No. 24A285

In the Supreme Court of the United States

Team Kennedy, American Values 2024, and Jeffrey Rose,
Applicants,

v.

Henry T. Berger, Peter S. Kosinski, Essma Bagnuola, Anthony J. Cassale, Kristen Zebrowski Stavisky, Raymon J. Riley, III, and Letitia James,
Respondents.

Reply Brief of Team Kennedy, American Values 2024, and Jeffrey Rose in Support of Their Application for an Emergency Injunction Pending Appeal

To the Honorable Sonia Sotomayor,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Second Circuit

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REPLY BRIEF IN SUPPORT OF APPLICATION FOR EMERGENCY INJUNCTION PENDING APPEAL

Applicants respectfully submit this short Reply brief to point out several important errors in Respondents' Opposition papers.

FACTUAL STATEMENT

Respondents tell a strange story in which Applicants were "dilatory" because they "waited" for "months" before bringing their federal claims in mid-August, 2024. But New York did not exclude Mr. Kennedy from the ballot until August 11, 2024. And from that date to this, Applicants have pursued every avenue of relief as expeditiously as humanly possible.

New York also seeks to bar relief on the ground that some ballots have already been distributed to overseas servicemen. But as stated in their opening brief, Applicants ***are not seeking to invalidate those ballots or to have replacement ballots sent to those servicemen***. Applicants seek relief only with respect to the millions of ballots still to be printed. (Application at 20.)

ARGUMENT

I. Respondents Misstate the Standard of Review.

Respondents invoke (Opposition at 9) the "indisputably clear" standard of review often used by this Court prior to 2020, for ruling on injunctions pending appeal. *But see, e.g.*, *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14 (2020) (granting injunction pending appeal without reference to "indisputably clear" standard). As previously shown, even that very high standard is met here, because New York has indisputably violated *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

But Respondents overlook the fact that this Court has authority to issue ***stays*** pending appeal on the basis of a significantly lower standard of review. *See, e.g.*, *Smith v. Hamm*, 144 S. Ct. 414, 415 (2024) (Sotomayor, J., dissenting from denial of stay) ("Courts considering a stay must weigh the applicant's likelihood of success on the merits, potential for irreparable injury, and the public interest.") And a stay of the New York courts' judgment would grant Applicants the relief they seek.[1]

II. This Case Is Indistinguishable from *Anderson*.

Respondents offer no material distinction between this case and *Anderson*. The constitutional interests here are identical, and New York's interest is, if anything, weaker. Astonishingly, Respondents actually admit that excluding Kennedy from the ballot serves none of the state interests they attribute to the Residency Requirement. *See* Opposition at 23 ("the State need not establish that these particular interests are served" by excluding Mr. Kennedy from the ballot). But of course, New York ***was*** required to show that its exclusion of Kennedy serves state interests. That is the entire point of *Anderson*.

Respondents also fail to distinguish *Anderson* when they claim that the constitutional violation here is cured by the possibility of a write-in vote. *See Anderson*, 460 U.S. at 799 n.26 ("It is true, of course, that Ohio permits 'write-in' votes for independents. [But] this opportunity is not an adequate substitute for having the

[1] Except in extraordinary cases, a stay is issued by this Court only if the "relief requested was first sought in the appropriate court or courts below." S. Ct. R. 23(3). Here, a stay pending appeal of the New York judgments was sought in and denied by the New York Court of Appeals. (Letter of Sept. 11, 2024 from New York Court of Appeals to Gary Donoyan, Esq., by e-mail only (in possession of counsel) (stating "Your application for a stay in the above title was presented to Judge Halligan, who … den[ied] the application.").)

candidate's name appear on the printed ballot.").

III. The Residence Requirement is Severe.

Although the Residence Requirement as applied to presidential candidates is unconstitutional even under *Anderson*'s more deferential review, it also imposes a severe burden, subject to strict scrutiny, for four reasons unrefuted by Respondents.

First, disclosure of a controversial public figure's home address can endanger that individual and his family. Second, the Residence Requirement excludes from the ballot any candidate with no "fixed," "permanent" home to which he "always intends to return." All such candidates suffer "exclusion or virtual exclusion from the ballot," which is the "hallmark of a severe burden." *Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020). Kennedy himself may fall in this category, because he appears to have no address that is a "fixed," "permanent" home to which, "wherever temporarily located," he "always intends to return." N.Y. Election L. § 1-104 (22).

Third, the Residence Requirement falls unequally on independent candidates. Respondents do not dispute the fact that major party candidates (but not independent candidates) can submit a corrected nomination certificate amending their place of residence. (*See* Application at 18.) That difference makes the Residence Requirement discriminatory. *See Anderson*, 460 U.S. at 793 ("A burden that falls unequally … on independent candidates … discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.").

Finally, Respondents do not and cannot rebut Applicants' showing that New York courts have expressly held that a nominating petition "should not be invalidated" for an invalid address absent "an intent to mislead or confuse signatories ***as to the candidate's identity***." *E.g.*, *Maloney v. Ulster County Board of Elections*, 21 A.D.3d 692, 693 (3d Dep't 2005) (emphasis added). No such intent has been alleged here. Respondents say that other New York cases contradict this rule, but even if so, that proves Applicants' point. New York does not apply the Residence Requirement even-handedly, which both triggers strict scrutiny and demonstrates that New York has no policy of "strict compliance" with the Residence Requirement (which was the putative basis for the state courts' exclusion of Kennedy from the ballot).

IV. The *Purcell* Principle Has No Application Here.

Respondents contend that the *Purcell* principle bars relief here. (Opp. at 10 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006).) But *Purcell* applies only to cases where federal courts are asked to change "election rules." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020). "The principle has, for example, covered injunctions imposing new congressional maps … injunctions compelling curbside voting [and] injunctions changing the rules for submitting absentee ballots." *Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 897 (6th Cir. 2024) (citations omitted). No such change in any election rules or laws is requested here.

IV. Neither Res Judicata Nor Collateral Estoppel Bars This Action.

Respondents' preclusion claims are frivolous. Neither AV24 nor Rose were parties to the state court proceedings. Respondents' privity argument is simply that

AV24 and Rose have the same interests as Kennedy, which is both untrue and completely insufficient to show privity, which under New York law (state law governs this issue) requires not only identity of interest, but also control. *See, e.g.*, *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 95-96 (2d Cir. 2005). Defendants have shown no such control here; indeed, they have not even tried to.

V. Irreparable Harm is Established Here.

Respondents claim that there is no irreparable harm in this case because Kennedy has suspended his campaign. But Kennedy remains a presidential candidate who will appear on the ballot of many states, and his party in New York will qualify for automatic ballot access in future if he wins a sufficient percentage of New York votes. Even more important, Respondents forget that the critical harm at the center of this Application is not harm to Kennedy. It is the harm to over 100,000 New York voters who signed Kennedy's nominating petition and have a First Amendment right "***to have candidates of their choice placed on the ballot***." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphasis added). And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

CONCLUSION

For the foregoing reasons, Applicants respectfully urge the Court to order, pending further review, restoration of Kennedy to the New York ballot or a stay of the New York judgments removing him therefrom.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this application was served by email, E serve and mail to the counsel listed below in accordance with Supreme Court Rules 22.2 and 29.3:

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