines* untouched. In either situation, the result is that the 2015 Amendment did not expand this Court's jurisdiction under § 204B.44 to permit determination of presidential candidate eligibility, let alone a Section 3 determination.

c. Section 204B.44(a)(4) does not provide Petitioners a cause of action.

Sensing vulnerability, Petitioners rely on § 204B.44(a)(4) to assert that this challenge is properly before this Court. Pet. ¶ 26; Pet. Br. at 2. Minnesota statutes section 204B.44(a)(4) provides that a petition may be brought challenging "any wrongful act . . . or error of . . . the secretary of state, or any other individual charged with any duty concerning an election." But, § 204B.44(a)(4) is not a "catchall" provision and, more importantly, it does not cure the jurisdictional deficiency in this case because §

204B.44(a)(4) only addresses wrongful conduct of a state official—it does not address eligibility determinations. Indeed, when *Oines* was decided, § 204B.44(a)(4) was law—yet, the Court did not hold that § 204B.44(a)(4) gave the Court authority to rule on a presidential candidate's eligibility under Article II. HF 40, § 44, 72nd Leg., Reg. Sess. (Minn. 1981) (enacted); *Oines*, No. A12-1756 at 4.

To the extent that the placement of Donald J. Trump's name on the ballot is the complained of conduct, this is an eligibility challenge disguised as a challenge to an official's conduct and is an attempt to circumvent Petitioners' standing deficiency. In *Oines*, the Court affirmed that the Secretary of State has no discretion to remove a presidential candidate's name from a ballot and stated a presidential candidate's qualifications must first be decided by Congress—not the Secretary of State and not the Court. Because the Secretary of State is mandated by law to place the name of a "duly nominated presidential . . . candidate[]"on a ballot, the Secretary's ability to exclude the name of that candidate has to be based on an initial eligibility determination.[3] Minn. Stat. § 208.04, subd. 1.

In other words, until Section 3 disability is determined, there is no conduct at issue which would implicate § 204B.44(a)(4). In relying on § 204B.44(a)(4) as a fail-safe, Petitioners miss the forest for the trees. Where the complained of error is an alleged ineligibility, the plain text of § 204B.44 counsels that the "wrongful act" or "error" of any official can only occur if a candidate is first determined to be ineligible, and if the

[3] In the case of presidential candidates, an eligibility, or in this case, disability, determination can only be made by Congress.

ineligibility falls into the purview of the statute, that determination is made under § 204B.44(a)(1), a provision that explicitly contemplates eligibility review. *See, e.g.*, *Studer v. Kiffmeyer*, 712 N.W.2d 552, 557 (Minn. 2006) (granting a § 204B.44 petition and ordering a candidate that did not meet residency requirements be removed from a ballot *after* making a factual finding as to residency); *Landis v. Simon*, 977 N.W.2d 663, 664 (Minn. 2022) (same); *Piepho v. Bruns*, 652 N.W.2d 40, 43 (Minn. 2002) (denying a § 204B.44 petition challenging a candidate's compliance with residency requirements *after* making a factual finding as to residency). Indeed, the Secretary of State *would* commit a § 204B.44(a)(4) wrongful act or error if the Secretary of State prematurely excluded a candidate from the ballot without a proper basis. *See Moulton v. Simon*, 883 N.W.2d 819, 826 (Minn. 2016).

Petitioners acknowledge that an eligibility determination is required before removal. In their requested relief, the Petitioners *first* request is that this Court determine that "Donald J. Trump is disqualified from holding" office.[4] Pet. at 79. Petitioners *then* request that this Court order the Secretary of State to exclude Donald J. Trump's name from the ballot. *Id.* Obviously, Petitioner recognize that any relief under § 204B.44 will first be subject to an eligibility, or disability, determination.

Second, if § 204B.44(a)(4) contemplated an eligibility review, then this would render the 2015 Amendment superfluous as there would be no reason for the Legislature to enact a redundant provision. This Court should decline to interpret § 204B.44(a)(1) as

[4] Petitioners also request discovery in the matter, something that would not be necessary absent a factual finding being a prerequisite for removal.

a needless, toss away provision—particularly in light of the clarifying language added by the Legislature after *Oines*.

Third, the Court regularly made eligibility determinations under § 204B.44(a)(1) prior to the 2015 Amendment. *Moe v. Alsop,* 180 N.W.2d 255, 256 (Minn. 1970) (finding implicit authority under Minn. Stat. 204B.44's predecessor statute to review a state candidate's eligibility); *see Piepho*, 652 N.W.2d at 42 (eligibility challenge based on "alleg[ed] a wrongful act or omission by the respondent . . . in their placement of candidate . . . name on the ballot"); *Lundquist v. Leonard*, 652 N.W.2d 33, 34 (Minn. 2002) (same); *Olson v. Zuehlke*, 652 N.W.2d 37, 38 (Minn. 2002) (same). The 2015 Amendment reaffirmed this practice by expressly including eligibility determinations in Minn. Stat. 204B.44(a)(1).

Oines confirms what the RPM has already asserted—§ 204B.44 does not provide a mechanism to remove a presidential candidate from a ballot based on Article II qualifications or Section 3 disability. Under *Oines*, this Petition should be dismissed.

II. Laches bars the petition.

The Petition should be dismissed because laches prevents an election ballot challenge where the Petitioners have failed to diligently assert a claim. And that is exactly what has occurred here. Petitioners sat on this challenge since November of 2022 and decided to bring suit on the eve of the election season.

Laches bars a claim where "the petitioner does not proceed with diligence and expedition in asserting his claim." *Olson v. Simon*, 978 N.W.2d 269, 270 (Minn. 2022) (internal quotation and citation omitted). When ruling on laches, the court considers (1) if

"petitioner unreasonably delayed asserting a known right," and (2) "whether that delay result[s] in prejudice to others, as would make it inequitable to grant the relief." *Id.* at 270, 271 (internal quotation and citation omitted). Although some delay may be permitted for a petitioner to gather evidence, delays even as short as twenty days have been found unreasonable. *Larkey v. Ritchie*, No. A12-1064, Order at 2-3 (Minn. filed June 28, 2012); *see Trooien v. Simon*, 918 N.W.2d 560, 561 (Minn. 2018) (4-week delay); *Clark v. Reddick*, 791 N.W.2d 292, 295 (Minn. 2010) (2-month delay).

Here, Petitioners' claims center on events surrounding January 6, 2021. Pet. ¶¶ 1-24, 37-305. Donald J. Trump announced candidacy on November 15, 2022. Pet. ¶ 1. Yet, Petitioners waited until just months before the RPM's January 2, 2024, deadline to submit presidential candidate names to the Secretary of State to bring this challenge and just months before absentee voting is to begin. *See* Declaration of Maeda ¶¶ 4, 5. As Petitioners acknowledge, "[a]ll facts necessary for adjudication of whether Trump is eligible to be President of the United States have already occurred." Pet. Br. at 10. Indeed, these facts have been publicly available for ample time. *Oines*, No. A12-1756 at 3 ("[T]he facts upon which petitioner relies have been public for some time."); Pet. Br. at 9 ("The public record here forms an ample factual basis for the petition.").

Petitioners' unjustified delay has now thrust the parties into an expedited proceeding—a proceeding which Petitioners, but not the RPM, have had abundant time to prepare for. Out-of-state Petitioners Free Speech for People began this litigation

campaign as early as April 2023.[5] At the very least, they should have filed this Petition at that time, as they were aware of the facts and legal theories they were going to forward.

Petitioners' unreasonable delay prejudices the RPM. The RPM, on the eve of election season, must divert time and resources to fighting for its right to associate with a candidate at the expense of connecting with RPM members and facilitating its presidential nominee selection process. Petitioners fail to offer even a feigned excuse for their delay. Instead, they press this Court for urgency in an emergent situation that they have created. Pet. Br. at 10 ("This Court's century of case law demands expeditious resolution of this petition . . . .").

As in *Oines*, Petitioners' unreasonable delay and prejudice caused to the RPM provide a separate basis to dismiss the Petition on laches grounds.

CONCLUSION

Based on the foregoing, *Oines* provides additional grounds to dismiss the Petition.

Respectfully submitted,

Date: October 25, 2023

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[5] *See* Letter from Free Speech for the People, to Nev. Sec'y of State Francisco Aguilar (Apr. 10, 2023) https://freespeechforpeople.org/wp-content/uploads/2023/06/fsfp-mfv-nv-sos-14-3-ltr-041023-1.pdf (Section 3 challenge to Donald J. Trump).

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the typeface requirements of Minn. R. Civ. App. P. 132.01 and contains 2,720 words. This brief was prepared using Microsoft Word for Mac version 16.77.1.

R. Reid LeBeau II