No. 24A285

In the Supreme Court of the United States

TEAM KENNEDY, et al.,

Applicants,

v.

HENRY BERGER, et al.,

Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR AN EMERGENCY INJUNCTION PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

Applicants Team Kennedy, American Values 24, and Jeffrey Rose seek an extraordinary, and extraordinarily belated, emergency injunction pending appeal that would require respondents to order New York's sixty-three county boards of elections to add Robert F. Kennedy, Jr. to the election ballot as a presidential candidate. They seek this relief even though the State's ballot certification deadline already passed on September 11, 2024; the federal statutory deadline for sending ballots to overseas and military voters already passed on September 21, 2024; and the county boards of elections across the State have already mailed tens of thousands of ballots to overseas and military voters—and will continue to mail absentee and mail-in ballots to applicants on an as-requested basis. And applicants seek relief despite the state courts having already determined that state law required appellees to remove Mr. Kennedy from the ballot, and that doing so did not violate Mr. Kennedy's (or any other cognizable) rights under the United States Constitution.

This Court should deny applicants' request for such extraordinary and disruptive relief for three independent reasons. *First*, as a threshold matter, applicants' requested relief would violate this Court's repeated admonition against enjoining the enforcement of state election laws in the period close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

Second, equitable considerations and the public interest weigh dispositively against an injunction. Applicants fail to show irreparable harm absent an injunction given their delay in seeking relief, the suspension of Kennedy's candidacy for the

presidency, and the availability of write-in voting. By contrast, respondents and the voting public would be severely harmed by an injunction requiring the invalidation, reprinting, and remailing of tens of thousands of ballots to military and overseas voters. The requested injunction would not only severely disrupt the State's election processes and trigger substantial voter confusion, but also cause New York to miss federal deadlines for mailing overseas and military ballots and potentially disenfranchise voters who receive and vote the original ballot.

Third, applicants are exceedingly unlikely to succeed on the merits of their claims, which have already been rejected by the state court and which are meritless in any event. Applicants' claims are barred by principles of res judicata and collateral estoppel. And applicants do not come close to demonstrating a likely right to relief under either the *Anderson-Burdick* framework governing constitutional election claims,[1] or the Qualifications Clause of the federal Constitution.

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[1] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

BACKGROUND

A. Elections in New York

This case involves a challenge to New York's requirement that independent nominating petition candidates accurately provide their "place of residence" on the independent nominating petition forms used to gather the signatures required to obtain ballot access. *See* N.Y. Election Law § 6-140(1)(a). "Residence" is defined in New York's Election Law as "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." *Id.* § 1-104(22).

Presidential elections in New York involve the production of millions of ballots comprising thousands of distinct ballot layouts across the many different election districts in the State. (*See* Applicants' Appendix (App.) 106 ¶ 3 (Decl. of Kristen Zebrowski Stavisky, Co-Executive Director of State Board of Elections).) The presidential contest will appear on every one of these ballots. State election officials must certify ballots no later than fifty-five days before the general election—a deadline that fell this year on September 11, 2024. *See* N.Y. Election Law § 4-112(1). County boards of election must certify the ballots as to the nominees for county or local offices the next day—this year, September 12, 2024. *Id.* § 4-114.

The ballot certification is an extremely important step in the elections process. After certification, county boards may begin to test voting machines; to prepare voting site materials; to craft, proof, print, and (where necessary), translate ballots; and to mail absentee and early mail ballots. (App. 108 ¶ 6 (Zebrowski Stavisky).) Federal

law requires general election ballots to be mailed to voters covered by the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA) beginning no later than forty-five days before the election, a deadline that this year fell on Saturday, September 21, 2024. *See* 52 U.S.C. § 20302(a)(8)(A). New York law requires those ballots to be mailed the day before, i.e., September 20, 2024. *See* N.Y. Election Law § 10-108.

B. Factual and Procedural Background

In May 2024, plaintiff Team Kennedy commenced this federal lawsuit challenging the constitutionality of certain New York requirements for independent nominating petitions. However, Team Kennedy's federal lawsuit did *not* challenge the residency disclosure requirement found in § 6-140(1)(a). (*See* Compl. for Injunctive & Declaratory Relief (May 20, 2024), SDNY ECF No. 1.) Shortly thereafter, Kennedy submitted to the Board his independent nominating petition for the Office of President of the United States. (App. 111 ¶ 16(b) (Zebrowski Stavisky).) The Board determined that Kennedy's petition was valid "subject to judicial action in any court proceeding." (App. 112 ¶ 16(k).)

One such court proceeding was filed in state court by several individual voters in June 2024. (Decl. of Erin R. McAlister, Ex. 2, Verified Pet., *Matter of Cartwright v. Kennedy*, Index No. 2024-52389 (Sup. Ct. Dutchess Cnty. June 7, 2024), SDNY ECF No. 47-2.) The petition in *Cartwright* alleged that Kennedy's nominating petition was invalid because Kennedy had listed as his residence "the address of a family friend in Katonah, New York, where he has at most only visited," rather than "the candidate's true residence in California, where he has lived with his wife for years." (*Id.* ¶ 1.)

In August 2024, the state trial court granted the petition and invalidated Kennedy's nominating petition. The court concluded that Katonah was not Kennedy's actual place of residence, but rather was a "sham address that he assumed for the purpose of maintaining his voter registration and furthering his own political aspirations in this State." *Matter of Cartwright v. Kennedy*, 2024 N.Y. Slip Op. 24221, 2024 WL 3894605, at *14-16 (N.Y. Sup. Ct. Albany Cnty. Aug. 13, 2024). The court further held that because Kennedy's listing of this false address was intentional and not the result of inadvertent error, "'opportunities for deception or the likelihood of confusion'" were present, and thus invalidation of the petition was required under New York law. *Id.* at *15 (quoting *Matter of Ferris v. Sadowski*, 45 N.Y.2d 815, 817 (1978)). Finally, the court held that New York's residency disclosure requirement did not impermissibly establish additional qualifications for the presidency. *See id.*

The state intermediate appellate court affirmed the trial court's rulings. The court further concluded that New York's residency disclosure requirement imposed a reasonable and nondiscriminatory burden on Kennedy's First and Fourteenth Amendment rights, which was justified under New York's broad authority to regulate its electoral processes. *See Matter of Cartwright v. Kennedy*, 2024 N.Y. Slip Op. 04354, 2024 WL 3977541, at *3-4 (N.Y. 3d Dep't Aug. 29, 2024). The New York Court of Appeals dismissed Kennedy's subsequent appeal sua sponte, determining that the appeal presented "no substantial constitutional question" worthy of review. *Matter of Cartwright v. Kennedy*, 2024 N.Y. Slip Op. 73915, 2024 WL 4127460 (N.Y. Sept. 10, 2024).

On August 22, 2024—nearly two-and-a-half months after *Cartwright* was filed, and more than three months after Team Kennedy commenced this federal lawsuit—Team Kennedy amended its complaint in this federal lawsuit to challenge the residency disclosure requirement. The amendment also added two new plaintiffs, American Values 2024 (AV24), an independent political action committee, and Jeffrey Rose, a New York voter. (*See* First Am. Compl. (Aug. 22, 2024), SDNY ECF No. 32.) Applicants also sought a preliminary injunction enjoining the Board from removing Kennedy's name from the ballot. (*See* Proposed Order to Show Cause for TRO and/or Prelim. Inj. at 2 (Aug. 22, 2024), SDNY ECF No. 33.) One day later, Kennedy suspended his campaign and announced that he would be "withdrawing his name from the ballot in battleground states."[2]

On September 9, 2024, the district court notified the parties that it was denying plaintiffs' request for preliminary injunctive relief, with opinion to follow. The court issued its opinion the next day, on September 10, 2024.

The district court concluded that Team Kennedy's claims were barred by both res judicata and collateral estoppel due to the state court rulings in *Cartwright*. (App. 14-22 (Op. & Order).) The court also concluded that all applicants were unlikely to succeed on the merits of their claims. (App. 22-33.) Applying the *Anderson-Burdick* framework, the court found that the burden imposed by the State's residence disclosure requirement was "minimal and nondiscriminatory," and therefore not subject to

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[2] *See* Rebecca Davis O'Brien et al., *Robert F. Kennedy Jr. Endorses Trump and Suspends His Independent Bid for President*, N.Y. Times (Aug. 23, 2024). (For authorities available on the internet, URLs appear in the Table of Authorities.)

strict scrutiny. (App. 24; *see* App. 29.) The court further held that the requirement was justified by the State's interests, including ensuring that petition signers are aware of the candidate's identity, administering fair and orderly elections, and protecting the State and its voters from potential fraud. (App. 30-32.) Finally, the court concluded that applicants had failed to show irreparable harm in the absence of relief, or that the public interest and balancing of equities weighed in their favor. (App. 33-34.)

On September 11, 2024, the State Board certified the ballot.[3] That same day, plaintiffs noticed their appeal to the Second Circuit. (*See* Notice of Appeal, SDNY ECF No. 75.) Then, after the close of business on September 12, 2024—the day that county boards of election were required to certify the ballots for county and local contests—plaintiffs filed a motion in the Second Circuit seeking emergency relief requiring the Board "to withdraw or withhold certification of the ballot until further notice from this Court and/or an injunction requiring [it] to place Kennedy on the ballot." Appellants' Mem. of Law in Supp. of Emergency Mot. for an Inj. Pending Appeal (Mem.) 21, CA2 ECF No. 21.1. On September 17, 2024, a panel of the Second

[3] *See* N.Y. State Bd. of Elections, *Amended Certification for the November 5, 2024 General Election* (Sept. 12, 2024). The certification was amended on September 12, 2024, to note certain contests for which litigation concerning nominees was pending—a purely informational amendment that has no legal effect on the ballot or on county boards' ballot production timelines. *See id.* at 2. Although not reflected on the public website, this Office understands from the Board that the certification was amended on September 13, 2024, to correct the middle initial of a congressional candidate.

Circuit heard oral argument on the motion. The next day, the court denied plaintiffs' requested relief. (App. 1 (Order).)

Meanwhile, following state and county certifications of the ballots on September 11 and 12, county boards began the process of preparing, testing, translating (where appropriate), and printing ballots. (*See* App. 108 ¶ 6 (Zebrowski Stavisky).) As of September 6, 2024, approximately 55,200 ballots were scheduled to be mailed (or, where appropriate, transmitted electronically)[4] to military and overseas voters no later than September 20, 2024.[5] (*See* Letter from E. McCalister to Hon. A. Carter, Dist. J., at 2 n.2 (Sept. 6, 2024), SDNY ECF No. 64.)

[4] Military and overseas voters may elect to receive ballots by electronic mail. *See* N.Y. Election Law §§ 10-107(1), 11-203(1).

[5] The Board does not have updated information from county boards of election as to how many ballots were actually transmitted by the September 20, 2024, deadline, but it is almost certainly higher than the estimate as of September 6, 2024.

ARGUMENT

APPLICANTS ARE NOT ENTITLED TO THE EXTRAORDINARY RELIEF OF AN INJUNCTION PENDING APPEAL

An injunction pending appeal is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Unlike a stay pending appeal,[6] which "simply suspend[s] judicial alteration of the status quo," an injunction pending appeal "grants judicial intervention" withheld by the lower court. *Nken v. Holder*, 556 U.S. 418, 429 (2009). Injunctive relief therefore "demands a significantly higher justification" than a stay and should not be granted except "in the most critical and exigent circumstances." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313-14 (1986) (Scalia, J., in chambers) (quotation marks omitted). Accordingly, this Court should grant such an application only "when it is necessary or appropriate in aid of [its] jurisdiction" and "the legal rights at issue are indisputably clear." *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) (quotation and alteration marks omitted). Applicants utterly fail to meet this high burden here.

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[6] Applicants erroneously assert that this Court's authority to award their requested relief derives not only from the All Writs Act, 28 U.S.C. § 1651(a), but also from 28 U.S.C. § 2101(f), which authorizes a stay pending application for writ of certiorari of a "final judgment or decree," and Rules 22 and 23 of the Rules of this Court. *See* Application for Emer. Inj. Pending Appeal (Application) 2. Applicants do not seek a stay at all, much less a stay in connection with any "final judgment or decree." Instead, they seek affirmative injunctive relief directing New York election officials to cause Kennedy's name to be placed on the ballots.

A. The *Purcell* Principle Forecloses Applicants' Requested Relief.

As a threshold matter, the *Purcell* doctrine disposes of applicants' request for injunctive relief. This Court has repeatedly cautioned that "federal district courts ordinarily should not enjoin state election laws in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (citing *Purcell*, 549 U.S. at 1). As the Court has explained, court "orders affecting elections . . . [can] result in voter confusion" and, "[a]s an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5. For relief to be granted despite the proximity of an election, the changes imposed must "at least [be] feasible before the election, without significant cost, confusion, or hardship."[7] *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J. concurring).

Here, an emergency injunction altering the contents of all statewide ballots, issued nearly two weeks *after* ballots have been certified and several days *after* absentee ballot mailings have already begun, would squarely implicate *Purcell* and its progeny. *See, e.g.*, *Riley v. Kennedy*, 553 U.S. 406, 426 (2008) ("practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges"); *Westermann v. Nelson*, 409 U.S. 1236, 1236 (1972) (Douglas, J., in chambers) (denying injunction where "the time element is now short and the ponderous Arizona

[7] The applicant also must show an "entirely clearcut" entitlement to relief on the merits, irreparable harm in the absence of relief, and that it has not unduly delayed in presenting the issue to court. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Applicants fail to establish any of these additional prerequisites either. See *infra* at 12-26.

election machinery is already under way, printing the ballots"). For example, relief would, at minimum, require the State to direct county boards to invalidate tens of thousands of ballots that are currently in the hands of voters, and then craft, proof, print, test, translate (as required), and transmit replacement ballots. (*See* App. 107-108 ¶¶ 3-6 (Zebrowski Stavisky).) Voters are likely to be confused if they receive multiple different ballots. *See Walen v. Burgum*, No. 1:22-cv-31, 2022 WL 1688746, at *5 (D.N.D. May 26, 2022) (three-judge panel) (per curiam) ("We would be hard pressed to think of a situation more confusing to a voter than receiving a second ballot with instructions to vote again."). And voters would have less time to vote the "correct" ballot than they are otherwise entitled to receive, *see* 52 U.S.C. § 20302(a)(8)(A)—likely leading to further voter confusion, disenfranchisement, and delays with unknowable ripple effects on the remaining preparations for the election. (*See* App. 107-108 ¶¶ 5-6 (Zebrowski Stavisky).) *See Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) ("important, interim deadlines . . . are imminent," and "moving or changing a deadline or procedure now will have inevitable, other consequences").

Applicants err in suggesting that these concerns are unfounded because New York courts have purportedly ordered changes to ballots later in the election calendar than the current application (*see* Application 24). In *Matter of Wilson v. Bowman*, 121 A.D.3d 1402 (3d Dep't 2014), on which applicants rely, the Appellate Division reversed the lower court's invalidation of a candidate's nominating petition on the ground that the order to show cause by which the invalidation was secured had not properly been

served. *Id.* at 1403. The court's order said nothing about changing the ballot as a result of its ruling, possibly because the ballot did not need changing.[8]

In any event, it is one thing for a State on its own to alter its election laws close to its own State's elections. "But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Applicants' reliance on *state* court interventions into *state* election administration processes under *state* law thus have little relevance to the *Purcell* doctrine's application here. Accordingly, *Purcell* forecloses applicants' requested relief here.

B. Equitable Considerations Also Weigh Dispositively Against an Injunction.

In any event, the equities and public interest also weigh dispositively against applicants' requested emergency relief. As explained above, an emergency injunction would be highly disruptive to the election process and would harm voters.

By contrast, applicants would not be irreparably harmed absent an emergency injunction. Team Kennedy delayed more than two months after initially filing its

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[8] *Matter of Innamorato v. Friscia*, No. 80042/07, 2007 N.Y. Misc. LEXIS 457 (N.Y. Sup. Ct. Richmond Cnty. Feb. 5, 2007)—also cited by applicants (at 24)—involved a change to the *first name* of a candidate to avoid voter confusion, and only required changing the name on lever-voting machines (and stand-by paper ballots) used at the time at a single district's polling sites in New York City. *Id.* at *5. Under the circumstances, the court *declined* to order the reprinting and mailing of absentee ballots with the corrected first name. *Id.* at *5 & n.4. Here, by contrast, lever-voting machines are no longer used and ballots would need to be reprinted and mailed to reflect the addition of a candidate, not just the correction of an existing candidate's first name. *See* N.Y. State Bd. of Elections, *Voting Technology* (n.d.).

lawsuit to amend its complaint to challenge the residency disclosure requirement. And AV24 and Rose delayed the same amount of time before being added as plaintiffs in this proceeding through Team Kennedy's amendment to its complaint. Such delay severely undermines applicants' "argument that absent a stay irreparable harm w[ill] result," *Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d Cir. 1993). *See also Benisek v. Lamone*, 585 U.S. 155, 160 (2018); *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers). Moreover, the failure of AV24 and Rose to seek intervention or otherwise make their positions known in the state court proceeding (such as through amicus briefs) further demonstrates a lack of irreparable harm to them. *See, e.g.*, *Davis v. Stapleton*, 480 F. Supp. 3d 1099, 1109 (D. Mont. 2020) (equities did not support relief where plaintiffs "chose not to attempt intervention in the state court matter and instead waited until the final hour to raise their constitutional claims").

Further undermining applicants' claimed harm is the undisputed fact that Kennedy has suspended his campaign for President, endorsed one of the major party candidates,[9] and is litigating to *remove* his name from many States' general election ballots.[10] There is little irreparable harm to Kennedy from being removed from the

[9] *See* Robert F. Kennedy Jr., *Vote Trump*, YouTube (Sept. 10, 2024) ("Bottom line: No matter what state you live in, VOTE TRUMP.").

[10] *See, e.g.*, *Kennedy v. North Carolina State Bd. of Elections*, No. 235P24, 2024 WL 4119196, at *3 (N.C. Sept. 9, 2024) (ordering removal of Kennedy's name from North Carolina ballot at Kennedy's behest); *Kennedy v. Secretary of State*, No. 167545, 2024 WL 4125710 (Mich. Sept. 9, 2024) (denying Kennedy's mandamus petition to remove his name from Michigan ballot); Henry Redman, *Appeals Court Will Hear RFK Jr. Lawsuit to Get Off Presidential Ballot*, Wisc. Examiner (Sept. 18, 2024).

ballot for an office he no longer seeks. And as for applicants' claim that Kennedy may "unsuspend" his campaign in the future (as Ross Perot did in 1992) (Application 23), this Court has consistently rejected such speculative injury as a basis for awarding emergency injunctive relief. *See, e.g.*, *Murthy v. Missouri*, 144 S. Ct. 1972, 1993-96 (2024); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999) (Ginsburg, J., concurring in part) ("'Speculative injury is not sufficient.'" (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.3, at 153)).

Moreover, applicants' assertion of harm to voters who wish to vote for and associate themselves with Kennedy's now-suspended candidacy, "whether he is campaigning for their vote or not" (*see* Application 23-24), is undermined by the fact that those voters remain able to vote for him as a write-in candidate. *See* N.Y. Election Law §§ 6-153, 8-308. While some courts have held that write-in voting does not mitigate the harm from a candidate's exclusion from the ballot, they have done so on the basis that the candidate's "chances of election as a write-in candidate, as a practical matter, are substantially less than his chances as a ballot candidate." *Edmonds v. Gilmore*, 988 F. Supp. 948, 956 (E.D. Va. 1997); *see also Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974). That concern is not present here, where Kennedy is no longer seeking the office for which he insists on the right to appear on the ballot and is imploring his supporters to vote for someone else.

As for applicants' claim that exclusion violates the rights of Kennedy's petition signatories (*see* Application 23), that is plainly not the case. An independent candidate nominated by petition may decline the nomination regardless of the views of that candidate's petition signers. *See* N.Y. Election Law § 6-158(11). And Kennedy's purported concern for his petition signers' rights is highly questionable given his attempts to *remove* his name from the ballots in other States. See *supra* at 13 n.10. Meanwhile, voters who may not be aware of Kennedy's suspension of his candidacy may be misled by his presence on the ballot into thinking that he remains a bona fide candidate for the presidency.

Additional equitable considerations further "support refusing to interfere with a state's administration of its own election laws." *Davis*, 480 F. Supp. 3d at 1109. While "federal courts have a duty to ensure that national, state and local elections conform to constitutional standards, [they must] undertake that duty with a clear-eyed and pragmatic sense of the special dangers of excessive judicial interference with the electoral process." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1182-83 (9th Cir. 1988); *cf. Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (federal courts should be reluctant "to swoop in and re-do a State's election laws in the period close to an election"). Here, the state courts have already adjudicated applicants' constitutional claims, and "there is an overwhelming public interest in allowing the state judiciary and legislature to function without unnecessary federal intervention." *Davis*, 480 F. Supp. 3d at 1109. Principles of federalism and comity weigh heavily against granting applicants' motion. *See id.*

C. Applicants Are Exceedingly Unlikely to Succeed on the Merits of Their Claims.

1. Applicants' claims are barred by res judicata and collateral estoppel.

Applicants' claims are foreclosed by principles of res judicata and collateral estoppel because the issues raised in this federal proceeding are identical to the issues litigated to final judgment in state court and affirmed on appeal in *Cartwright*. In *Cartwright*, after a multiday trial, the court held that the Katonah residence listed by Kennedy on his petition was not a proper residence within the meaning of § 1-104(22), and that the use of that residence was not an inadvertent mistake but rather was a "deliberate choice" by Kennedy. 2024 WL 3894605, at *13, *15. Because New York requires "strict compliance with statutory commands as to matters of prescribed content" in a nominating petition, *Matter of Hutson v. Bass*, 54 N.Y.2d 772, 774 (1981), the court concluded that Kennedy's inclusion of a false residency on his nominating petition required invalidation of the petition and, as a result, his exclusion from the ballot. *Matter of Cartwright*, 2024 WL 3894605, at *16. The court also found that requiring the disclosure of the candidate's residency did not expand the constitutional qualifications for the presidency. *Id.* at *15. And, in affirming these rulings, the Appellate Division further held that the residence disclosure requirement "imposes a reasonable and nondiscriminatory burden on rights" under the *Anderson-Burdick* framework. *Matter of Cartwright*, 2024 WL 3977541, at *3.

In light of these state court rulings, collateral estoppel bars Team Kennedy's claims here. *See McKithen v. Brown*, 481 F.3d 89, 105 (2d Cir. 2007) (elements of collateral estoppel under New York law); *Burkybile v. Board of Educ.*, 411 F.3d 306,

310 (2d Cir. 2005) (preclusive effect of state court decisions is governed by state law). Kennedy had a full and fair opportunity to litigate these issues in state court, and applicants do not meaningfully challenge the district court's conclusion that Team Kennedy (the campaign) is in privity with Kennedy (the candidate). *See* Application 20. He is not entitled to another bite at the apple.

AV24 and Rose are also subject to collateral estoppel and res judicata because they share the same interests as Kennedy in his name appearing on the ballot, and Kennedy adequately represented those interests in the state court action.[11] *See Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 96 (2d Cir. 2005) (privity between voters and candidate where "voters advance only those interests that they share with the candidates"). Moreover, AV24 and Rose joined this proceeding only after the state trial court ruled against Kennedy in *Cartwright*, and Rose has been described as having a role in the Kennedy campaign and attending state court proceedings in *Cartwright* with Kennedy.[12] Applying preclusion principles to bar

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[11] Applicants' statement that AV24's interests are not aligned with Kennedy's because it "has supported ballot access . . . for other candidates and parties in competition with Kennedy" (Application 21) is not true for New York, where the only other candidates on the ballot are the candidates nominated by the two major parties (*see id.* at 9).

[12] *See* Brittany Gibson, *Robert F. Kennedy Jr.'s Cash Crunch*, Politico (June 15, 2024) (describing Rose as "an old friend of Kennedy's and volunteer fundraiser for both the campaign and super PAC"); Savannah Kuchar & Terry Collins, *Reports: RFK Jr. to Exit Race, Back Trump by End of Week*, USA Today (Aug. 21, 2024) (Rose "scheduled to be with Kennedy in court in Albany to appeal his right to be on the New York state ballot").

their claims here would thus be "fair under the particular circumstances." *Buechel v. Bain*, 97 N.Y.2d 295, 305 (2001).

2. Applicants are unlikely to succeed on the merits of their First and Fourteenth Amendment claims.

All applicants are unlikely to succeed on the merits even if preclusion principles do not bar their claims.

a. The burden imposed by the residency disclosure requirement is not "severe."

Applying this Court's *Anderson-Burdick* framework, the residency disclosure requirement "imposes only reasonable, nondiscriminatory restrictions upon the [constitutional] rights of voters." *Burdick*, 504 U.S. at 434 (quotation marks omitted). The requirement is nondiscriminatory because *all* candidates—not just independent nominating petition candidates—must truthfully and accurately disclose their residence.[13] Indeed, New York courts have routinely invalidated nominating or party designating petitions where candidates did not actually reside at the addresses listed on the petition as their residences. (*See* App. 28 (Op. & Order).) And every voter in the State must provide a residence to qualify to vote. *See* N.Y. Election Law § 5-102. The burden is also minimal because a "reasonably diligent" candidate could be expected to provide truthful and accurate information on their candidacy filings.

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[13] *See, e.g.*, N.Y. Election Law §§ 6-128 (certificates of nomination by newly recognized parties); 6-132 (designating petitions for party primary candidates); 6-156 (certificates of nomination for party nominees not selected via primary).

Storer v. Brown, 415 U.S. 724, 742 (1974); *see Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 178 (2d Cir. 2020).

Applicants' arguments to the contrary (*see* Application 15-19) are unavailing. The burden is not "severe" because the consequence of noncompliance is exclusion from the ballot (*see id.* at 15); that is true of many election restrictions, severe and nonsevere alike. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (State law forbidding "fusion" candidates did not impose severe burden on associational rights of political party precluded from nominating candidate of its choice for office); *SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 276 (2d Cir. 2021) (political party qualification requirements do not impose "severe" burden under *Anderson* framework, even if noncompliance forecloses access to ballot); *Libertarian Party of Conn.*, 977 F.3d at 179 (same for minor party petition candidacy requirements). Instead, the measure is whether the burden of *compliance* is "severe," i.e., whether the "reasonably diligent candidate" could satisfy that burden. *Libertarian Party of Conn.*, 977 F.3d at 178.

Applicants also miss the mark in contending that New York's residency disclosure requirement might, in hypothetical situations not at issue here, exclude from the ballot a candidate with no fixed, permanent home. *See* Application 16. Here, the state courts were perfectly capable of adjudicating whether Kennedy maintained a residence at the address listed. Indeed, whatever the term encompasses, a "residence" under the election law must at minimum entail "that place where a person maintains a fixed, permanent and principal home," N.Y. Election Law § 1-104(22).

The state court reasonably concluded that Kennedy did not satisfy that standard when he failed to spend a single night at his listed Katonah "residence" prior to the institution of the state court lawsuit, "while actually residing in California."[14] *Matter of Cartwright*, 2024 WL 3894605, at *12, *14.

Kennedy's contention that his speculative intent to leave his current California residence at some undetermined point in the future means that he has no "residence" under New York's statute (*see* Application 17) is plainly at odds with New York law. The New York Court of Appeals has held that "to be a resident of a place, a person must be physically present with the intent to remain *for a time*," *People v. O'Hara*, 96 N.Y.2d 378, 384 (2001) (emphasis added)—not, as plaintiffs incorrectly read the statute, *forever*.[15] *Accord Williams v. Salerno*, 792 F.2d 323, 327 (2d Cir. 1986) ("the word 'permanent'" in the statutory definition for "residence" "requires only physical presence and an intention to remain *for the time at least*" (emphasis added)). New York's residency disclosure requirement thus imposes a minimal, reasonable burden on candidates for office.

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[14] Applicants' invocation of Kennedy's New York voter registration status (*see* Application 16) does not help his argument. Under New York law, a voter must also be a "resident" of the State as that term is defined by Election Law § 1-104(22). *See* N.Y. Election Law § 5-104(2); *Matter of Maas v. Gaebel*, 129 A.D.3d 178, 180 (3d Dep't 2015); *Matter of Coalition for Homeless v. Jensen*, 187 A.D.2d 582, 584 (2d Dep't 1992). When other States (like Maine) (*see* Application 16) require candidates to disclose the residence at which they are registered to vote, the presumption is that the candidates are *lawfully* registered to vote at that location.

[15] Applicants' interpretation would lead to absurd results, excluding from the definition (for example) current New York residents who intend one day to retire to a different State, since they too would not "*always* intend[] to return" to their current abode. N.Y. Election Law § 1-104(22) (emphasis added).

Applicants' assertion that the residency disclosure requirement is "not applied even-handedly" (Application 18-19) fares no better. Both independent and party-designated petition candidates must disclose their residence on each petition signature form. *See* N.Y. Election Law §§ 6-132, 6-140. And party nominees not selected via primary election must disclose their residence on the certificates of nomination filed with the Board. *See id.* §§ 6-128, 6-156. That the disclosure requirements differ at the margins (i.e., candidates who obtain ballot access other than by petition do not need to disclose their residences on petition forms but rather must do so on certificates of nomination) does not alter the analysis. *Cf. Kuntz v. New York State Senate*, 113 F.3d 326, 328-29 (2d Cir. 1997) (differential treatment between independent and party candidates does not, by itself, raise equal protection concern).

The fact courts in New York have excused inadvertent errors regarding the disclosure of previous bona fide residences or other information on petition forms, *see, e.g.*, *Matter of Maloney v. Ulster Cnty. Bd. of Elections*, 213 A.D.3d 692 (N.Y. 3d Dep't 2005); *Matter of Pagones v. Irizarry*, 87 A.D.3d 648 (N.Y. 2d Dep't 2011), *Farrell v. Board of Elections.*, No. 85-cv-6099, 1985 WL 2339 (S.D.N.Y. Aug. 20, 1985), does not compel a different conclusion. Kennedy's listing of a New York address for his residence was not inadvertent, nor did it involve the use of a prior bona fide residence. Instead, Kennedy intentionally disclosed an address at which he had never lived. The court was not required to also find, as applicants wrongly suggest (*see* Application 13-14 (Op. & Order)), that Kennedy intended to mislead voters *as to his identity*. That argument was rejected by the intermediate appellate court in *Matter of Eisenberg v.*

Strasser, 307 A.D.2d 1053, 1054 (N.Y. 2d Dep't 2003) (Miller, J., concurring in part & dissenting in part) (dissenting from affirmance of candidate's disqualification for using incorrect address because there was no proof that candidate intended to mislead or confuse voters as to his qualifications or identity), in a ruling that was affirmed by New York's Court of Appeals, *see Matter of Eisenberg v. Strasser*, 100 N.Y.2d 590, 591 (2003) (affirming disqualification of candidate because "the candidate decided to use an address that was not a true residence" on his designating petition forms).

Whatever safety burden the requirement might impose on "controversial public figure[s]" (Application 15) is not at issue here. There is no dispute that Kennedy's use of the Katonah "residence" on his petition forms had nothing to do with any concern for his own or his family's safety. (*See* App. 132-152 (Decl. of Robert F. Kennedy, Jr., in Supp. of Pls.' Mot. for a TRO and/or Prelim. Inj. (Aug. 22, 2024)).)

b. The residency disclosure requirement advances the State's important regulatory interests.

Because the burden imposed by the residency disclosure requirement is minimal, it need only be justified by the State's "important regulatory interests." *See Burdick*, 504 U.S. at 434 (quotation marks omitted).

Judicial review of reasonable, nondiscriminatory restrictions is deferential; "the State's asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on the party's rights," and "elaborate, empirical verification of the weightiness of the State's asserted justifications" is not required. *Timmons*, 520 U.S. at 364.

Here, the State's interests in election integrity, fraud prevention, and equal application of the law are all served by its requirement that candidates accurately disclose their residence on campaign filings. For example, requiring the disclosure of the candidate's residence on petition forms gives signers confidence that that they are signing a petition supporting a *particular* candidate (as opposed to any potential candidate bearing the candidate's name), and reasonably alerts the Board to the identity (not just the name) of the candidate seeking access to the ballot. *See Matter of Ferris v. Sadowski*, 45 N.Y.2d 815, 817 (1978). By contrast, excusing the requirement could subject the State and its voters to confusion, while encouraging the use of "sham" or misleading residencies by candidates.[16] *See O'Hara*, 96 N.Y.2d at 385 ("crucial determination" for "residence" is that "the individual must manifest an intent, coupled with physical presence without any aura of sham" (quotation marks omitted)); *cf. Larson v. Marsh*, 144 Neb. 644, 649 (1944) (statutory directive to Secretary of State to include residence of candidates bearing same name on ballot deemed to be mandatory).

Contrary to applicants' contentions (at 14-15), the State need not establish that these particular interests are served in every application of the residency disclosure requirement. For example, States are generally permitted to limit access to the ballot to those candidates or parties who are able to demonstrate "a modicum of support

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[16] Kennedy explained in state court that one of the reasons he listed a New York residence on his petition forms is that he "wouldn't want anyone to think of me as a resident of any other state." (App. 149 (Kennedy).)

among the potential voters for the office," to avoid confusion, deception, and the overcrowding of ballots, *Munro v. Socialist Workers* Party, 479 U.S. 189, 193 (1986), and the attendant "frustration of the democratic process at the general election," *id.* at 194. But in evaluating the constitutionality of such restrictions, this Court has "never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Id.* at 194-95. The same principle applies here. The State was not required to excuse Kennedy from the requirement to provide truthful and accurate information regarding his residency simply because he is a well-known candidate. To do so would invite the very unequal treatment that applicants wrongly claim is being applied to Kennedy. *See Matter of Seawright v. Board of Elections*, 35 N.Y.3d 227, 233 (2020) (requiring strict compliance with election requirements reduces likelihood of unequal enforcement).

This Court's decision in *Anderson* does not support plaintiffs' application. In *Anderson*, this Court concluded that Ohio's independent candidate petition filing deadline was unconstitutionally early, because it imposed burdens on independent candidates to enter the race and circulate petitions at a time when the election was still remote and the public less engaged, and because those burdens were not justified by any legitimate state interest. *See* 460 U.S. at 790-806. Here, by contrast, applicants *concede* that New York's residency disclosure requirement furthers the pertinent state interests (i.e., assuring that petition signers are aware of the candidate's identity, *see* Application 10-11); instead, they ask for an exemption from this

requirement because no petition signer could have been confused as to Kennedy's identity "[g]iven how well-known Kennedy" considers himself to be (*id.* at 11). Contrary to applicants' argument, *Anderson* does not stand for the proposition that compliance with reasonable election requirements, supported by legitimate state interests, must be excused on a case-by-case basis.[17]

3. The residency disclosure requirement does not impermissibly add qualifications to the office of the presidency.

Applicants are also mistaken in contending (*see* Application 19-20) that New York's residency disclosure requirement imposes additional qualifications for the presidency. Requiring accurate information on candidacy forms is not a "qualification" for office; it is, as discussed above, a reasonable, nondiscriminatory restriction that furthers the State's important regulatory interests under the *Anderson-Burdick* framework. Applicants again err in speculating that New York's residency disclosure requirement could, in a hypothetical situation, "bar persons without a 'fixed' home" such as a "member of the military" or a "homeless person" from running for President. *See* Application 20. Applicants' hypothetical has no bearing on this as-applied challenge, where Kennedy does not claim that he falls within either of those categories.

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[17] Nothing in *Anderson* can be read to suggest that an independent candidate who misses a *constitutionally permissible* filing deadline is entitled to relief if the candidate can show that there is still time to process the petition, that there is sufficient time for voters to be educated about the candidate, that the candidacy is not an effort to resolve an intraparty feud at the ballot box, and that doing so would not result in unequal treatment between party and independent candidates. *See Anderson*, 460 U.S. at 796-806 (evaluating state interests of voter education, equal treatment, and political stability, supporting filing deadline).

Indeed, as explained, it is implausible that Kennedy lacks any residence under New York law when he plainly has a fixed and permanent home in California where he intends to remain for a time, *see O'Hara*, 96 N.Y.2d at 384, as the state courts found in *Cartwright*.

Applicants' hypothetical does not accord with New York law in any event. Election Law § 5-104(1) provides that "[f]or the purpose of registering and voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States," and the same definition of residence that is used for purposes of voter registration and voting is used for the residency disclosure requirement here (see *supra* at 20 n.14). *See also Matter of Coalition for Homeless v. Jensen*, 187 A.D.2d 582 (N.Y. 2d Dep't 1992) (noting that "transients" may establish bona fide residency for purpose of registering to vote).

CONCLUSION

For all of the foregoing reasons, this Court should deny appellants' application for an emergency injunction pending appeal.

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