STATE OF MICHIGAN

COURT OF APPEALS

CONNOR BERDY,

Plaintiff-Appellee,

v

SONYA BURDA, in her capacity as Elected City Clerk, and WARREN CITY ELECTION COMMISSION,

Defendants-Appellants.

and

FRED MILLER, Macomb County Clerk,

Defendant.

FOR PUBLICATION
June 6, 2019
9:00 a.m.

No. 349171
Macomb Circuit Court
LC No. 2019-001802-AW

Before: TUKEL, P.J., and CAVANAGH and GLEICHER, JJ.

GLEICHER, J.

Defendants-appellants, the Warren City Clerk and Warren City Election Commission, appeal as of right from the circuit court's opinion and order granting plaintiff's complaint for mandamus and ordering defendants to strike the names of four candidates for Warren City Council from the list of candidates for the upcoming primary election. We reverse.

I

Plaintiff, a candidate for Warren City Council, sued defendants seeking to bar four other candidates from appearing on the primary ballot for city council, arguing that those candidates[1]

[1] Those candidates were incumbent city council members Cecil St. Pierre, Scott Stevens, Steve Warner, and Robert Boccomino.

were term-limited under §§ 4.3(d) and 4.4(d) of the Warren City Charter. Plaintiff's argument relied upon an interpretation of §§ 4.3(d) and 4.4(d) which was inconsistent with a 2014 opinion from the Warren City Attorney. In 2014, the city attorney concluded that separate term limits applied to city council members elected at-large versus those elected to represent a single district. The city attorney concluded that by approving those charter amendments, the voters created a "bicameral" legislature of two separate and distinct legislative groups: district city council members and at-large city council members. The city attorney noted that the two groups had different election rules and responsibilities, such as different residency requirements and separate campaigning and fundraising rules. Additionally, only an at-large city council member may serve as mayor pro tem. The city attorney noted that the language of § 4.4(d) referred to three terms or 12 years "*in that particular office*." Since "at-large city council members and district city council members hold separate and distinct offices," he concluded that the charter permitted persons to exhaust their term limits in one type of city council office, then run for the other type of office.

The city attorney's opinion regarding the application of the term limits was upheld by a 2015 circuit court decision, *Olejniczak v Warren Elections Bd*, Macomb Circuit Court docket number 2015-001304-AW. In *Olejniczak*, the circuit court upheld the city attorney's interpretation of §§ 4.3 and 4.4 of the charter as "an arguably sound position" and expressed "severe reservations whether defendants can reject the City of Warren Attorney's opinion, let alone [had] a clear legal duty to do so." The plaintiff in *Olejniczak* sought leave to appeal the circuit court's decision, and this Court denied leave to appeal for lack of merit in the grounds presented. *Olejniczak v Warren Elections Comm*, unpublished order of the Court of Appeals, entered June 11, 2015 (Docket No. 327779).

As previously noted, plaintiff argued that the four candidates at issue were ineligible because they had each served at least three terms or a total of 12 years on the Warren City Council and so were barred from running again despite that none had exhausted the term limits for the offices they seek. In the instant case the trial court agreed with plaintiff, finding "that the term limits were not intended to be cumulative in the way defendants argue" and that "a plain reading of the charter shows that there is no differentiation between at-large councilmembers and district councilmembers in the term-limit definition." The trial court found that plaintiff was entitled to have the four candidates excluded from the primary ballot on the basis of the term limitations contained in §§ 4.3 and 4.4 of the city charter, that defendant Warren City Elections Commission had a clear statutory duty to strike the four candidates' names from the ballot, that doing so was a ministerial act, and that plaintiff had no other viable remedy at law.

Defendants appealed to this Court, arguing that the trial court erred by simply ignoring the prior circuit court decision from 2015, that the trial court erroneously found a clear legal duty based upon a contested interpretation of the Warren City Charter, and that it erred by exercising jurisdiction to determine the candidate's eligibility under §§ 4.3 and 4.4 of the charter. Defendants moved to expedite their appeal and for immediate consideration, which we granted. *Berdy v Buffa*, unpublished order of the Court of Appeals, entered June 5, 2019 (Docket No. 349171). We now reverse the trial court's grant of mandamus relief.

II

A writ of mandamus is an extraordinary remedy which may be granted only where the plaintiff shows "(1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016), quoting *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 829 (2014). A trial court's decision whether to grant mandamus is reviewed for abuse of discretion. *Berry*, 316 Mich App at 41. However, whether the defendants have a clear legal right to perform a duty and whether the plaintiff has a clear legal right to the performance of that duty present questions of law to be reviewed de novo by this Court. *Id.*

Plaintiff failed to show that he had a clear legal right to have the subject candidates disqualified from running for city council, failed to show that defendants had a clear legal duty to strike the names from the ballot, and failed to show that the action demanded was purely ministerial. Since plaintiff failed to make those showings, the trial court abused its discretion by granting plaintiff's complaint for mandamus.

With regard to seeking mandamus relief, "a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Id.*; *Rental Props*, 308 Mich App at 519. The rules of statutory construction apply to the interpretation of city ordinances, including city charters. *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998); *Barrow v Detroit Election Comm*, 301 Mich App 404, 413; 836 NW2d 498 (2013).

Plaintiff did not show that the four candidates at issue were term-limited under the plain language of the Warren City Charter or that the city government was misinterpreting or misapplying the relevant charter provisions. The specific language of § 4.4(d) states "[a] person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years *in that particular office*." (Emphasis added.) While the words "that particular office" in § 4.4 could be interpreted to distinguish between terms served as city council member, clerk, or treasurer, there is room for reasonable disagreement with regard to whether there should also be a distinction between council members elected by district and at-large. While the Warren City Council may not be a true bicameral legislature with an upper and lower house, like the U.S. Senate and Congress, the city charter does distinguish between council members elected by district and at-large with regard to their election, fundraising, constituencies, and abilities to serve as mayor pro tem. Contrary to the trial court's ruling, the city's interpretation of its term-limit provisions under §§ 4.3 and 4.4 of the city charter was not clearly wrong. Accordingly, plaintiff has not shown a clear legal right to have the four incumbents' names removed from the primary ballots.[2]

[2] The dissent, which has designated this case for publication, contends that the "general election laws of the state" must guide us, rather than the language of the Warren City Charter. In support

Nor has plaintiff shown that either defendant has a clear legal duty to strike the names from the ballot as requested. Warren City Charter § 13.15(1)-(8) gives the Warren City Elections Commission purely administrative duties such as arranging and staffing polling places and supervising the conduct of elections. The charter does not grant the election commission the power to decide whether candidates are eligible or to strike them from the ballot for ineligibility. While MCL 168.323 and MCL 168.719 give city election commissions the power and duty to prepare and deliver primary ballots, neither statute gives those commissions the power to assess whether a candidate is ineligible for a particular office on the basis of term limits. In fact, the language of MCL 168.323 limits a city election commission's functions to the purely ministerial tasks of preparing and furnishing ballots on the basis of the results certified by the board of county canvassers.

Section 4.2 of the Warren City Charter states that the city council "shall be the judge of the election and qualifications of its members, subject to the general election laws of the state and review by the courts, upon appeal." Neither the elections commission nor the city clerk has the power to apply the terms of the charter and determine whether candidates are ineligible to run for office. The city charter gives that power solely to the city council, subject to state election law and review by the courts. Where a city charter makes the city council the sole judge of the election and qualifications of its own members, the final decision rests in the city council and the courts cannot decide the matter unless and until the council reaches its final decision on the matter. *McLeod v State Bd of Canvassers*, 304 Mich 120, 129; 7 NW2d 240 (1942); *Grand Rapids v Harper*, 32 Mich App 324, 327; 188 NW2d 668 (1971), lv den 385 Mich 761 (1971); *Houston v McKinley*, 4 Mich App 94, 98; 143 NW2d 781 (1966). Since only the city council had the power to determine the candidate's eligibility, defendants did not have authority to determine the candidates' eligibility under the city charter and so could not strike their names from the ballot.

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of this proposition, the dissent relies heavily on *Barrow*, 301 Mich App 404. The dissent misreads *Barrow*. That decision flowed directly and solely from the language of Detroit's charter, which defined the residency requirements for mayoral candidates. This Court stressed, "Michigan statutory law provides that a city's charter governs qualifications for persons running for office[.]" *Id*. at 413. In *Barrow*, the pertinent language of the charter provided that a person seeking elective office must be "a registered voter of the City of Detroit for one (1) year at the time of filing for office . . . " *Id*. We determined that the relevant section of the charter was clear and unambiguous, prohibiting a candidate from seeking office unless the candidate had been a registered voter for one year at the time he or she filed a nominating petition. The candidate, (now Mayor) Duggan, conceded that he was not registered to vote in Detroit one year before he filed his nominating petitions. *Id*. at 415.

The language of the Warren City Charter is not so easily parsed, and legitimately subject to differing interpretations. The Warren City Attorney concluded that the charter permits the four candidates to run for positions on the city council. This determination may prove incorrect, but it is not unreasonable. Accordingly, *Barrow* is inapposite.

Additionally, plaintiff failed to show that the action requested was purely ministerial. In *Berry*, this Court defined a ministerial act as "one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry*, 316 Mich App 42, quoting *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013). While striking the names of clearly ineligible candidates who have not submitted facially adequate petitions or neglected to comply with other clear statutory requirements is a ministerial act, *Barrow*, 316 Mich App at 412, choosing between competing interpretations of city charter language regarding term limits is not purely ministerial, but instead requires analysis and discretionary decision-making. Since determining the eligibility of candidates under §§ 4.3 and 4.4 is not within the powers of defendants and was not a ministerial act, plaintiff was not entitled to mandamus relief to compel defendants to do those acts.[3]

The trial court's opinion and order granting declaratory and mandamus relief to plaintiff is reversed. No costs, as this appeal concerned an issue of public importance. MCR 7.219. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh

[3] Contrary to the dissent, MCL 168.323 has not supplanted, arguably or otherwise, the mandamus principles set forth in *McLeod*, 304 Mich App 120. To the contrary, *McLeod*'s central teaching remains relevant. Mandamus is an extraordinary remedy. "Mandamus issues only to compel the recognition of a clear legal right or the performance of a legal duty; it does not issue so long as the right or the duty is disputed or doubtful." *Id*. at 125-126. This is the law. The enactment of MCL 168.323 has not changed it. If any of the four candidates win the election, a challenge to the result is certain. The dissent's position may then prevail. But the cause of action here is for mandamus, and that form of unusual relief is unavailable where serious and compelling legal questions about a legal duty abound, as here.

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June 6, 2019

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Before: TUKEL, P.J., and CAVANAUGH and GLEICHER, JJ.

TUKEL, P.J. (*dissenting*).

I respectfully dissent.

Defendants argue that mandamus is not an available remedy in this case. "Although this Court reviews a trial court's decision to issue or deny a writ of mandamus for an abuse of discretion, this Court reviews de novo as questions of law whether a defendant has a clear legal duty to perform and whether a plaintiff has a clear legal right to performance." *Wilcoxon v City of Detroit Elec Comm*, 301 Mich App 619, 630; 838 NW2d 183 (2013) (quotation marks and citations omitted).

As a general matter, in order to justify a writ of mandamus,

> [t]he plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it

> involves no discretion or judgment, and (4) the plaintiff has no other adequate legal or equitable remedy. [*Barrow v City of Detroit Elec Comm*, 301 Mich App 404, 412; 836 NW2d 498 (2013).]

"[T]his Court has held that where the duty of the public official is certain, the Court cannot in its discretion deny the writ." *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728, 744; 322 NW2d 152 (1982).

Barrow is controlling in this case as to the potential availability of mandamus. *Barrow* involved a claim that a candidate was ineligible for the August primary ballot; the plaintiff in *Barrow* argued that then-candidate Michael Duggan was not eligible for the ballot because he had not been a resident and a qualified and registered voter for the requisite time period, as mandated by the city charter. *Barrow*, 301 Mich App at 407. Here, similarly, the allegation is that four candidates are not eligible for the August primary ballot (for Warren City Council) because they have served the maximum terms permitted by the city charter. In *Barrow*, the defendants were the City of Detroit Election Commission and the Detroit City Clerk. *Id*. Here, the defendants are the Warren City Election Commission and the Warren City Clerk. Moreover, although not mentioned by the *Barrow* Court, "[t]he boards of election commissioners shall correct such errors as may be found in said ballots, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk." MCL 168.567. That section refers to "official primary ballots," the election at issue here. Thus, defendant Warren City Election Commission had a duty to correct any error on the ballots, which necessarily required that it not list an ineligible candidate.

In *Barrow*, we determined that "mandamus is the proper method of raising [the plaintiff's] legal challenge" to the candidacy. *Barrow*, 301 Mich App at 412. In so doing, we relied on various provisions of the Michigan Election Law, MCL 168.1 *et seq*. Under the Michigan Election Law, "[i]t is the duty of the board of city election commissioners to prepare the primary ballots to be used by the electors." MCL 168.323. In addition, "[t]he election commission of each city and township shall perform those duties relative to the preparation, printing, and delivery of ballots as are required by law of the boards of county election commissioners." MCL 168.719. Thus, the *Barrow* Court held that "[i]t is undisputed that defendants have the statutory duty to submit the names of the *eligible* candidates for the primary election, see MCL 168.323 and MCL 168.719." *Barrow*, 301 Mich App at 412 (emphasis added). Further, "[u]pon review, if we in turn likewise determine that Duggan did not meet the qualifications to be a candidate for elected office under the charter, plaintiff would have a clear legal right to have Duggan's name removed from the list of candidates, the Election Commission would have a clear legal duty to remove Duggan's name, the act would be ministerial because it would not require the exercise of judgment or discretion, and plaintiff would have no other legal or equitable remedy." *Id*. at 412-413.

I. PLAINTIFF HAS A RIGHT TO THE PERFORMANCE OF THE SOUGHT ACTION

I disagree with the majority's view that plaintiff has failed to show that he had a right to the performance of the duty sought to be compelled.

First, the majority's interpretation of the Charter is contrary to the Charter's plain and unambiguous language. As already noted, we review the interpretation of a city charter de novo. *Trahey v City of Inkster*, 311 Mich App 582, 593; 876 NW2d 582 (2015). Thus, we give no deference to any other interpretations, *Buchanan v City Council of Flint*, 231 Mich App 536, 542 n 3; 586 NW2d 573 (1998), including those of the city attorney.

> "When reviewing the provisions of a home rule city charter, we apply the same rules that we apply to the construction of statutes. The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Courts apply unambiguous statutes as written." [*Barrow*, 305 Mich App at 663 (citation omitted).]

The Charter provides for seven members, two elected at-large and five who represent districts. Charter, § 5.1(a). There are no differences in the powers or authorities of council members; any combination of five members, irrespective of whether at-large or elected-district members, constitute a quorum and can conduct all business of the council. Charter, § 5.3(e).

The majority quotes the city attorney's conclusion that "the two groups had different election rules and responsibilities, such as different residency requirements and separate campaigning and fundraising rules." But that statement from the city attorney actually is incorrect. Those provisions relate to election matters, which of course are different for an at-large representation as opposed to an elected-district representation. But they draw no distinction regarding the authorities of serving council members to assemble a quorum or to conduct business. Importantly, if there were two different classes of council members, it would not be a legal irrelevancy under the Charter which of the five were present on any given occasion to constitute a quorum in order to conduct business. See Charter, § 5.3(e).

And while the majority soft-peddles the city attorney's incongruous statement that the council is "bicameral" by stating that it "may not be a true bicameral legislature," there is no doubt on this issue. A bicameral legislature literally means "two houses" and thus requires two houses. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "bicameral" as "having, consisting of, or based on two legislative chambers").[1] Additionally, if there really were a "bicameral" council, it certainly would be of great significance to spell that out, since a quorum in one house would not constitute a quorum in the other. Nevertheless, the Charter treats the seven council members interchangeably for official purposes and only provides a single mechanism for determining a single quorum. Of course, none of what the city attorney opined matters at all, given that our review on this matter, as an issue of law, is de novo; but even under a more deferential standard of review, the city attorney's position would have to be rejected.

[1] The city attorney and majority also note that only an at-large city council member can serve as mayor pro tem. However, that is an eligibility provision for the position of mayor pro tem, not for city council members; and as it only applies to one of the two at-large members in any event, it could not create a separate class for the at-large members as a whole.

Sections 4.3(d) and 4.4(d) govern how many terms or how long a person may serve as an elected official. Section 4.3 states,

> A person shall not be eligible to hold the office of mayor for more than the greater of five (5) complete terms or twenty (20) years. A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.

And § 4.4(d) provides,

> A person shall not be eligible to hold the office of mayor for more than the greater of five (5) complete terms or twenty (20) years. A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office.

The only difference between these two provisions is the addition of the word "particular" toward the end of § 4.4(d).

The only reasonable reading of the Charter provisions for three-term or 12-year maximum periods of service is that they each apply separately to anyone elected to "the position of city council." The Charter's use of the definite article "the" and the singular "position" indicate that there is only *one* class of city council members. See *Robinson v City of Lansing*, 486 Mich 1, 14-15; 782 NW2d 171 (2010) (stating that the use of "the" indicates a "specific or particular" thing). Any reliance on "that particular office" to somehow indicate that it applies to multiple city council positions is without merit. The clear meaning of the last sentence in § 4.4(d), "A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office," is that "particular office" refers to the previously mentioned positions of city council, city clerk, and city treasurer. Indeed, it is likely that no one who voted on those sections of the Charter, whether for or against, would have fathomed that what was being voted on were not provisions for three complete terms or 12-year maximums, but rather six complete terms and 24-year maximums. That is so for the reason that there is not a single word in the Charter stating that there are two different classes of city council members, as to whom the maximum term provisions would apply separately. See, e.g., *Wayne Co v Hathcock*, 471 Mich 445, 460; 684 NW2d 765 (2004) ("This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification.").

Defendants argue in their reply brief that the Charter has received a settled judicial construction which cannot be lightly abandoned under the rules for stare decisis. However, as to this issue, no rule set forth by a lower court was previously "settled." As noted, *this Court* reviews whether plaintiff has a clear legal right and whether defendants have a clear legal duty de novo. We owe no deference whatsoever to previous rulings by a circuit court, either in the 2015 case, *Olejniczak v City of Warren Elec Bd*, or in this case presently; and the unpublished order of this Court in *Olejniczak* is not of precedential value to us. See MCR 7.215(C). What would be a settled rule would be a definitive construction from this Court of the meaning of the Charter; as we held in *Barrow*, "Upon review, if *we* in turn likewise determine that Duggan did not meet the qualifications to be a candidate for elected office under the charter, plaintiff would

have a clear legal right to have Duggan's name removed from the list of candidates, the Election Commission would have a clear legal duty to remove Duggan's name, the act would be ministerial because it would not require the exercise of judgment or discretion, and plaintiff would have no other legal or equitable remedy." *Barrow*, 301 Mich App at 412-413 (emphasis added). Thus, even if defendants had simply been relying on the city attorney's interpretation of the City Charter and such an interpretation could be considered "difficult," "a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts *regardless of the difficulty of the legal question to be decided*." *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016) (quotation marks and citation omitted; emphasis added). And here, the plain language of the Charter reveals that a person is limited to serve a total of three terms or 12 years in the position of city council.

Therefore, I would hold that the trial court did not err in determining that plaintiff had a clear legal right to the performance of the duty sought to be compelled, i.e., the removal of the four individuals on the ballot for city council. See *Barrow*, 301 Mich App at 412 (stating that if the Court determines that a person is not qualified to be a candidate, "plaintiff would have a clear legal right" to have the person's name removed from the list of candidates).

II. DEFENDANTS HAD A CLEAR LEGAL DUTY TO REMOVE THE NAMES FROM THE BALLOT AND THE ACT WAS MINISTERIAL

I also disagree with the majority's view that defendants did not have a clear legal duty to remove the names from the ballot. Defendants argue that the duty of determining eligibility for the ballot is vested in the Warren City Council, pursuant to the Charter. The charter provides in relevant part that "[t]he council shall be the judge of the election and qualifications of its members, *subject to the general election laws of the state and review by the courts, upon appeal*." Charter, § 4.2 (emphasis added). The Charter thus does not give unlimited discretion to the council; rather, it gives council such discretion as is not limited by the "general election laws of the state."[2] Such "general election laws of the state" are precisely what we construed in *Barrow*, and under which "[i]t is undisputed that defendants have the statutory duty to submit the names of the *eligible* candidates for the primary election." *Barrow*, 301 Mich App at 412 (emphasis added); see also MCL 168.719 ("The election commission of each city and township shall perform those duties relative to the preparation, printing, and delivery of ballots as are required by law of the boards of county election commissioners."). Consequently, and notwithstanding the Charter, the courts have a duty to apply the "general election laws of the state" regarding a candidate's eligibility for office, even where that eligibility is limited by a provision of a city charter. See MCL 168.321(1).

Moreover, as we held in *Barrow*, 301 Mich App at 412, once a court determines that a candidate is legally ineligible to run for office, "the Election Commission would have a clear

[2] Nor could the charter grant unlimited discretion to the council. "No provision of any city charter shall conflict with or contravene the provisions of any general law of the state." MCL 117.36.

legal duty to remove [the candidate's] name." This holding is supported by § 13.15(2) of the Charter, which provides that one of the duties of the election commission is "[t]o prepare and print election ballots . . . for all city officers *for whom the electors are entitled to vote* . . . ." (Emphasis added.) Contrary to the majority, the Election Commission makes that determination for the primary purpose in the first instance, not after certification by the County Board of Canvassers. Further, "the act would be ministerial because it would not require the exercise of judgment or discretion," as the law leaves no discretion once a candidate's ineligibility is clear, "and plaintiff would have no other legal or equitable remedy." *Id*. at 412-413; see also *Romulus City Treasurer*, 413 Mich at 744 ("[W]here the duty of the public official is certain, the Court cannot in its discretion deny the writ.").[3]

III. CONCLUSION

Thus, none of defendants' arguments is persuasive on the question of whether there is more than one class of council member; rather, there is only a single class of city council member, as to whom the Charter provides for a maximum of three terms in office or a total of 12 years. It is undisputed that the four defendants here who are council members have served or will have served those maximum terms by the time of the 2019 elections; they are thus ineligible under the Charter. Therefore, the City Elections Commission was duty-bound to remove the names of the individuals from the ballot. Because the trial court properly ordered mandamus requiring the City Elections Commission to do so, I would affirm the trial court's judgment.

/s/ Jonathan Tukel

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[3] *McLeod v State Bd of Canvassers*, 304 Mich 120; 7 NW2d 240 (1942), and the line of cases the majority cites arguably have been supplanted by MCL 168.323, which imposed on city election commissioners the duty to prepare the primary ballots; that provision was enacted as § 323 of 2013 PA 53, after *McLeod* had been decided, and thereby may have implicitly overruled it. If two statutes are incapable of harmonious construction, then there may be a repeal by implication or a sub silentio repeal, such that "a more recently enacted statute takes precedence over an earlier one, especially if the more recent one is also more specific," *City of Kalamazoo v KTS Indus*, 263 Mich App 23, 34; 687 NW2d 319 (2004), although "repeals by implication are disfavored." *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 651 852 NW2d 865 (2014). If so, then the cited cases would no longer be good law. See *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191 n 32; 880 NW2d 765 (2016) (stating that while the Court of Appeals normally is bound to follow decisions of the Supreme Court, "lower courts have the power to make decisions without being bound by prior cases that were decided under the now-repudiated previous positive law"). We need not decide that issue here, and I express no opinion as to it because the premise of the majority's citation of *McLeod*, that the Charter makes the council the sole and exclusive judge of the qualifications of its members, is inapplicable.