STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ROBERT F. KENNEDY, JR.,

Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.

Respondent.

Case Code: 30607
[Administrative Agency Revie]

PETITION FOR REVIEW COVER LETTER

TO: **Wisconsin Elections Commission**
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Rep.Vos@legis.wisconsin.gov

You are hereby notified that the Petitioner named above has filed a review of a decision by the Wisconsin Elections Commission, challenging the decision to be unconstitutional. You are being served the Petition of Review pursuant to Wis. Stat. § 893.825.

Respectfully submitted this 3rd day of September, 2024.

ROBERT F. KENNEDY, JR., *Petitioner*

Electronically signed by Joseph A. Bugni
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Case Code: 30607
[Administrative Agency Review]

PETITION FOR JUDICIAL REVIEW

Petitioner Robert F. Kennedy, Jr. ("Kennedy" or "Petitioner") by his undersigned counsel, petitions the Court pursuant to Wis. Stat. § 227.52 to review the decision of the Respondent, the Wisconsin Election Commission ("WEC," "Commission" or "Respondent") dated August 27, 2024, which held that Robert F. Kennedy, Jr. would be included on the November 5, 2024 General Election ballot as an independent party. With no compelling reason, the WEC's decision violates the statute, Kennedy's Equal Protection rights, and his First Amendment Rights under the First and Fourteenth Amendments of the U.S. Constitution and Article I, sections 1 and 3 of the Wisconsin Constitution.

The grounds for this Petition are as follows:

PARTIES

1. Kennedy is a resident in Katonah, New York and previously filed to be a candidate in Wisconsin for the upcoming general election for the office of President of the United States.

2. WEC is a Wisconsin organization with its principal office at 201 West Washington Avenue, Second Floor, Madison Wisconsin 53703. The meeting and vote in question took place in Madison, Wisconsin, located in Dane County.

VENUE AND JURISDICTION

3. Venue is proper in Dane County for the following reasons. WEC's principal office is located in Dane County, and the decision that Kennedy is aggrieved by was held in Dane County. Pursuant to Wis. Stat. § 227.53(1)(a)(3), venue "shall be held in the county . . . where the dispute arose."

4. This Court has jurisdiction under Wis. Stat. § 227.52, which permits judicial review of administrative decisions which "adversely affect the substantial interest of any person, whether by action or inaction, whether affirmative or negative in form."

FACTS

5. Kennedy filed to be a candidate for the office of President of the United States in Wisconsin for the November 5, 2024 General Election on April 19, 2023.

6. Kennedy publicly suspended his Presidential campaign on August 23, 2024.

7. The same day that he suspended his campaign, Kennedy requested to the WEC that his name not appear on Wisconsin's general election ballot.

8. On August 27, 2024, WEC held a Ballot Access Meeting in Madison, Wisconsin. During this meeting, the Commission voted on a motion that would put Kennedy on the November 5, 2024 General Election ballot. The Motion carried 5-1.

9. The motion to include Kennedy on the ballot came four days after his request to be removed. Kennedy was summarily aggrieved by the WEC's decision.

GROUNDS FOR REVIEW

10. Kennedy is substantially aggrieved by the WEC's decision to keep him on the November 5, 2024 General Election Ballot as a presidential candidate. The WEC's decision is unlawful, arbitrary, capricious, erroneous, and an abuse of discretion, and should be reversed, vacated, and remanded for the following reasons:

    a. The WEC's decision violates Kennedy's First Amendment Rights by compelling him to state that he is a candidate for something that he has publicly stated he is not. Compounded with this, Kennedy is being compelled to associate with a campaign that he has publicly disavowed. The First Amendment protects Kennedy from being forced to convey a message that he is against both through speech and association, and the WEC's decision directly violates both protections.

    b. The WEC's decision places Kennedy's own health and safety at risk. Following Kennedy's decision to terminate his presidential bid, the Secret Service protection afforded to presidential candidates was terminated. By including Kennedy's name on the ballot, the WEC

forces his association in this political process, which poses significant health and safety risks to Kennedy.

c. The WEC had no compelling reason for keeping Kennedy on the November 2024 General Election ballot. The motion to include Kennedy as a presidential candidate directly violated his request to be removed from the ballot, which was submitted four days prior to the WEC meeting. The Commission has no reason to prevent a candidate from dropping out when he acts in good faith to remove himself.

d. The WEC leaves Kennedy with almost zero recourse to be made whole from their decision. Immediate judicial review pursuant to Wis. Stat. § 227.52 is the only practical recourse. This is Kennedy's only source of recourse.

RELIEF REQUESTED

WHEREFORE, Petitioner requests judgment in its favor as follows:

A. Preliminarily order WEC to advise all municipal clerks in this state that they should not mail any absentee ballots until this court has issued a ruling on the merits of this Petition.

B. Declaring that the WEC's decision is reversed, set aside, and vacated, or in the alternative, remanded to the WEC for further action; and

C. Such other relief as the Court may deem just and equitable.

Respectfully submitted this 3rd day of September, 2024.

Respectfully submitted,

ROBERT F. KENNEDY, JR., *Petitioner*

Electronically signed by Joseph A. Bugni
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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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Respondent.

Case Code: 30607
[Administrative Agency Review]

PETITIONER'S NOTICE OF MOTION AND MOTION FOR A TEMPORARY INJUNCTION

TO: Wisconsin Election Commission

PLEASE TAKE NOTICE that Petitioner Robert F. Kennedy, through counsel, moves this Court, pursuant to Wis. Stat. §§ 227.54 and 813.02, for a temporary injunction requiring the WEC to not include Kennedy as a candidate on the November 5, 2024 General Election ballot and preventing them from mailing any absentee ballots until this Court has issued a ruling on the merits of the Petition. The Petitioner asks this Court to set this matter for a hearing as soon as possible.

In support of this motion, the Petitioner states the following:

1. Kennedy filed to be a candidate for the office of President of the United States in Wisconsin for the November 5, 2024 General Election on April 19, 2023.
2. Kennedy publicly suspended his Presidential campaign on August 23, 2024.

3. The same day that he suspended his campaign, Kennedy requested to the WEC that his name not appear on Wisconsin's general election ballot.

4. On August 27, 2024, WEC held a Ballot Access Meeting in Madison, Wisconsin. During this meeting, the Commission voted on a motion that would put Kennedy on the November 5, 2024 General Election ballot. The Motion carried 5-1.

5. The motion to include Kennedy on the ballot came four days after his request to be removed. Kennedy was summarily aggrieved by the WEC's decision.

This motion is further supported by the Petitioner's Brief in Support of the Motion for a Temporary Injunction.

Respectfully submitted this 3rd day of September, 2024.

ROBERT F. KENNEDY, JR., *Petitioner*

Electronically signed by Joseph A. Bugni
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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ROBERT F. KENNEDY, JR.,

Petitioner,

v. Case No. 2024CV____

WISCONSIN ELECTION COMMISSION, ET AL.,

Respondent.

BRIEF IN SUPPORT OF THE MOTION FOR A TEMPORARY INJUNCTION

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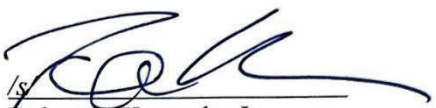
I. Introduction

Politics is an ugly business. While political maneuvering and gamesmanship will always be present and to a certain extent tolerated, the Supreme Court has been clear that it goes too far when there is a different playbook for the major parties than for the independent or third-party candidates. Third parties can't be treated differently and they can't be discriminated against. Yet that's what happened here. The Republicans and the Democrats have until today at 5 p.m. to withdraw their nominees and replace them with someone else. If President Trump or Vice President Harris have a change of heart and decide it isn't worth it (for whatever reason), then they can get out of the race and get off the ballot. Indeed, President Biden did precisely that.

But those rules don't apply to independent candidate Robert F. Kennedy, Jr. Not in the least. Rather, he had to decide whether he'd withdraw *before* the DNC had even held its convention. Against his wishes and in violation of the promises contained in the Equal Protection Clause and the First Amendment, he's stuck on the ballot. He's there despite his demand to withdraw. The following is the relevant portion of the withdrawal:

CERTIFICATE OF WITHDRAWAL

I, Robert F. Kennedy, Jr., a candidate for the office of President of the United States, hereby withdraw my candidacy from the 2024 United States Presidential Election, and I hereby formally request that my name not be printed on the ballot. This election is being conducted by the State of Wisconsin and is to be held on November 5, 2024.



/s/
Robert F. Kennedy, Jr.

He submitted that with a letter from his lawyer to the Commission, making it clear as day: Kennedy does not want his name associated with this election.

Despite seeking withdrawal 10 days ago, and despite having his lawyers ensure there was no mistake about it, the Wisconsin Election Commission has kept him on the ballot. In First Amendment parlance: it has compelled him to not just speak, but to associate with a cause he doesn't want to be part of. In doing so, Kennedy's rights have been violated. He has not been treated fairly or equally with the other presidential candidates who declared and ran for the presidency and have since wanted to withdraw.

Of course, in this case withdrawal doesn't just mean telling the world to vote for someone else; rather, withdrawal means taking Kennedy's name off the ballot. And that is something that can be done by the Commission. After all, even the law the Commision argues is relevant provides a specific mechanism for removing a person's name in the case of death. Thus, it can't be argued that Kennedy's request is unreasonable or impossible. He simply seeks to be treated the same as the other candidates and to compel the Commission to do what he wants: remove his name.

The Commission's refusal to do so means that, not only have his Equal Protection rights been violated so too have his rights to free speech and association. What follows traces *how* he's been treated differently from major party candidates, *why* he can't be, and *what* the remedy must be: ordering the Commission to not place his name on the ballot.

II. Facts in support of this motion.

Like President Biden, Kennedy thought it was a good idea to run for President. Both have been lifelong politicians and have great name recognition; both are dynamic speakers, and both have vast experiences within government—each having served decades in Congress. Hoping to win the Presidency, both sought to have their names appear on Wisconsin's ballot. Biden timely submitted his documents and so did Kennedy.

As the campaigns raged on, both men had second thoughts about the Presidency and whether they should continue their pursuit. Initially, both pushed off calls to withdraw—some vehement, others caustic. And into the middle of the summer, both forged ahead with their campaigns. Both stated for the world to hear: they wanted to be President.

Yet, they *both* eventfully changed their minds. And Wisconsin law allows for that—sometimes a candidate drops off for personal reasons, sometimes it's a scandal, sometimes it's health-related. Whatever the reason, the law recognizes that no one should be compelled to continue on with a campaign for office—and having the ballot declare they want that position—if they don't want to.

But while Biden had until today at 5 p.m., Kennedy had to let the Commission know a full month before that. (Again, he was supposed to withdraw even *before* the DNC had announced its candidate.) Indeed, it's helpful to imagine the competing candidates' situations this way:

	BIDEN	KENNEDY
Announced Their Withdrawal	July 21, 2024	August 23, 2024
Deadline to Submit a Declaration of Candidacy	September 3, 2024	August 6, 2024
ALLOWED TO WITHDRAW?	Yes	No

The real question is: Why? Why the different playbook for Kennedy as opposed to Biden. It can't be because of the legwork involved: Kennedy simply wants off the ballot, there is no rigorous testing of a candidates *bona fides* when they want off the ballot—you simply do not include his name. It can't be because of some compelling State need; in other words, we're simply asking to *not* be put on the ballot, as opposed to getting on it. (Again, State law provides a mechanism for removing someone in case of death—so it can be done.)[1] Without any reason—let alone a compelling reason—the only difference in the treatment rests on the prohibited fact that Independents are treated differently (read: worse) than mainstream party candidates.

III. Absent a compelling reason, such different treatment violates Kennedy's rights under the federal and state constitutions.

The facts alleged make it plain: there's a different set of rules for Kennedy than Biden; there's a different playbook for the Democrats than for Independents. That different set violates the promise of equal protection for candidates. And it violates Kennedy's rights to free speech and association. What follows makes that plain, but those constitutional problems can *all* be avoided by properly interpreting the Wisconsin

[1] Wis Stat. § 8.35(1).

statutes governing elections. Indeed, a qualified candidate isn't simply a person who is over thirty-five and a citizen; rather, a qualified candidate is one who has put himself out there and declared that he wants to be a candidate. After all, no one can be drafted into being a candidate and a person isn't actually a viable (read: qualified) candidate *until* the Commission puts him on the ballot. And Kennedy let the Commission know he wasn't interested *far, far* before the Commission made that decision. Whether this Court engages with the concrete demands of the Equal Protection Clause, the lofty promises of the First Amendment, or the technical reading of the statute, the result is the same: The Commission must be enjoined from placing Kennedy's name on the ballot.

A. Third parties are treated differently.

For fifty years, the Supreme Court has been clear: ballot access questions implicate the First and Fourteenth Amendments and statutes that restrict ballot access cannot "unfairly or unnecessarily" burden an independent candidate's interest in the "availability of political opportunity."[2] The precedents surrounding ballot-access issues embody a deep-seated fear of two-party entrenchment and all it portends for those outside the two parties.[3] For example, the Supreme Court held a statute restricting ballot access unconstitutional because it all but prohibited a minor political party with a "very small number of members" from appearing on the ballot.[4] As the Court reasoned, voters have a right to "associate for the advancement of political beliefs" and to "cast their votes

[2] *See Lubin v. Panish*, 415 U.S. 709, 716 (1974).
[3] *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).
[4] *Id.* at 24.

effectively," regardless of their "political persuasion."[5] Axiomatically, the First and Fourteenth Amendments, viewed together, require that whatever opportunity the major political parties have to disassociate from a particular candidate be provided on equal terms to Independent candidates.[6]

Yet, from time to time (as we have here), third parties have been treated differently in Wisconsin from those inside the entrenched two-party system. In 1980, the Natural Law Party chose its candidate, but when scandal swirled around the Vice Presidential candidate, the powers that be didn't want to allow the Natural Law Party the ability to switch out the candidate—despite the Republicans and Democrats having that exact same ability, just with an extended timeline.[7] When consulted, the Attorney General gave his opinion: "Preventing Anderson from considering relevant issues and events in the selection of his running mate during this critical period of electoral activity, as are the major parties, *is a substantial disability for his campaign*."[8] The opinion added: "Further, the interest of all the citizens of Wisconsin in having their presidential electors cast meaningful votes in the event the Anderson ticket should gain a plurality in the November election counsels against including anyone but Lucey on the Anderson ticket."[9] Put differently, the voters don't benefit from different rules for different parties and the Equal Protection Clause doesn't allow it.

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[5] *Id.* at 30.
[6] *See Janus v. AFSCME*, 585 U.S. 878, 891–92 (2018).
[7] OAG 55-80 (Sept. 17, 1980) (Unpublished Opinion) (1980 WL 119496 (Wis.A.G.)); *see also Brown County v. Brown Cty. Taxpayers Ass.*, 2022 WI 13, ¶ 32.
[8] *Id.*
[9] *Id.*

Here, Wisconsin's deadlines for ballot access violate this rule by giving Democrats and Republicans a greater opportunity to disassociate from a candidate or for a candidate to dissociate from the campaign—as Biden did. Specifically, Wis. Stat. § 8.16(7) provides that these political parties have until "5 p.m. on the first Tuesday in September preceding a presidential election" (today) to "certify the names of the party's nominees for president and vice president" to the Wisconsin Elections Commission. In contrast, Wis. Stat. § 8.20(8)(am) says that an Independent candidate must commit a full month earlier: "Nomination papers for independent candidates for president and vice president, and the presidential electors designated to represent them . . . may be filed not later than 5 p.m. on the first Tuesday in August preceding a presidential election."[10] It's worth adding a third time that Kennedy had to withdraw *before* the DNC had even announced its candidate.

These statutory deadlines advantage the Democrats and Republicans in multiple ways. They get more time to vet a candidate. Should a candidate have a scandal (or health issues) just a few months out from the election, the major parties can potentially backtrack and try to get someone else on the ballot. An Independent candidate, however, must move faster—a full month faster. Not only does the statute give the Democrats and Republicans more time for vetting, but it also gives them more time to contemplate the best course of action for the *candidate.*

[10] Wis. Stat. § 8.20(8)(am).

Here, upon reflection, Kennedy has (like President Biden) decided that for associational and expressive reasons, he does not want to run for President anymore. The deadlines prevent him from withdrawing, even though the Democratic and Republican Parties (at least in theory) could provide a different nominee to the Commission today.

The Commission cannot claim any compelling state interest in forcing Independent candidates to file paperwork a month earlier. Even if the Commission needs more time to review an Independent candidate's paperwork, it does not need a full month. Even if the Commission does need a full month, there is no reason to prevent an Independent candidate from dropping out when he or she acts before a key deadline set for major political parties. If today is "good enough" for the Democrats and Republicans, today is "good enough" for Kennedy and any other Independent candidate who wants to remove himself or herself from the ballot. If nothing else, the promise of Equal Protection provides that "good enough" for the major parties applies with equal force to the independents.

B. Forcing Kennedy to remain on the ballot also violates his rights under the First Amendment.

The First Amendment's seven distinct promises often overlap in their protections. Here, forcing Kennedy to remain on the ballot stands as compelled speech—he must state that he's a candidate for something he has publicly avowed he's not. And it doubles as compelled association: the right to associate also entails the right not to associate; and here, Kennedy is being compelled to associate with a campaign he's publicly avowed he's against. And the point is more than an academic matter. Kennedy's health and safety are put at risk by forced involvement in the presidential race—after all, President Biden ordered the U.S. Secret Service to protect Kennedy and *after* he suspended his campaign that protection was yanked. Continued association as a candidate in the presidential race thus brings obvious health and safety risks. Including Kennedy's name on the ballot forces his association in this political process against his will. The First Amendment does not allow for such involuntary action, especially as it relates to speech and association.

Among the great promises of the U.S. and Wisconsin Constitutions is the right to free speech. The Wisconsin Constitution guarantees that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."[11] And the breadth of that guarantee is at least as great as the U.S. Constitution. As the Supreme Court has explained, when it comes to political speech those assurances are at their "fullest and most urgent application precisely to the conduct of campaigns for

[11] Wis. Const. art. I, § 3.

political office.'"[12] Put another way, "[p]olitical speech is thus a fundamental right and is afforded the highest level of protection. Indeed, freedom of speech, especially political speech, is the right most fundamental to our democracy."[13] That right "includes both the right to speak freely and the right to refrain from speaking at all."[14] "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning," which is why "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command[.]"[15] And that support extends even to candidate-eligibility requirements.[16]

Here, Kennedy is a national political figure and he does not want to represent to the citizens of Wisconsin that he is vying for their votes for the office of President of the United States. Placing his name on the ballot against his will compels his speech and subjects him to derision, anger, reputational harm, and loss of good will by those who would vote for him based on this speech to later find out their vote was wasted. Free speech means a free-flow of information within the economy of ideas; it is not meant to force Kennedy to facilitate a message that is neither accurate, nor true—namely, that he wants to be voted for by the people in Wisconsin.

Beyond that simple (yet critical) point, Kennedy has publicly endorsed President Donald Trump's candidacy for the November 2024 presidential election. By forcibly

[12] *McCutcheon v. FEC*, 572 U.S. 185, 191–92 (2014).
[13] *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 47.
[14] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
[15] *Janus v. AFSCME*, 585 U.S. 878, 892–93 (2018).
[16] *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983).

including Kennedy's name on the ballot, Defendants are falsely representing to the people of Wisconsin that Kennedy is running against President Trump and is opposed to President Trump's candidacy. Nothing could be further from the truth. Yet, by forcing him to remain on the ballot that message is intentionally conveyed.[17] Such compelled speech is anathema to the First Amendment.

In that same vein, placing Kennedy's name on the ballot against his will constitutes compelled association in violation of the United States Constitution and the Constitution of Wisconsin. "The right to eschew association for expressive purposes is likewise protected" by the First Amendment to the U.S. Constitution.[18] "Freedom of association … plainly presupposes a freedom not to associate."[19] "[F]orced associations that burden protected speech are impermissible."[20] Here, Kennedy does not want to associate his name (or himself) with the Presidency in Wisconsin. Yet forcing his name to appear on the ballot doesn't just force him to state a message—I am running for President—it also forces him to associate with a cause (the Presidency) that he is not running for in Wisconsin.

Thankfully, the First Amendment protects Kennedy (like every other American) from being forced to convey such a message through both speech and association. For

[17] *Soltysik v. Padilla*, 910 F.3d 438, 447–48 (9th Cir. 2018) (state law violated speech and associational rights of minor-party candidates by requiring placing "None" next to their names on the ballot for their party affiliation).
[18] *Janus*, 585 U.S. at 892.
[19] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).
[20] *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986).

that reason, the Commission's decision not only violates the Equal Protection Clause, it also violates the First Amendment.

C. A correct reading of the statute means that Kennedy is not qualified to appear on the ballot and cannot be placed on the ballot.

The case law and principles outlined above inform *why* the Commission's decision forcing Kennedy on the ballot is problematic as a constitutional matter. These problems can and should be avoided under the "constitutional-doubt principle," which instructs that statutes should not be read in a "constitutionally suspect" manner.[21] Here, the controlling statute is Wis. Stat. § 8.35(1). It provides, in relevant part, "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination."[22] A correct interpretation of this statute avoids all of the constitutional issues.

While Kennedy clearly filed nominating papers, he does not "qualify" to "appear on the ballot." Under Wisconsin law, a person is not qualified to appear on the ballot until the Commission approves them for the ballot. In other words, the Commission's approval is the last and necessary step in the qualification process. If the person files nomination papers, but then doesn't get the requisite documents or isn't thirty-five, they aren't qualified for the ballot. The qualification comes when the Commission agrees that everything is in order. But here, before the Commission could approve Kennedy's candidacy, he said: no, I'm withdrawing, I don't want to be part of this. So, his

[21] *Wis. Leg.e v. Palm*, 2020 WI 42, ¶ 31.
[22] Wis. Stat. § 8.35(1).

withdrawal doesn't come within the limits of § 8.35(1), because he shouldn't have been put on there in the first place. Put differently, and in the statutory language of Wis. Stat. § 8.30(1)(b), he was "ineligible to be nominated or elected."[23] The Commission's decision to the contrary, runs roughshod over the plain text.

The Commission may argue that "qualified" means "qualified" to hold office, e.g., the qualifications set forth in the United States Constitution. *See* U.S. Const. art. II, §1. That is not what the statute says. The statute says, "qualified to appear on the ballot." The phrase "to appear on the ballot" cannot be read out of the statute. [24] To do so, violates the plain-text canons and it goes contrary to the legislature's clear choice in the language they used.

[23] Wis. Stat. § 8.30(1)(b).
[24] *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶ 46.

IV. Conclusion.

In the end, this case is pretty simple. If it's good enough for the Democrats to have until 5 p.m. to withdraw their candidate and replace him with someone else, then it's good enough for Kennedy. That basic principle of fundamental fairness is given force by the Equal Protection Clause and the First Amendment. Neither provision of the Constitution tolerates third-party candidates being treated as second-class candidates. Indeed, the Wisconsin Statutes (properly read) prevent that as well. And thus, we ask that the Commission's order placing Kennedy on the ballot be stayed and that the Commission not be allowed to place his name on the ballot.

Dated this 3rd day of September, 2024.

Respectfully submitted,

Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff *Pro Hac Vice* Motion forthcoming	ROBERT F. KENNEDY, JR., *Petitioner* *Electronically signed by Joseph A. Bugni* Joseph A. Bugni *Wisconsin Bar No.* 1062514 HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com (608) 257-0945

STATE OF WISCONSIN CIRCUIT COURT BRANCH ___ DANE COUNTY

ROBERT F KENNEDY, JR.,

Petitioner,

v.

CASE NO: 2024CV002653

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondent.

PETITIONER'S NOTICE OF MOTION AND MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER

Petitioner Robert F. Kennedy, by undersigned counsel, hereby moves the Court for an emergency, *ex parte* temporary restraining order under Wis. Stat. § 813.025. Petitioner further requests that this motion be decided without a hearing by 5:00 p.m. on September 6, 2024.

The grounds for this motion are set out in full in the brief in support of the motion for temporary injunction. The need for emergency relief is supported in particular by these four salient facts.

1. Petitioner was previously a candidate for the Presidency of the United States and has sought to be removed from the ballot in Wisconsin.
2. His ability to be removed from the ballot could be compromised once those ballots begin printing. As the Wisconsin Supreme Court held in *Hawkins*: "We agree with the Commission that requiring municipalities to print and send a second round of

ballots to voters who already received, and potentially already returned, their first ballot would result in confusion and disarray and would undermine confidence in the general election results."[1]

3. When it comes to ballots in Wisconsin, there are three deadlines that matter: The August 28 deadline for County Clerks to prepare ballots and send proofs to the WEC, which has already passed, and two looming deadlines, September 18 and 19, when the ballots have to be delivered. Here is a screenshot from the very helpful website at WEC laying out the dates for September:

8 Destruction of Some 2022 General Election Materials	9	10	11 **10:00 am - 06:00 pm** September 2024 Quarterly Meeting	12 Partisan primary reconciliation and participation due	13	14
15	16	17	18 Deadline for county clerks to deliver ballots and supplies for the general election.	19 (State) Deadline to Send Absentee Ballots Municipal clerks send Absentee Ballots to electors with requests and Record in WisVote	20	21 (Federal) Deadline to send General Election ballots

[1] *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877.

4. These ballots can, however, be approved and sent out before those deadlines. That is why in the motion for temporary injunction requests that the Court "Preliminarily order WEC to advise all municipal clerks in this state that they should not print or mail any absentee ballots until this court has issued a ruling on the merits of this Petition."
5. Additionally, upon information and belief, all of the defendants have been served. Undersigned counsel does not, however, have the Affidavits of service which will, I am told, arrive before ten tomorrow.

Given the looming deadlines and the possibility of Petitioner's claims being mooted, Petitioner asks that this Court enter an emergency, *ex parte* temporary restraining order under Wis. Stat. § 813.025 by 5:00 p.m. on September 6, 2024.

Respectfully submitted this 4th day of September, 2024.

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

- -

ROBERT F. KENNEDY, JR.,

Petitioner,

-vs- Case No. 24-CV-2653

WISCONSIN ELECTIONS COMMISSION, ET AL,

Respondents.

- -

PROCEEDINGS: Oral ruling

DATE: September 16, 2024

COURT: Circuit Court Branch 15
The Honorable STEPHEN E. EHLKE
Circuit Court Judge, Presiding

APPEARANCES: ROBERT F. KENNEDY, JR., the Petitioner, by JOSEPH BUGNI and CRICKET BEESON, Attorneys at Law.

WISCONSIN ELECTIONS COMMISSION, Respondent, by STEVEN KILPATRICK, CHARLOTTE GIBSON, and LYNN LODAHL, Assistant Attorneys General.

REPORTER: Erin Rauber, RPR
Court Reporter

P R O C E E I N G S:

THE COURT: We'll go on the record in the matter of Robert F. Kennedy, Jr. versus Wisconsin Elections Commission, 24-CV-2653. May I have the appearances for the petitioner.

MR. BUGNI: Good afternoon, your Honor, Joe Bugni and Cricket Beeson appear on behalf of Mr. Kennedy.

THE COURT: And on behalf of the Commission.

MR. KILPATRICK: Steven Kilpatrick, Assistant Attorney General. And with me are Assistant Attorneys General Charlotte Gibson and Lynn Lodahl.

THE COURT: Good afternoon to everyone. This matter has been fully briefed. We had a very brief hearing this morning. There's been various declarations or affidavits filed in this matter. I've had a chance now to review all the briefs, consider the various declarations that have been filed, think about this matter, and am prepared to issue the following ruling: As everyone knows, pending before the court is petitioner Robert F. Kennedy, Jr.'s request for a temporary injunction.

Mr. Kennedy asks that his name be removed from the November ballot and that ballots be reprinted without his name. Alternatively, he suggests that stickers be placed over his name to facilitate distributing these in a timely fashion because of various state and federal guidelines. Those are the basics of his request.

The facts, the pertinent facts are really not in dispute. On August 6th, 2024, Robert Kennedy and Nicole Shanahan submitted nomination papers and declarations of candidacy for the office of President and Vice President. Mr. Kennedy sent a letter to WEC asking to withdraw his candidacy and requesting that his name not be printed on Wisconsin ballots on August 23rd, 2024.

On August 27, 2024 WEC held a statutorily-required meeting to provide election notices to county clerks. During that meeting, WEC voted 5-1 to deny Mr. Kennedy's request to remove his name from the ballot, and it also certified his name as an independent candidate for President on the November ballot. The notices drafted by WEC at the August 27th meeting triggered the creation of Wisconsin ballots,

which county clerks create "immediately upon receipt" of WEC's election notice. That's pursuant to Section 7.10(2) of the Wisconsin Statutes.

September 19th, which is coming up, is the 47th day before the election. On this day, Wisconsin Statute Section 7.15(1)(cm) requires that each municipal clerk must send an official absentee ballot to each elector who has requested a ballot by mail, and to each military elector. Last week, the WEC surveyed 57 Wisconsin counties. According to Robert Kehoe, the deputy administrator of WEC, the survey showed a couple of things. First, a majority of county clerks have already sent their ballots for printing. Number two, four counties have received ballots from their printers and sent them out to the municipalities. Three counties have municipalities that have sent out absentee ballots to voters. Those are the basic underlying facts here as far as I'm concerned.

And in this matter, the WEC first argues that I should deny petitioner's request for injunctive relief, apart from any consideration of the merits based on our supreme court's

decision in *Hawkins v. Election Commission* found at 393 Wis. 2d 629. In *Hawkins*, the court denied a request for leave to commence an original action filed by the Green Party candidates seeking inclusion on the 2020 presidential ballot. The *Hawkins* court denied the request based on practical considerations.

At paragraph 10, the court stated, "Even if we would ultimately determine that the petitioners' claims are meritorious, given their delay in asserting their rights, we would be unable to provide meaningful relief without completely upsetting the election. We agree with the Commission that requiring municipalities to print and send a second round of ballots to voters who already received, and potentially already returned, their first ballot would result in confusion and disarray and would undermine confidence in the general election results. Under the circumstances presented here, it would be unfair both to Wisconsin voters and to the other candidates on the general election ballot to interfere in an election that, for all intents and purposes, has already begun. For these reasons, we determine that the best exercise of

our discretion is to deny the petitioners' petition for leave to commence an original action and motion for temporary injunctive relief."

Although I agree with the WEC that there would be many obstacles to overcome if I were to grant petitioner's request for injunctive relief, I decline to apply *Hawkins* because I believe faith in our electoral process is better served by a decision on the merits.

For similar reasons, I decline WEC's request to deny petitioner's claims based on principles of forfeiture and/or laches. Instead, I turn to the question whether a temporary injunction should be issued in this case.

The standards for issuance of a temporary injunction are well known. A court may issue a temporary injunction only if four criteria are met by the moving party. First, the movant is likely to suffer irreparable harm if a temporary injunction is not issued. Second, the movant has no other adequate remedy at law. Third, a temporary injunction is necessary to preserve the status quo. And fourth, the movant has a reasonable probability of success on the merits. This is found, among other cases,

Service Employees International Union Local 1 v. Vos, often referred to as SEIU, found at 393 Wis. 2d 38.

Injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction. Temporary injunctions are not to be issued lightly. The cause must be substantial. Further, a temporary injunction should be issued only to preserve the status quo, not to grant the ultimate relief sought.

With regard to the first factor, I conclude petitioner cannot meet his burden. In balancing the equities, the issue is whether the harm to petitioner in not granting the injunction far outweighs the harm to others if it is granted. Petitioner claims he will be irreparably harmed if his name is left on the ballot. However, he voluntarily submitted the nomination papers, placing himself before the voters. Further, he has simultaneously argued in this national election that he will be irreparably harmed if his name is left on the

ballot in Wisconsin and irreparably harmed in other states, New York, for example, if his name isn't on the ballot. This is quite obviously contradictory; both things cannot reasonably be true.

Balanced against this are the obvious harms to the voting public if an injunction is granted. Various affidavits submitted by county clerks set forth the high cost involved with reprinting the ballots. Many, if not most of the counties, have not budgeted for reprinting the ballots. Further, given federal deadline requirements, it may not be possible to reprint the ballots and mail them to voters voting absentee, including service members overseas.

Petitioner suggests stickers could be affixed to all of the ballots covering Mr. Kennedy's name. Apart from the logistical nightmare this would cause, the record is, at best, muddied as to what problems this would cause. The voting equipment to be used in the upcoming election has not been tested with stickers applied to ballots. Given that approximately 4 million ballots would need stickers, it is not hard to imagine many mistakes

would be made in affixing the stickers, either failing to place them on some ballots or inadequately affixing them to others.

There was a suggestion this morning that the problem with the 4 million ballots isn't as bad as it seems because we could take it one step at a time; putting the stickers on the ones that need to go out this week and then doing the others later. I'm not convinced that that's really workable either for the reason that it's not a timing issue so much as I think a lot of mistakes will be made in applying those stickers. And one can easily imagine the litigation that would arise if a box of ballots went through mistakenly without the stickers on. It just is going to create a lot of problems in my view. Further, as the affidavits from the clerks demonstrate, there are legitimate concerns that the stickers would gum up the internal workings of the scanners.

Although I do not simply deny petitioner's motion based on *Hawkins*, I am mindful of the court's common sense admonition that "As an election draws closer, court orders affecting elections can themselves result in

voter confusion and consequent incentive to remain away from the polls." In our current highly charged political environment, and given the fact impending deadlines governing absentee ballots are arriving, and given the great uncertainty whether petitioner's request to place stickers on the ballots in lieu of reprinting would even work, I conclude the balance of equities weighs heavily against petitioner's request that his name be removed from the ballots.

The third factor asks whether a temporary injunction is necessary to preserve the status quo. In *School District of Slinger v. WIAA*, the court set forth the black letter rule that "the purpose of a temporary injunction is to maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought. Our supreme court has held that a temporary injunction is not intended to change the position of the parties or to require the doing of an act which constitutes all or a part of the ultimate relief sought in the action. Its purpose is not to decide the action before trial.

Applied here, petitioner asks the court to do what is prohibited. He asks to alter the status quo by removing his name from the ballot. He also asks this court to grant the ultimate relief he seeks in the guise of a temporary order or injunction. So in my judgment, the third factor is not satisfied.

Finally, the fourth factor to consider in determining whether to grant an injunction is whether the movant has a reasonable probability of success on the merits. Again, I conclude petitioner cannot satisfy this criteria.

On August 27th, the Commission voted 5-1 to deny Mr. Kennedy's request that his name not be printed on the November ballot in Wisconsin. The Commission's decision was grounded on Section 8.35(1). That section provides as follows: "Any person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person. A person who is appointed to fill a vacancy in nomination or who is nominated by write-in votes is deemed to decline nomination if he or she fails to file a

declaration of candidacy within the time prescribed under Wisconsin law."

Mr. Kennedy argues that the Commission should simply have honored his request to be left off of the ballot. Although this may, at first blush, appear to make sense, it would require the Commission to ignore Section 8.35(1). Again, the first sentence of that section provides, "Any person who files nomination papers and qualifies to appear on the ballot may not decline nomination."

The triggering event is the filing of papers. Once a person files papers, he or she shall be on the ballot if all the statutory requirements are satisfied. The only exception is for the death of the person. Here, petitioner filed nomination papers with the Commission on August 6, 2024, thereby fulfilling the nomination papers requirement of Section 8.35(1). Petitioner also filed a declaration of candidacy with the Commission the same day, and this declaration fulfills the qualified to appear on the ballot requirement of 8.35(1).

A declaration of candidacy is a sworn declaration that states the candidate's name and

"that the signer meets, or will at the time he or she assumes office meet, applicable age, citizenship, residency, or voting qualification requirements, if any, prescribed by the constitutions and laws of the United States and of this state. And that the signer will otherwise qualify for office if nominated and elected." Those requirements are found in Section 8.21.2(a)-(c). By way of his declaration of candidacy, petitioner acknowledged and admitted that he qualifies to appear on the ballot for President. Thus, petitioner met the two requirements under Wisconsin Statute 8.35(1) to have his name placed on the ballot as a matter of law when he filed his nomination papers on declaration of candidacy on August 6, 2024.

Petitioner effectively asks the court -- or what the petitioner effectively asked the court to do is rewrite the statute to read as follows: "Any person who files nomination papers and qualifies to appear on the ballot may not decline nomination, unless they withdraw their nomination papers prior to the Commission convening to provide election notices to county clerks pursuant to its duties under 10.06(1)(i).

However, courts are required to apply the law as written, not as some party wishes it were written. When the statute is plain on its face, as it is here, courts must apply the statute. Under the statute, the Commission clearly was correct when it certified Mr. Kennedy for inclusion on the November ballot.

Petitioner contends the different filing deadlines for independent candidates and major party candidates places him, as an independent candidate, at a disadvantage vis-à-vis the major party candidates. He argues that Wisconsin's different filing requirements violates both the First and Fourteenth Amendment.

Courts review state election laws based on a flexible standard. A court considering a challenge to a state election law on First and Fourteenth Amendment grounds, as here, must weigh the character and magnitude of the burden the law imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Under this standard, regulations imposing a severe burden on the plaintiff's rights must be narrowly tailored and

advance a compelling state interest, but lesser burdens trigger less exacting review. The State's important regulatory interests are generally sufficient to justify an election law that imposes only reasonable, nondiscriminatory restrictions on First and Fourteenth Amendment rights.

In this case, the different filing deadlines are rationally related to the process by which candidates qualify for inclusion on the ballot. The Commission succinctly and correctly, in my view, explained the rationale for the different filing dates as follows: This is in their brief, "Independent candidates are nominated by nomination papers: They demonstrate sufficient elector support to qualify for the ballot by circulating and submitting nomination papers with the requisite number of signatures from throughout the state. The nomination papers must be submitted to the Commission by the first Tuesday in August preceding the presidential election, which, this year, was August 6th. Major party candidates, meaning candidates of parties entitled to partisan primary ballots, have demonstrated sufficient elector support

through their party's performance in prior elections or other means. Rather than nomination papers, major parties select their nominees for president and vice president at their respective conventions and then certify the names of the nominees. The certification must be submitted to the Commission no later than the first Tuesday in September preceding the presidential election, which, this year, was September 3rd.

Those deadlines reasonably reflect the time needed to review nomination papers with signatures of thousands of electors for sufficiency and to process any challenges to those papers from voters and opposing candidates. The extra time is not needed for major party candidates because they do not file nomination papers."

Any advantages major party candidates have in a later filing deadline is simply not constitutionally significant. The U.S. Supreme Court has determined that "the State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to

encumber the ballot with the names of frivolous candidates. That's the *Celebrezze* case, 460 U.S. at 788 at note 9. Repeating myself, I find that the differing filing deadlines for the candidates versus the major party candidates in this case is reasonable. As I said, it's not constitutionally significant.

Almost all the cases brought to my attention, including the *Celebrezze* case, involve a person who did not obtain access to the ballot. Here, as noted, petitioner's complaint is that he cannot withdraw his name after he submitted his nomination papers. However, petitioner cites no authority for the proposition that a person has a constitutional right to withdraw their name after they voluntarily submitted nomination papers with full knowledge of the statutory framework in place which does not allow for a person to withdraw.

The one case which involved removal of a candidate's name, *Lamone v. Lewin*, L-e-w-i-n, it's 190 A.3d 376, a Maryland appellate case from 2018, is not helpful to the petitioner. *Lamone* was a case brought by voters seeking to remove a candidate's name from a Maryland ballot after the

state's deadline for doing so had passed. The Maryland court of appeals explained why that state's prohibition on remand violated no constitutional right. "This case is therefore unlike cases in which candidates were denied access to the ballot, and the challenged provisions restricted the pool of candidates on the ballot from whom voters could readily choose. As applied in this case, these provisions did not limit candidate access to the ballot or the ability of a voter to select a preferred candidate. Appellees conceded that, while early candidacy filing deadlines have sometimes been held unconstitutional when they restrict access to the ballot, they were unable to find a case holding that a withdrawal deadline was unconstitutionally early. This should not be surprising, as a withdrawal deadline by itself does not restrict access to the ballot. And that's the *Lamone* case at page 391.

Unlike Maryland, Wisconsin has no withdrawal deadline. Instead, once you submit your nomination papers and qualify to appear, you may not decline nomination. The constitutional logic is similar, however. Namely, Wisconsin's

framework does not restrict access to the ballot nor limit the ability of a voter to select a preferred candidate. As such, in my view, it does not run afoul the First or Fourteenth Amendments.

Petitioner contends that keeping his name on the ballot is a form of compelled speech and also violates his right of free association. Once again, I reject petitioner's contention because there is no constitutional right to have your name removed from a ballot after you voluntarily submitted your nomination papers with full knowledge that the statutes don't allow you to withdraw your name. Petitioner continually argues he is somehow being forced to speak, ignoring the fact it was his decision to file nomination papers. Under these circumstances, I conclude he is not being compelled to speak, nor are his rights to freedom of association being denied.

Based on my research, no case, federal or state, has ever held that declination to remove a name from a government ballot, this close to an election, constitutes compelled speech or is a denial of freedom of association,

and petitioner cites none. The U.S. Supreme Court has said, "ballots serve primarily to elect candidates, not as forums for political expression. And that's the *Timmons v. Twin Cities Area New Party* case cited by the Commission in its briefing; that's 520 U.S. 351 (1997). I found that to be persuasive. Given this, I conclude that keeping petitioner's name on the ballot does not infringe his First Amendment rights.

Petitioner argues that if his name remains on the ballot, some voters might be confused whether he is still actually a candidate or is endorsing former President Trump. This may be so, but any such confusion does not translate into a constitutional right to have your name removed from the ballot. The bottom line here is that Mr. Kennedy has no one to blame but himself if he didn't want to be on the ballot. He either knew, or should have known, that Section 8.35(1) is clear regarding the mandatory nature of inclusion on the ballot if all statutory requirements are satisfied.

For all of these reasons, his request for a temporary injunction is denied, and I will

issue a written order including these reasons promptly upon the end of this hearing so that if anyone continues with their leave to appeal, which I'm assuming they will, they'll have that order in place.

So I know you disagree with me, Mr. Bugni, but anything further to put on the record?

MR. BUGNI: No, your Honor.

THE COURT: Anything further from the Commission?

MR. KILPATRICK: No, your Honor.

THE COURT: So counsel, just so you're aware, I'll tell you what I'm going to upload because I already drafted it.

So this will be uploaded in just a moment. Petitioner, Robert F. Kennedy, Jr., seeks a temporary injunction commanding the Wisconsin Elections Commission to remove Kennedy as a candidate on the November 5, 2024 general election ballot and further preventing the mailing of any absentee ballots. On September 16, 2024, the court heard oral arguments and denied petitioner's motion in an oral ruling. For those reasons stated on the record, it is

ordered that petitioner's motion for a temporary injunction is denied. I'll upload that electronically and then you'll have your written order that you can continue your appeal with.

MR. BUGNI: Thank you, your Honor.

THE COURT: With that, we'll be adjourned. Take care, everyone.

(End of proceedings.)

* * *

STATE OF WISCONSIN)
ss.)
COUNTY OF DANE)

I, ERIN RAUBER, RPR, Official Court Reporter, Dane County Circuit Court, hereby certify that I reported in Stenographic shorthand the proceedings had before the Court on this 16th day of September, 2024, and that the foregoing transcript is a true and correct copy of the said Stenographic notes thereof.

Dated this 17th day of September, 2024.

ELECTRONICALLY SIGNED BY
ERIN RAUBER, RPR
OFFICIAL COURT REPORTER

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP____

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondent-Respondent.

ROBERT F. KENNEDY, JR.'S PETITION FOR LEAVE TO APPEAL

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

ROBERT F. KENNEDY, JR,
Petitioner-Appellant

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INTRODUCTION

Almost a month ago, Kennedy made a simple request: please remove my name from the Wisconsin ballot. I've changed my mind. I don't want to run for President, I'd like to endorse Trump, and I don't want there to be any confusion with the voters—having my name on the ballot provides a false message. He made that request in a simple letter to the Commission. Had that letter be sent by Harris or Trump, it would have been honored. Those candidates had a full month longer than Kennedy (and all other independent candidates) to get off the ballot.

After Kennedy's simple request to get off the ballot was denied, the legal wranglings commenced. Kennedy filed suit three business days after the Commission's decision. He sought a temporary injunction under Wis. Stat. § 813.02 and then an emergency temporary restraining order under Wis. Stat. § 813.025.[1] When the temporary restraining order was denied, he sought leave to appeal.[2] That was held in abeyance.[3] And the case returned to the circuit court, where yesterday afternoon, the temporary injunction was denied.[4] And this second petition for leave to appeal (in a little over a week) follows.

There's no reason to just copy-and-paste last week's brief, and so this petition is streamlined to focus on the circuit court's denial of the temporary injunction and the problems with its reasoning. The written denial is attached in the appendix,[5] as is the transcript of the oral ruling.[6] This petition explains that the circuit court operated on a flawed understanding of the law. The circuit court didn't look at this as a matter of constitutional

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[1] App. 1, 8, 24, 26.

[2] App. 32, 34, 36, 38.

[3] App. 70.

[4] App. 225.

[5] App. 225.

[6] App. 233.

rights but a question of equities: Kennedy initially put himself out there as a candidate in Wisconsin and he can't *now* complain that he's now being held to that.[7] What's more, the court reasoned that Kennedy was not seeking to preserve the status quo, but up-end it by having his name taken off the ballot.[8] And there was little chance of success on the merits—no case provided a right to withdrawal.[9]

The flaw in its reasoning started at step one: it looked at preliminary injunctions as a question of equity and not as a means of protecting Constitutional rights.[10] In equity, it saw Kennedy as being to blame; he shouldn't have started a process and been surprised that he'd have to see it through.[11] As much as that has some visceral appeal to the principle of "life's not fair, deal," that doesn't work when it comes to constitutional rights. Once a case goes into that territory, the questions crystalize and the equities center on the ability to remedy the violation, not whether Kennedy can complain about the violation. Put another way: constitutional rights are different, Kennedy's are violated by compelled speech and association, and the differing standards violate his right to Equal Protection. Once that's established (and it was) the question is whether there was a remedy—can we protect his rights. It's possible that there can't be a remedy. *Hawkins* suggests that there are instances when a person's constitutional rights will bend to the efficiencies in running an election.

But those are different questions. The first issue before the circuit court had to be: did the Commission's actions violate his constitutional rights. Once that was established, the other questions in the preliminary injunction statute follow easily—is there irreparable harm in allowing the violation to persist? Yes, Kennedy's rights are violated if he's not taken off

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[7] App. 252.

[8] App. 242–43.

[9] App. 245–50.

[10] App. 240.

[11] App. 251.

the ballot. Is there a different and adequate remedy at law? No. The violation is complete when the ballots go out. And would the injunction preserve the status quo? That last question is where the Court stumbled the most. The judge looked at the "status quo" as of yesterday—instead of when Kennedy first filed suit. As of yesterday, ballots were being mailed. When Kennedy sought suit *two weeks ago* that was not the case. Besides, as the Wisconsin Supreme Court has noted: "If the status quo would not change without a temporary injunction, would that mean the unconstitutional law could remain in effect? Obviously not."[12]

In the end, this case is very simple. Does the Constitution allow for the sort of two-tiered system of rights that Wisconsin has bound independent candidates to or the compelled speech and association that forcing Kennedy on the ballot means? If not, then the question is whether that violation can be remedied. If it can, then the question is whether the injunction should have issued. That's the analysis. The first part of that analysis—establishing the violation—is set out in the first petition. Those points don't need to be repeated. The question of remedy has been folded into the injunction analysis. And the last part of this petition is devoted to why this Court should exercise its discretion and allow for this appeal. In the end, Kennedy is running against the clock: where the Constitution and the law don't favor the Commission, time does. And the only way to ensure that his rights are protected is to grant this appeal, reverse the circuit court, and order it to enter a preliminary injunction that Kennedy's name be removed from the ballot. The circuit court would then retain jurisdiction to monitor the mechanics of making that happen.

[12] *SEIU, Loc. 1 v. Vos*, 2020 WI 67, ¶ 117, 393 Wis. 2d 38, 946 N.W.2d 35 (Kelly, J., majority opinion).

STATEMENT OF ISSUE PRESENTED

Wisconsin law provides that a party is entitled to a preliminary injunction, where it appears from the pleadings that the party is entitled to judgment and another party needs to be restrained from some act that would injure the party. And precedent has established that courts are to be very liberal in providing these injunctions. Was Kennedy entitled to a preliminary injunction?

The Circuit Court answered: No.

STANDARD OF REVIEW

A circuit court's order granting or withholding a temporary injunction is reviewed for an erroneous exercise of discretion.[13] Interpretation of constitutional and statutory provisions is a question of law reviewed de novo.[14]

[13] *SEIU*, 2020 WI 67, ¶ 27 (Hagedorn, J., majority op.).

[14] *Id.* ¶ 28.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues raised in this appeal can be fully addressed by briefing, but if the Court has questions, Kennedy would ask for immediate oral argument. The decision of the Court should be published if the matter is decided on the merits.

STATEMENT OF THE FACTS

The original petition sets out the statement of facts and there is little reason to repeat them. Here is, however, what happened since that petition was filed. The Commission responded to the petition, and the next day Kennedy filed for leave to reply and a reply brief. Leave was granted, and the Court then entered an order holding the petition in abeyance so that the circuit court could rule on the motion for temporary injunction. In the circuit court, the Commission filed a response brief on Friday at noon.[15] Kennedy was given until 4:30 to file a reply brief.[16] Both parties met their deadlines.

Also on Friday, the circuit court entered an order scheduling a hearing for Monday, September 16.[17] That hearing was to be an evidentiary hearing, where Kennedy hoped to cross-examine the declarants about what steps had been taken to test the viability of placing stickers on the ballots. No witnesses were produced, and the court heard argument on the matter. At that hearing, the court indicated that given the tight deadlines and this appeal that would follow, it could issue an oral ruling that afternoon.[18]

The parties reconvened later that afternoon and the court denied Kennedy's motion for a preliminary injunction.[19] In its ruling, the court rejected the Commission's arguments of forfeiture, laches, and that *Hawkins* precluded granting relief.[20] Instead, it felt compelled to address the merits. The court then cited Kennedy's inconsistent statements about his desires in the 2024 election—in some states he wanted on the ballot (New York and Massachusetts) and in some (Wisconsin, Michigan and North Carolina) he wanted off.[21] The court then walked through the factors under Wis. Stat. 813.02(1)(a) and noted (in a consistent theme) that Kennedy wanted on the

[15] App. 76.

[16] App. 206.

[17] App. 193.

[18] App. 224.

[19] App. 225.

[20] App. 238.

[21] App. 239–40.

ballot on August 6 and he cannot fault the Commission for keeping him on—to do so accorded with state law.[22] And placing him on the ballot neither compelled speech or association, nor violated the Equal Protection Clause.[23] And with that, the Court denied relief.[24]

ARGUMENT

I. The circuit court erroneously denied the temporary injunction.

The facts outlined in the original petition and alleged in the complaint make it plain: there's a different set of rules, a different playbook for the major parties than for Independents. That violates the promise of equal protection for candidates. And it violates Kennedy's rights to free speech and association. What's more, Wis. Stat. § 8.35, which falls under the heading "Vacancies after nomination," states in relevant part: "Any person who files nomination papers *and qualifies to appear on the ballot* may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person." The text is "qualified to be on a ballot," which isn't simply a person who is over thirty-five and a citizen (the demands of Article II); rather, a qualified candidate is one who has put himself out there and declared that he wants to be a candidate, *and one whom the Commission deems to be "qualified" to appear on the ballot*. Hence, the Commission's requirement that all presidential candidates (including the major parties) to file a declaration of candidacy that is then vetted by the Commissions.[25] After all, a person isn't actually a viable (read: qualified) candidate until the Commission puts him on the ballot. And here, on August 23, 2024, Kennedy let the Commission know he wasn't interested far before the Commission made that decision on August 27, 2024. That is, he withdrew his declaration and with it any possibility that he could be

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[22] App. 252.

[23] App. 251.

[24] App. 252.

[25] *Deadline to Certify Presidential & Vice Presidential Candidates*, WEC (last visited Sept. 7, 2024), https://tinyurl.com/mr2su3hv.

considered a person who is "qualified to appear on the ballot." That was the framing of the argument in the original petition and it's how Kennedy framed the argument below. The question now is whether the circuit court erred in denying the temporary injunction on those claims.

The relevant statute provides that "[w]hen it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party . . . a temporary injunction may be granted to restrain such act."[26] As one commentator has explained, "[t]he statutes are very liberal in providing for temporary injunction[s]," and "[t]hey contemplate the issuance of an order whenever it appears that a party's rights cannot effectually be vindicated unless the opposing party is restrained from acting or proceeding in a way which will clearly tend to defeat the object of the action."[27] Four factors are normally considered:

1. whether Kennedy has a "reasonable probability of ultimate success on the merits;"
2. whether he is likely to suffer "irreparable harm" in the absence of relief;
3. whether he has no other "adequate remedy at law;" and
4. whether a temporary injunction will "preserve the status quo."[28]

Those factors are not "prerequisites" but must be "balanced together."[29]

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[26] Wis. Stat. § 813.02(1)(a).

[27] 8 Jay E. Grenig, *Wis. Pleading & Prac. Forms* § 71:31 (5th ed. 2021); *see also Town of Fond du Lac v. City of Fond du Lac*, 22 Wis. 2d 525, 528–29, 126 N.W.2d 206 (1964).

[28] *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 429, 293 N.W.2d 540 (1980) (quoting *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)).

[29] *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263 (quoting *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (per curiam)) (discussing the

The circuit court failed to consider whether Kennedy has an adequate remedy at law (he doesn't). That failure alone constitutes an erroneous exercise of discretion.[30]

What's more, the circuit court was duty-bound to issue the temporary injunction if any injury to the Commission stemming from an erroneous decision would be "slight" relative to the injury that Kennedy would face from an erroneous decision.[31] Or in the words of one commentator: "It is the duty of the court to grant the application where the injury to the other party will be slight and failure to make the order would leave the way open for serious and irreparable injury, the discretion of the court in those cases being merely as to the terms of the restraint . . . ."[32] As explained below, the circuit court did not apply the correct legal analysis; instead, it looked at the equities and decided the case based on that improper factor.

A. Kennedy is likely to succeed on the merits of his legal challenge to keeping him on the ballot.

The first petition set out all the reasons *why* Kennedy's rights are being violated by keeping him on the ballot. But there is one central point that the circuit court failed to consider when denying relief. It looked at the requirements of Wis. Stat. § 8.35 as hard and fast, cast in stone, once the nomination papers are submitted that's it, you're on the ballot and can't get off.[33] There's no discretion in that call and no surprise. But the court failed to consider the precedent in this State and how other authorities have

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factors for both temporary injunctions and stays pending appeal); *see also Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001).

[30] *See Sch. Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997).

[31] *See Halsey, Stuart & Co. v. Pub. Serv. Comm'n of Wisconsin*, 212 Wis. 184, 195, 248 N.W. 458 (1933) (quoting *De Pauw v. Oxle*y, 122 Wis. 656, 659, 100 N.W. 1028 (1904)).

[32] 8 Grenig, *Wis. Pleading & Prac. Forms*, § 71:32.

[33] App. 252.

viewed those requirements when they disadvantage independent candidates—*i.e.,* do not provide them the same opportunities as the major parties. Again, the major parties had a whole month longer to swap out candidates or withdraw their support than Kennedy did.

The only other time this issue came up before (and there only partially) was in the 1980 case with the National Unity Campaign. And there, when scandal swirled around the Vice Presidential candidate, the powers-that-be didn't want to allow the National Unity Campaign the ability to switch out the Vice Presidential candidate—despite the Republicans and Democrats having that exact same ability on an extended timeline.[34] This was challenged on various grounds, and when consulted, the Attorney General gave his opinion: "Preventing Anderson from considering relevant issues and events in the selection of his running mate during this critical period of electoral activity, *as are the major parties, is a substantial disability for his campaign*."[35] The opinion added in a note that resonates here: "Further, the interest of all the citizens of Wisconsin in having their presidential electors cast meaningful votes in the event the Anderson ticket should gain a plurality in the November election counsels against including anyone but Lucey on the Anderson ticket."[36] Put differently, the voters don't benefit from different rules for different parties, and for that matter, the Equal Protection Clause doesn't allow it.[37] Swapping out names after the deadline or deleting them entirely is not so hard and fast, and there is no reason to apply a strict standard of August 5 to the Independent candidates that wouldn't also apply to the major party candidates. At least in 1980, the Department of Justice agreed with that point.

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[34] No. OAG 55-80, 1980 WL 119496 (Wis. A.G. Sept. 17, 1980); *see also Brown County v. Brown Cnty. Taxpayers Ass'n,* 2022 WI 13, ¶ 32, 400 Wis. 2d 781, 971 N.W.2d 491.

[35] No. OAG 55-80, ¶ 5, 1980 WL 119496 (Wis. A.G. Sept. 17, 1980).

[36] *Id.*

[37] *Id.*

Here, Wisconsin's deadlines for ballot access violate this rule. They hamstring third-party candidates, while giving Democrats and Republicans a greater opportunity to disassociate from a candidate or for a candidate to dissociate from the campaign. Specifically, Wis. Stat. § 8.16(7) provides that these political parties have until "5 p.m. on the first Tuesday in September preceding a presidential election" to "certify the names of the party's nominees for president and vice president" to the Commission. In contrast, Wis. Stat. § 8.20(8)(am) says that an Independent candidate must commit a full month earlier: "Nomination papers for independent candidates for president and vice president, and the presidential electors designated to represent them . . . may be filed not later than 5 p.m. on the first Tuesday in August preceding a presidential election."[38] It's worth adding that Kennedy had to withdraw *before* the DNC had even announced its candidate or his opponent.

These statutory deadlines advantage the Democrats and Republicans in multiple ways. They get more time to vet a candidate. Should a candidate have a scandal (or health issues) just a few months out from the election, the major parties can potentially backtrack and try to get someone else on the ballot. An Independent candidate, however, must move faster—a full month earlier. Not only does the statute give the Democrats and Republicans more time for vetting, but it also gives them more time to contemplate the best course of action for the *candidate*.

Here, upon reflection, Kennedy has (like President Biden) decided that for associational and expressive reasons, he does not want to run for President anymore. And Kennedy (like President Biden) decided he wanted to not just be off the ballot, he also wanted to give his endorsement to someone else. Kennedy for Trump; Biden for Harris. And Kennedy (like President Biden) wanted to make sure that there was no voter confusion in Wisconsin—no one thinking that he was soliciting votes. Yet, Wisconsin's

[38] Wis. Stat. § 8.20(8)(am).

arbitrary, two-tiered deadlines prevent Kennedy (unlike President Biden) from withdrawing and making sure that his message is clear.

The First Amendment safeguards fundamental rights, and unequal treatment of such rights triggers strict scrutiny.[39] In First Amendment parlance: the major parties had an additional month to ensure that Biden was not coerced into speaking a message he didn't desire—I want votes for President—and he was not compelled to associate with a campaign he's not part of. And put in terms of the Equal Protection Clause, if the first Tuesday in September is "good enough" for the Democrats and Republicans to withdraw, then it's "good enough" for Kennedy and any other independent candidate who wants to remove himself or herself from the ballot. If nothing else, when it comes to fundamental rights, the promise of Equal Protection provides that "good enough" for the major parties applies with equal force to independents.

B. In the absence of relief Kennedy will suffer irreparable harm.

In the absence of relief, Kennedy will suffer irreparable harm. Irreparable harm is defined as harm that is "not adequately compensable in damages."[40] The loss of a constitutional right is, as a matter of law, irreparable harm.[41] Or as one treatise put it: "When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary."[42] Money is not going to solve Kennedy's legal problem and make him whole. Once the election happens, the harm is done.

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[39] *In re Zahary B.*, 2004 WI 48, ¶ 17, 271 Wis. 2d 51, 678 N.W.2d 831.

[40] *Halter v. Wisconsin Interscholastic Athletic Ass'n*, 2024 WI App 12, ¶ 39, 411 Wis. 2d 191, 4 N.W.3d 573 (quoted source omitted).

[41] *Ezell v. City of Chicago*, 651 F. 3d 684, 699 (7th Cir. 2011); 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2948.1 (3d ed.).

[42] 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2948.1 (3d ed.).

What's more—and this is what was lost on the circuit court—this is not a case where Kennedy's desire to be on some ballots in other states and not in Wisconsin makes any difference. [43] Indeed, the Court seemed troubled that he was seeking votes in some states and disavowing it in others. But that doesn't matter. Kennedy has the right to do what he wants with the message he wants to promote. His speech can be inconsistent, because it's his right—a particular message in one state does not preclude him from making a different one in another. And deciding *whether* his speech in Wisconsin can be honored because of what's being said in New York is anathema to honoring his personal right.[44] After all, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*."[45]

Putting Kennedy's name on *Wisconsin's* ballot will mean that his constitutional rights are violated. And that means he's suffered irreparable harm.[46] To decide otherwise was error. Indeed, it's not a question of whether Kennedy's free speech rights are at their apex, but whether they are violated at all and they have been.

C. Issuing a temporary injunction in Kennedy's favor will preserve the status quo.

As a preliminary matter, while much of the discussion at the hearing centered on the status quo,[47] whether a temporary injunction will preserve the status quo is the least important factor. The Wisconsin Supreme Court has trended away from considering it at all. "If the status quo would not change without a temporary injunction, would that mean the

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[43] App. 239–40.

[44] *United States v. Stevens*, 559 U.S. 460, 480 (2010).

[45] *Id.*

[46] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (explaining "[t]he loss" of a constitutional right, "for even minimal periods of time," is "irreparable" harm).

[47] App. 242–43.

unconstitutional law could remain in effect? Obviously not."[48] Notably, the text of Wis. Stat. § 813.02(1)(a) does not mention the status quo.

To the extent this factor is even relevant, a temporary injunction will preserve the status quo. The status quo is the state of affairs that existed before the Commission violated Kennedy's constitutional rights by placing him on the ballot—not the state of affairs immediately before the court's ruling.[49] Otherwise, in all but a few exceptional circumstances, a temporary injunction could never preserve the status quo. Similarly, in this action, in the absence of temporary relief, if Kennedy is kept on the ballot, the ultimate relief he seeks will be largely pointless. A Pyrrhic victory, years down the line. The whole goal of this suit is to prevent his name from appearing, not to have a definitive ruling about the constitutionality of the Commission's actions before the next election cycle.

* * * * * *

In the end, as interesting as constitutional issues are and as much as we'd love to fully brief them in a year, in the midst of a Presidential election, this case is really very, *very* simple and it's moving very, *very* fast. If it's good enough for the Democrats to have until 5 p.m. on the first Tuesday in September to withdraw their candidate and replace him with someone else, then it's good enough for Kennedy and every other independent candidate. That basic principle of fundamental fairness is given force by the Equal Protection Clause and animated by the First Amendment. Neither provision of the Constitution tolerates third-party candidates being treated as second-class candidates. And as explained in the opening brief, the Wisconsin Statutes (properly read) prevent that as well. And thus, Kennedy asks that this Court grant leave to appeal, enjoin the Commission placing him on the ballot, and remand for the Circuit Court to weigh how best to do that.

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[48] *SEIU*, 2020 WI 67, ¶ 117 (Kelly, J., majority opinion); *see also Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W. 2d 691 (1979) (listing factors to be considered when issuing a temporary injunction, without mentioning the status quo).

[49] *See SEIU*, 2020 WI 67, ¶ 117.

II. This Court should accept the interlocutory appeal and decide this case on its merits.

This Court is very familiar with the standards for interlocutory appeals and they won't be needlessly reiterated—though they are all present here.[50] The most important factor is likely success on the merits. As one scholar has noted:

> The most important criterion for determining whether an [interlocutory] appeal should be granted is not expressly included among the statutory criteria listed in section 808.03(2), although it is implicit in those criteria. This consideration is whether the petition for leave to appeal shows a substantial likelihood of success on the merits. . . .Likelihood of success on the merits is the first question the court will consider when responding to a petition for leave to appeal because the court will want to ensure that an appeal will not simply serve to delay and defeat the ends of justice, rather than expedite and clarify the proceedings.[51]

In seeking this interlocutory appeal, Kenedy isn't seeking delay, but speed; he's not seeking to defeat the ends of justice, but to make sure that justice delayed does not mean justice denied. After all, *Hawkins* counsels that there is a real fear that Kennedy's First and Fourteenth Amendment rights will be subordinated to concerns about voter confusion (even though it's the Commission that is causing the confusion by forcing his name to appear on the ballot). The only way to ensure that doesn't happen is to move with speed. With both of Kennedy's bids for quick relief denied by the

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[50] Wis. Stat. § 808.03(2); *See Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 267, 569 N.W.2d 45 (Ct. App. 1997).

[51] Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 9.4 (6th ed. 2014); *see also State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991).

circuit court, the action has to happen here, where this Court can quickly enter the appropriate order.

To that end, this request for an interlocutory appeal is appropriate. For one, this case cannot wait for a final judgment. The looming election will likely moot all of Kennedy's claims. In other words, the appeal is either now or never. Two, if the appeal is granted and the merits considered, this will terminate the litigation—there is nothing piecemeal about this case or appeal. And if the Court takes the case, Kennedy will be spared irreparable injury; *and* since a Presidential election will be affected by it, this is a matter of great importance.

CONCLUSION

The opening set of briefs gave this Court all it needed about the merits of Kennedy's claims. This brief supplies the statutory framework for *why* the circuit court was mistaken in its analysis. Applying the proper analysis, we ask that the circuit court be reversed and that the case be remanded for an injunction to be entered and the terms of that injunction be fashioned immediately by the circuit court.

Dated at Madison, Wisconsin, September 17, 2024.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms with the rules contained in Wis. Stat. § 809.50(1) and (4) for a petition produced with a proportional serif font. The length of this petition is 4,082 words.

Electronically signed by Joseph A. Bugni
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondents-Appellants.

ROBERT F. KENNEDY, JR.'S SUPPLEMENTAL BRIEF

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

ROBERT F. KENNEDY, JR,
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I. Introduction

This Court is very familiar with the record and the claims before it. So none of that will be repeated. Instead, it has directed both sides to answer three specific questions centered on remedies. Since all three questions concern the exceedingly broad powers this Court has in equity and since they all concern the question of stickers being placed on the ballot, the first four pages concern those topics. Following that *brief* background, the precise questions are quickly answered. In addition, the Petitioner has briefed a fourth point—what to do with the ballots that have already gone out?

II. The Court's Equitable Powers Allow for Kennedy's Name to be Covered Up on the Ballot.

A court sitting in equity is cloaked with great power to ensure that injuries are redressed. That power flows from the Wisconsin Constitution's promise that "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."[1] Those are not empty platitudes, but promises fulfilled in 176 years of courts remedying constitutional violations. Injunctions are a form of equitable relief, and "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[2] That relief is only limited by the nature of the constitutional violation the party has suffered.[3] That simply means the remedy "must directly address and relate to the constitutional violation itself."[4] In other words, the remedy must be

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[1] WIS. CONST. ART. I, § 9.

[2] *Brown v. Bd. Of Educ.*, 349 U.S. 294, 300 (1955).

[3] *See Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 738, 750 (1974).

[4] *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977).

"tailored to cure the condition that offends the Constitution."[5] And crafting such remedies demands "a special blend" of "what is necessary, what is fair, and what is workable."[6]

Understanding the power that way, Wisconsin courts have broad flexibility to "adapt their decrees to the actual condition of the parties so as to meet the very form and pressure of each particular case, in all its complex habitudes."[7] These remedies are without limit as to "their substance, their form, or their extent."[8] Equity's hallmark is: "flexibility and expansiveness, so that new [remedies] may be invented, or old ones modified, in order to meet the requirements of every case."[9] In less florid but more concrete terms, the Wisconsin Supreme Court has explained how this power operates and where it stems from: "The issue of equitable authority is a variant of the inherent authority doctrine. It permits a court to grant equitable remedies to private litigants in situations in which there is no explicit statutory authority or in which the available legal remedy is inadequate to do complete justice."[10] That is all to say: there is certain and undeniable agreement that court's equitable powers are flexible and expansive to ensure that the harm is cured.[11]

Understanding that the harm must be cured, the Petitioner has offered that while it's not *now* feasible to get new ballots, it is feasible to put

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[5] *Id.* (quotation omitted).

[6] *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).

[7] *Nationstar Mortg. LLC v. Stafsholt*, 2018 WI 21, P30, 380 Wis. 2d 284, 299, 908 N.W.2d 784, 791 (alterations omitted); *see also Hall v. Bank of Baldwin*, 143 Wis. 303, 310, 127 N.W. 969 (1910).

[8] *Meyer v. Reif*, 217 Wis. 11, 20, 258 N.W. 391 (1935) (quoting 1 Pomeroy, Equity Jurisprudence, § 111).

[9] *Id.*

[10] *In Interest of E.C.*, 130 Wis. 2d 376, 388, 387 N.W.2d 72, 77 (1986) (emphasis added).

[11] *See* 1 Wis. Pl. & Pr. Forms § 6:37 (5th ed.).

stickers over Kennedy's name. The reason it's feasible is that for almost fifty years it has been contemplated by the Wisconsin legislature. With the help of the skilled and diligent staff at the Wisconsin Law Library, we were able to track down the iterations of that law—in 1975, the legislature decided that in certain instances "pasters" could be placed over a candidate's name.[12] When that term went out of style in 1985, the legislature replaced it with "stickers."[13] So placing stickers or pasters over a person's name is not something new—it's been available in elections for 49 years. And so, one would presume that the voting machines would accommodate this possibility; it is, again, a provision of state law and it's been around for a long, long time.

The point of citing the state law provision is that placing stickers over a candidate's name can be done. If it can be done, that means the violation of Kennedy's rights can be remedied. Petitioner is not asking for something outlandish, impossible, or uncontemplated by law. And it can be remedied in the same fashion as outlined for instances when a candidate dies. That is, if this court can grant a remedy, the remedy Kennedy proposes is workable and it fits the violation. Putting him on the ballot violates his constitutional rights and covering up his name will cure it. And despite the Commission's protests that it can't be done because the legislature has provided that it can only be done in case's of death, this Court has the flexibility and power to do it: "Though no precedent may be at hand in a given situation, since principles of equity are so broad that the wrong involved or the right to be enforced need not go without a remedy, its doors will swing open for the asking, and a new precedent be made."[14]

With that *brief* history on the broad powers of courts to fashion equitable remedies and how long this statute has been around, it becomes a

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[12] WIS. STAT. § 8.35(2) (1975) (It the ballots have been printed, the committees or body filling the vacancy shall supply pasters as under § 7.38(3)(c)).

[13] WIS. STAT. § 8.35 (2)(D) (1985) (If the ballots have been prepared, the committees or body filling the vacancy shall supply stickers as provided under § 7.38(3)(c)).

[14] *See Meyer*, 217 Wis. at 20 (quotation omitted).

lot easier to address the three questions raised in the Court's order and the fourth proposed by the Petitioner—i.e., what to do about the ballots that have gone out. For ease of reading, the point headings have omitted the background that helpfully framed the questions and been shortened to only the question asked.

a. Does it matter if ballots with stickers on them have not been tested with voting equipment?

No. It doesn't matter. We should presume that this can be done—the law, again, provides for it and has provided for it for almost a half-century. But at a deeper level, the answer to the question is that the lack of testing cuts against the Commission. It has known about this suit and request for over two weeks. In that time, the Commission filed multiple briefs and gathered six declarations about the problems this *could* cause, but in all that time and effort no one did any testing to see what it *would* cause. Not a single test was done to see if the declarant's predictions were right. Thus, the Court should reject the Commission's declarations. Anyone can speculate about anything. If the sky were really going to fall if these stickers were used, the Court should demand more than speculation.

As echoed throughout the briefing, you can't have a provision of state law that contemplate something and then claim it can't be done. Courts presume the legislature knows what it is doing.[15] What's more, the Commission's very own manual from 2024 provides repeated reference to the use of stickers.[16] And we've attached the cover page and relevant pages, with highlights, to show that stickers (or pasters) on ballots is not just a vestige of the 70's, but something contemplated and addressed—by the Commission—this *very* year. Put succinctly, given that State law provides the use of stickers and the Commission's refusal to test the stickers, it should be presumed that there is an adequate remedy at law.

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[15] *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996).

[16] https://elections.wi.gov/sites/default/files/documents/ED%20Manual-August%202024_0.pdf.

b. If there was a vacancy in a statewide office race due to the death of a candidate, would the stickers have to be placed on the ballots statewide?

Yes. In that instance, all of the statutory provisions provided for by the legislature have been met. There would be no means or reason or ability for the Commission to deny that relief. Indeed, one would imagine that in such an instance the Party would be suing for the precise relief that Kennedy now seeks, and no court would countenance the Commission saying to the effect: "we *think* that the stickers would gum up the machines, so it just can't be done. Sorry." Put differently and in terms of the Equal Protection Clause arguments made in the earlier briefs: if it could be done there, then it should be done here.

c. Do clerks, as WEC has suggested, have discretion to not have the stickers applied to the ballots?

No. The clerks do not have discretion to not apply the stickers. Petitioner submits that the Commission's argument is just a plain misreading of the law. Placing stickers on the ballot must be done at the clerk's direction—not discretion. Adding the "s" and transposing the "c" makes a world of difference in the two word's meaning. Put simply, the plain reading of the text does not allow for any discretion. The law provides direction, and that is enough.

d. What should be done about the ballots that have already been sent out?

Kennedy is not seeking to create any more confusion than what the Commission has already wrought. Thus, Petitioner is not asking that a second set of ballots go out. For those ballots that went out, what's been done is done. This case now centers on the rest of the ballots that the stickers can and should be placed on. The perfect cannot be the enemy of the good. Thus, we are not asking that two sets go out. But that for those ballots that

a sticker can be placed on, the Commission and the clerks must be directed to place it on.

III. Conclusion

This Court has received a lot of briefing in the past week and the issues now focus on the question of remedy. This Court has the power to order that Kennedy's name be covered up. Since placing stickers on the ballot is contemplated by law and would be done in other instances, it can and should be done here. To do so, again, cures the constitutional violation and gives Kennedy the relief he deserves.

Dated at Madison, Wisconsin, September 19, 2024.

Respectfully submitted,

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CERTIFICATION

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP____

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ROBERT F. KENNEDY, JR.'S PETITION FOR LEAVE TO APPEAL

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INTRODUCTION

The Supreme Court has been clear: third-party candidates can't be treated as second-rate candidates, burdened by laws and restrictions that don't apply to the two major-party candidates. Yet, that's what's happened here. Robert F. Kennedy, Jr., told the Wisconsin Elections Commission that he wanted to be off Wisconsin's ballot. They said no, he doesn't have the right. Even though the two major parties had until September 3 to do so—the day Kennedy filed suit to get off the ballot—he was supposed to let the Commission know a full month earlier. A deadline that was actually *before* the DNC had even met and nominated Vice President Harris.

This is a Presidential election and entrenched political parties play games.[1] We all know it. And so, it's not surprising that this isn't the first time that a third-party candidate has been treated differently. When that's happened the Supreme Court has given extremely clear guidance on what the Constitution tolerates.[2] And it's not unequal treatment: "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment."[3] Giving that unimpeachable principle teeth, the Court went on to make clear exactly what it meant: "[I]n a Presidential election[,] a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries."[4] In other words, two-tiered treatment with different standards

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[1] *E.g.*, Sarah Lehr, *Democrats Ask Wisconsin Supreme Court to Boot Green Party from Ballot*, WPR (Aug. 20, 2024).

[2] *Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983).

[3] *Id.*

[4] *Id.* at 794–95.

for third-party candidates will not be tolerated, especially in a Presidential election.[5]

After all, unequal treatment violates the very core principles of Equal Protection, and it trounces on the very promises that the First Amendment is supposed to hold inviolate—namely, being free from compelled speech and association. Indeed, Kennedy's rights are no less precious (or protected) than Biden's or Harris's, yet he's being treated differently because he's an independent candidate and did not (as his relatives did) march under the Democrat's banner.

Demanding that his rights not be diminished on that basis, Kennedy filed suit in Dane County—as he must.[6] He filed for a preliminary injunction and a temporary restraining order, seeking immediate relief and for the Commission to strike his name from the ballot.[7] That motion was denied late Friday afternoon, and the Court set a status conference more than a full week after he filed suit.[8] At that conference, a briefing schedule will be set, and Kennedy's claim will likely be mooted.

Kennedy made such haste in filing suit and now seeking an interlocutory appeal because once the ballots are printed and sent out, the Wisconsin Supreme Court in *Hawkins* has indicated that the claims may be moot.[9] The risk of voter confusion is too great.[10] And so Kennedy is running against the clock: as soon as the ballots are approved and sent out, the Commission (who has already rejected his request) will simply assert that *Hawkins* controls—arguing purported voter confusion trumps Kennedy's

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[5] *Id*.

[6] Wis. Stat. § 227.53(1)(a)3.

[7] App. 8–9, 19–20.

[8] App. 19–20.

[9] *Hawkins v. WEC*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W. 877.

[10] *Id*.

constitutional rights. Put differently, where the Constitution and the law don't favor the Commission, time does. Its victory will not be one of principle and precedent but procrastination.

Kennedy needs the Court to act and to act quickly; he needs the Court to address his constitutional arguments and take him off the ballot. It's supposed to be that "when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed."[11] To call foul (as the law demands), this Court cannot wait for the Circuit Court to act and the parties to take their time with the briefing.[12] Rather, Kennedy needs this Court to exercise its discretion, take this interlocutory appeal, and take the rare—but appropriate—step of addressing this claim immediately on the merits and granting Kennedy the relief he seeks: order his name not added to the ballot.

[11] *James v. Heinrich*, 2021 WI 58, n.18, 397 Wis. 2d 517, 960 N.W.2d 350 (lead opinion) (quoted source omitted).

[12] *See In re Fort Worth Chamber of Com.*, 100 F.4th 528, 534–35 (5th Cir. 2024) ("Given the Chamber's diligence in seeking to expedite briefing and consideration, and its repeated requests for a ruling by specific dates so as to avoid substantial compliance with the new rule, the district court effectively denied the [preliminary injunction] motion by failing to rule on it by those dates," even though the "district court found good cause to expedite the briefing schedule.").

STATEMENT OF ISSUES PRESENTED

In deciding this appeal there are three issues concerning the merits.

1. The Equal Protection clause prevents states from unfairly burdening third-party candidates. Here, Wisconsin law demands that third-party candidates move to withdraw from the ballot a full month before the major parties. Is that arbitrary distinction based on party designation consistent with the Equal Protection Clause's guarantees?

2. The First Amendment forbids coerced speech and association. Here, Kennedy does not want his name on the ballot, which makes a statement he's explicitly disavowed—namely, I am seeking votes in Wisconsin a bid for President of the United States. Does forcing that statement and his association with the candidacy violate his First Amendment rights?

3. Wisconsin law provides that any person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The term "qualifies" has been misread by the Commission. Before the ballot was approved, Kennedy withdrew his candidacy and since he cannot be drafted into being a candidate—against his will—he no longer "qualifies" as one. Did the Commission err in its reading of the statue's text?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues raised in this appeal can be fully addressed by briefing, but if the Court has questions, Kennedy would ask for immediate oral argument. The decision of the Court should be published if the matter is decided on the merits.

STATEMENT OF THE FACTS

Like President Biden, Kennedy thought it was a good idea to run for President. Both have been lifelong politicians and have great name recognition. Hoping to win the Presidency, both sought to have their names appear on Wisconsin's ballot. Biden timely submitted his documents and so did Kennedy. As the presidential campaigns raged on, both men had second thoughts about continuing their pursuit. Initially, both pushed off calls to withdraw—some vehement, others caustic. And into the middle of the summer, both forged ahead with their campaigns, stating for the world to hear: they wanted to be President.

Yet, they both eventfully changed their minds. And Wisconsin (like almost every other state) allows for that—sometimes a candidate drops off for personal reasons, sometimes it's a scandal, sometimes it's health-related. Whatever the reason, the law recognizes that no one should be compelled to continue with a campaign for office—and having the ballot declare they want citizens to vote for them—if they don't want it. Ours is a free country, rooted in liberty and the promise that everyone (even politicians) aren't compelled to give a message they disavow.[13]

But while Biden had until the first Tuesday in September to withdraw, Kennedy had to let the Commission know a full month before that. (Again, he was supposed to withdraw even before the DNC had announced its candidate.) Indeed, it's helpful to imagine the competing candidates' situations this way:

	BIDEN	KENNEDY
Announced their withdrawal	Before September 3, 2024	Before September 3, 2024 (but after August 6, 2024)
Deadline to submit a declaration of candidacy	September 3, 2024	August 6, 2024
Allowed to withdraw?	Yes	No

[13] Wis. Const. art. I, §§ 1, 3; *see also McCutcheon v. FEC*, 572 U.S. 185, 191–92 (2014).

The issue in the circuit court and on appeal is why? Why the different playbook for Kennedy as opposed to Biden. It can't be because of some compelling state need to check the signatures and makes sure that every "i" is dotted and "t" is crossed. Kennedy simply wants off the ballot, there is no rigorous testing of a candidate's qualifications when they want off the ballot—you simply do not include his name. It can't be that this is some impossible administrative task. Again, Kennedy is simply asking to not be put on the ballot. And getting off the ballot isn't something that *never* happens that these ballots. State law provides a mechanism for removing someone in case of death—so it can be done.[14] Without any reason—let alone a compelling reason—the only difference in the treatment rests on the prohibited fact that third-party candidates are treated differently (read: worse) than the two mainstream party candidates. Put in the constitutional parlance of our claims, this unequal treatment subordinates Kennedy's First Amendment rights beneath those of Biden and other major party candidates.

Refusing to tolerate that treatment, Kennedy sued the Commission and every other interested party.[15] He asked for a preliminary injunction and (knowing the importance of timing) a temporary restraining order.[16] The initial complaint and motion were filed on Tuesday, September 3, a follow-up motion the next day, and service was perfected a day later.[17] In the motion for a temporary restraining order, Kennedy asked for an order by 5:00 on Friday. Grant it, great. Deny it, fine—we'll appeal. All the while,

[14] Wis. Stat. § 8.35(1).

[15] App. 1–7.

[16] App. 8–9.

[17] App. 10–12.

every newspaper and political talk show and news station in Wisconsin covered the story.[18]

As the hours passed, the WEC's attorneys put in their notice and we waited for a brief to follow.[19] Something that would defend Kennedy's unequal treatment. None came. Instead, on Friday, the WEC sent in a letter, asking that the motion be dismissed because they weren't properly served.[20] Again, it wasn't that they didn't have notice or that this wasn't an important issue or that time wasn't of the essence. They quibbled about who got the complaint. Again, ducking the merits would mean Kennedy's claim could be denied through procrastination and not principle.

Late Friday afternoon, the Circuit Court weighed in.[21] No temporary restraining order would come. No denial on the merits. Instead, in five days the lawyers would leisurely convene and set a briefing schedule on the merits. The principle has always been: justice delayed is justice denied. And the greater the delay in reaching the merits, the more likely it is (closing in on certainty) that they will never be heard and Kennedy's claims denied. Hence, the need for this interlocutory appeal.

The following is a brief but comprehensive timeline of the case, the filings, and Kennedy's attempts to get off the ballot and not have his name associated with something he has disavowed. The statutory deadlines are on the left and Kennedy's or WEC's actions are on the right.

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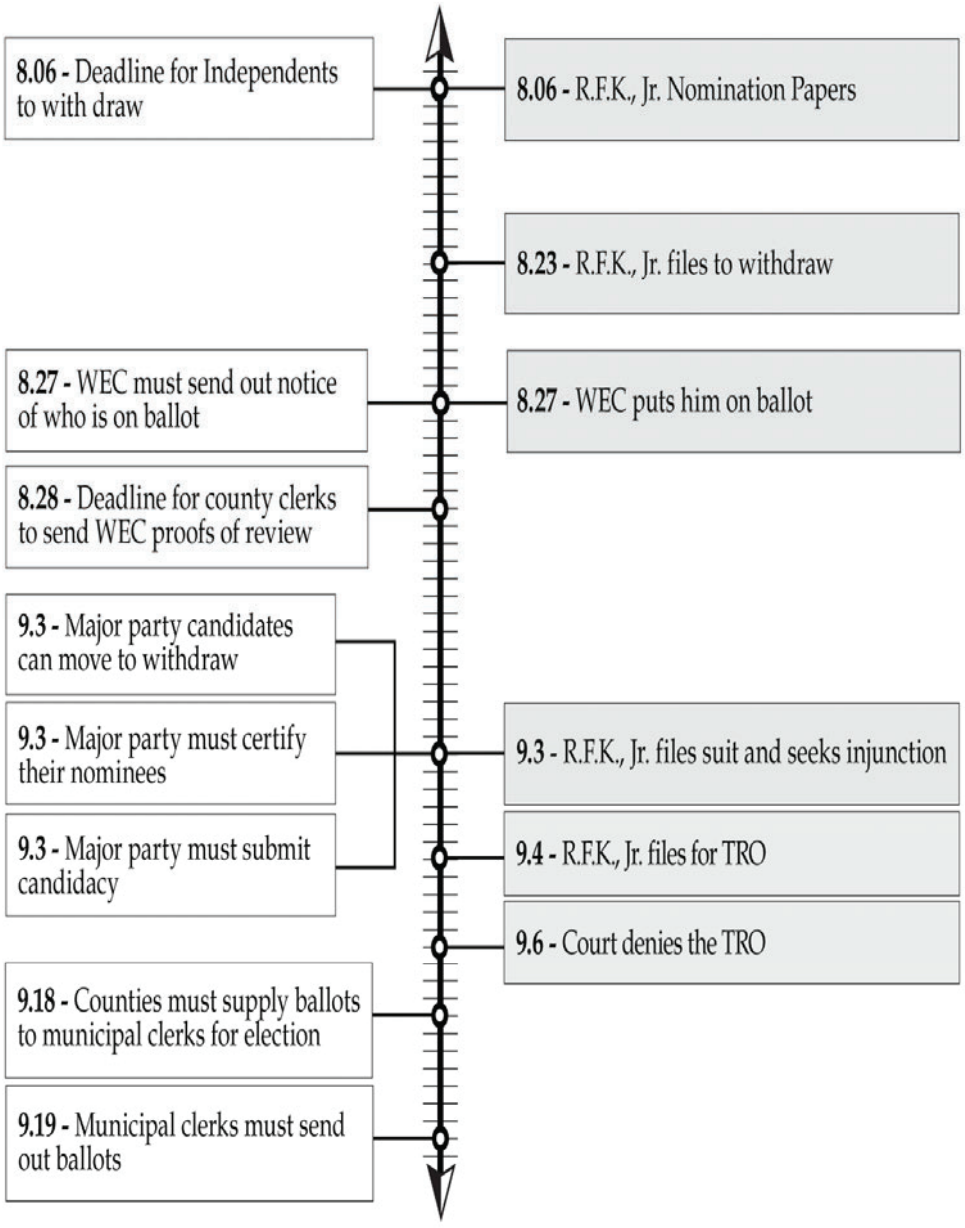
[18] Rich Kremer, *RFK Jr. Suing to Remove His Name from Wisconsin Presidential Ballot*, WPR (Sept. 4, 2024), https://tinyurl.com/yx3nzhyp.

[19] App. 13–18.

[20] App. 21.

[21] App. 19–20.


8.06 - Deadline for Independents to with draw
8.06 - R.F.K., Jr. Nomination Papers
8.23 - R.F.K., Jr. files to withdraw
8.27 - WEC must send out notice of who is on ballot
8.27 - WEC puts him on ballot
8.28 - Deadline for county clerks to send WEC proofs of review
9.3 - Major party candidates can move to withdraw
9.3 - Major party must certify their nominees
9.3 - Major party must submit candidacy
9.3 - R.F.K., Jr. files suit and seeks injunction
9.4 - R.F.K., Jr. files for TRO
9.6 - Court denies the TRO
9.18 - Counties must supply ballots to municipal clerks for election
9.19 - Municipal clerks must send out ballots

ARGUMENT

I. The trial court erred in refusing to enter the temporary restraining order and instead setting briefing

The facts outlined above and alleged in the complaint make it plain: there's a different set of rules for Kennedy than Biden; there's a different playbook for the Democrats than for Independents. That violates the promise of equal protection for candidates. And it violates Kennedy's rights to free speech and association. What follows makes that plain. Indeed, little case law needs to be cited to know that Biden shouldn't be treated better than Kennedy. And everyone knows that putting someone on the ballot against their will—compelling their speech—is repugnant to the First Amendment. It's worth adding that suits like this have been filed in two other states and so far Kennedy has triumphed in both.[22] As much as political games and maneuvering are expected and tolerated every four years, once they trample on a person's constitutional rights, courts have to stop them: "when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed."[23]

But maybe this Court doesn't want to delve into those heady constitutional waters, and Kennedy is agnostic about how he gets off the ballot. If the Court wants an easy out from the constitutional issues, it simply has to read the statute. Wis. Stat. § 8.35, which falls under the heading "Vacancies after nomination," states in relevant part: "Any person who files nomination papers **and qualifies to appear on the ballot** may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person." The text is "qualified to be on a ballot," which isn't simply a person who is over thirty-five and a citizen (the demands of

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[22] Paul Egan, *Appeals Court Reverses Earlier Rulings, Says RFK Jr.'s Name Should Be Removed from Ballot*, Detroit Free Press (Sept. 7, 2024, 5:37 AM), https://tinyurl.com/yeywa59y; App. 22–28.

[23] *Heinrich*, 2021 WI 58, n.18 (lead opinion) (quoted source omitted).

Article II); rather, a qualified candidate is one who has put himself out there and declared that he wants to be a candidate, **and one whom the Commission deems to be "qualified" to appear on the ballot**. Hence why the WEC requires all presidential candidates (including the major parties) to file a declaration of candidacy.[24] After all, a person isn't actually a viable (read: qualified) candidate until the Commission puts him on the ballot. And here, on August 23, 2024, Kennedy let the Commission know he wasn't interested far before the Commission made that decision on August 27, 2024. That is, he withdrew his declaration and with it any possibility that he could be considered a person who is "qualified to appear on the ballot."

Whether this Court engages with the concrete demands of the Equal Protection Clause, the lofty promises of the First Amendment, or the technical reading of the statute, the result is the same: The Commission must be ordered to not send out any ballot with Kennedy's name on it. To the extent that may have already happened—despite the haste that has attended Kennedy's every move and no indication any ballot has been printed yet—this Court should require the Commission to follow the procedures that govern what happens when a candidate dies.[25] In those instances, the Commission supplies the municipal clerks with stickers to put over the candidate's name. To be absolutely clear, Kennedy doesn't care *how* his name is excised from the ballot—he just doesn't want a single voter in Wisconsin to be confused and believe (for one second) that he's interested in their vote.

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[24] *Deadline to Certify Presidential & Vice Presidential Candidates*, WEC (last visited Sept. 7, 2024), https://tinyurl.com/mr2su3hv.

[25] Wis. Stat. § 8.35(2)(d).

A. Treating third-party candidates differently, with additional burdens and restrictions, violates the Equal Protection Clause's guarantees.

The Supreme Court has consistently held: statutes cannot "unfairly or unnecessarily" burden an independent candidate's interest in the "availability of political opportunity."[26] To do so, violates the First Amendment. The precedents surrounding ballot-access issues embody a deep-seated fear of two-party entrenchment and what it portends for those outside the two parties—a marginalized and compromised voice.[27] (It's worth noting that *all* of the members of the Commission are from the two major parties – party leaders in the legislature are in charge of appointing commissioners.)[28] Consistent with that principle, the Supreme Court has held that a statute restricting ballot access is unconstitutional when it practically prohibited a minor political party with a "very small number of members" from appearing on the ballot.[29] It reasoned, voters have a right to "associate for the advancement of political beliefs" and to "cast their votes effectively," regardless of their "political persuasion."[30] Axiomatically, the First and Fourteenth Amendments, viewed together, require that whatever opportunity the major political parties have to associate or disassociate from a particular candidate be provided on equal terms to independent, third-party candidates.[31] In a word, what's good for the goose is good for the gander.

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[26] *See Lubin v. Panish*, 415 U.S. 709, 716 (1974).

[27] *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

[28] *Members and Administrator*, WEC (last visited Sept. 7, 2024, 1:24 PM), https://tinyurl.com/43kdwxs4; Wis. Stat. § 15.61(1)(a).

[29] *Williams,* 393 U.S. at 24.

[30] *Id.* at 30.

[31] *See Janus v. AFSCME*, 585 U.S. 878, 891–92 (2018).

Yet, from time to time (as we have here), third-party candidates have been treated differently from those inside the entrenched two-party system. In 1980, the Natural Law Party chose its candidate, but when scandal swirled around the Vice Presidential candidate, the powers-that-be didn't want to allow the Natural Law Party the ability to switch out the Vice Presidential candidate—despite the Republicans and Democrats having that exact same ability on an extended timeline.[32] This was challenged on various grounds, and when consulted, the Attorney General gave his opinion:

> Preventing Anderson from considering relevant issues and events in the selection of his running mate during this critical period of electoral activity, *as are the major parties, is a substantial disability for his campaign*.[33]

The opinion added in a note that resonates here:

> Further, the interest of all the citizens of Wisconsin in having their presidential electors cast meaningful votes in the event the Anderson ticket should gain a plurality in the November election counsels against including anyone but Lucey on the Anderson ticket.[34]

Put differently, the voters don't benefit from different rules for different parties, and for that matter, the Equal Protection Clause doesn't allow it.[35]

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[32] OAG 55-80 (Sept. 17, 1980) (Unpublished Opinion) (1980 WL 119496 (Wis.A.G.)); *see also Brown County v. Brown Cnty. Taxpayers Ass.*, 2022 WI 13, ¶ 32, 400 Wis. 2d 781, 971 N.W.2d 491.

[33] *Id.*

[34] *Id.*

[35] *Id*.

Here, Wisconsin's deadlines for ballot access violate this rule. They hamstring third-party candidates, while giving Democrats and Republicans a greater opportunity to disassociate from a candidate or for a candidate to dissociate from the campaign—as Biden did. Specifically, Wis. Stat. § 8.16(7) provides that these political parties have until "5 p.m. on the first Tuesday in September preceding a presidential election" to "certify the names of the party's nominees for president and vice president" to the Commission. In contrast, Wis. Stat. § 8.20(8)(am) says that an Independent candidate must commit a full month earlier: "Nomination papers for independent candidates for president and vice president, and the presidential electors designated to represent them . . . may be filed not later than 5 p.m. on the first Tuesday in August preceding a presidential election."[36] It's worth adding (for a third time) that Kennedy had to withdraw *before* the DNC had even announced its candidate or his opponent.

These statutory deadlines advantage the Democrats and Republicans in multiple ways. They get more time to vet a candidate. Should a candidate have a scandal (or health issues) just a few months out from the election, the major parties can potentially backtrack and try to get someone else on the ballot. An Independent candidate, however, must move faster—a full month earlier. Not only does the statute give the Democrats and Republicans more time for vetting, but it also gives them more time to contemplate the best course of action for the *candidate.*

Here, upon reflection, Kennedy has (like President Biden) decided that for associational and expressive reasons, he does not want to run for President anymore. And Kennedy (like President Biden) decided he wanted to not just be off the ballot, he also wanted to give his endorsement to someone else. Kennedy for Trump: Biden for Harris. And Kennedy (like President Biden) wanted to make sure that there was no voter confusion in Wisconsin—no one thinking that he was soliciting votes. Yet, Wisconsin's

[36] Wis. Stat. § 8.20(8)(am).

arbitrary, two-tiered deadlines prevent Kennedy (unlike President Biden) from withdrawing and making sure that his message is clear.

The First Amendment safeguards fundamental rights, and unequal treatment of such rights triggers strict scrutiny.[37] In First Amendment parlance: the major parties had an additional month to ensure that Biden was not coerced into speaking a message he didn't desire—I want votes for President—and he was not compelled to associate with a campaign he's not part of. And put in terms of the Equal Protection Clause, if the first Tuesday in September is "good enough" for the Democrats and Republicans to withdraw, then it's "good enough" for Kennedy and any other independent candidate who wants to remove himself or herself from the ballot. If nothing else, when it comes to fundamental rights, the promise of Equal Protection provides that "good enough" for the major parties applies with equal force to independents.

B. Printing Kennedy's name on the ballot against his will violates the First Amendment's guarantees against compelled speech and association.

The Equal Protection Clause assures Kennedy the same footing as the major parties, but his First Amendment's rights are even greater.[38] Here, forcing Kennedy to remain on the ballot constitutes compelled speech—he must state that he's a candidate for something in Wisconsin he has publicly avowed he's not. And it doubles as compelled association: the right to associate also entails the right not to associate.

Those principles are more than an academic matter to be debated in Constitutional law seminars. Compelling Kennedy's association with the campaign comes with real world health and safety risks. After all, President

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[37] *Monroe Cnty. Dep't of Health & Hum. Servs. v. Kelli B.*, 2004 WI 48, ¶ 17, 271 Wis. 2d 51, 678 N.W.2d 831.

[38] *McCutcheon*, 572 U.S. at 191.

Biden ordered the U.S. Secret Service to protect Kennedy in July, and *after* Kennedy suspended his campaign that protection was yanked.[39] Continued association as a candidate in the presidential race in Wisconsin thus brings obvious health and safety risks. After all, why give Kennedy Secret Service protection if it didn't, and why pull it once he quit the race. Yet including Kennedy's name on the ballot (as the Commission insists) forces his association in this political process against his will and with obvious threat to his person. The First Amendment does not allow for such involuntary action, especially as it relates to speech and association.

Defendants are free to write and share with the world their opinion about Mr. Kennedy. That message will be viewed as coming **from Defendants**. But when they place Mr. Kennedy's name on the ballot, voters believe that is because Mr. Kennedy wanted his name on the ballot, and that he is asking for their support and their vote. That message will be viewed as coming **from Mr. Kennedy**, not from Defendants. This is precisely the form of compelled speech that the Wisconsin Constitution and U.S. Constitution are intended to protect against. While Defendants are not harmed in any way by simply leaving Mr. Kennedy's name off of the ballot, compelling Mr. Kennedy to convey a false message to every citizen of Wisconsin that he is vying for their vote in this state, when he is not, and then subjecting him to the reputational and irreparable harm, and the loss of good will, that flows from this compelled speech.

Among the great promises of the U.S. and Wisconsin Constitutions is the right to free speech.[40] As the Supreme Court has explained, when it comes to political speech, those assurances are at their "fullest and most urgent application precisely to the conduct of campaigns for political

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[39] Zeke Miller and Colleen Long, *Biden Orders Secret Service to Protect RFK Jr. After Attempt on Trump's Life*, Associated Press (July 15, 2024, 4:48 PM), https://tinyurl.com/zn3w2w6j; Kaia Hubbard and Allison Novelo, *RFK Jr.'s Scret Service Protection Ends After Campaign Suspended*, CBS News (Aug. 25, 2024, 2:49 PM), https://tinyurl.com/4tctyzkj.

[40] Wis. Const. art. I, § 3.

office.'"[41] Put another way, "[p]olitical speech is thus a fundamental right and is afforded the highest level of protection. Indeed, freedom of speech, especially political speech, is the right most fundamental to our democracy."[42] That right "includes both the right to speak freely and the right to refrain from speaking at all."[43] "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning," which is why "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command[.]"[44] And that support extends even to candidate-eligibility requirements.[45]

Here, Kennedy is a national political figure and he does not want to tell, yell, or even hint to the great citizens of Wisconsin that he is vying for their votes. Placing his name on the ballot against his will subjects him to derision, anger, reputational harm, and loss of good will by those who would vote for him based on this speech only to later find out their vote was wasted. Imagine the serviceman or woman stationed overseas who doesn't get the bombardment of political advertisements most Wisconsinites receive, who's on the front lines and doesn't have the luxury to check-in and see that Kennedy has dropped out. That serviceman shouldn't have their vote wasted because Kennedy was compelled to give a message he didn't endorse. Free speech means a free flow of information within the economy of ideas. The Commission cannot, however, make Kennedy a conduit for a message that he does not want to promote and that isn't even accurate.

Beyond that simple (yet critical) point, Kennedy has publicly endorsed President Donald Trump's candidacy for the November 2024

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[41] *McCutcheon*, 572 U.S. at 191–92.

[42] *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 47, 363 Wis. 2d 1, 866 N.W.2d 165.

[43] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[44] *Janus*, 585 U.S. at 892–93.

[45] *Anderson*, 460 U.S. at 786.

presidential election. By forcibly including Kennedy's name on the ballot, the Commission is falsely representing to the people of Wisconsin that Kennedy is running against President Trump in Wisconsin and is opposed to President Trump's candidacy. Nothing could be further from the truth. Yet, by forcing him to remain on the ballot that message is unmistakably conveyed.[46] Such compelled speech is anathema to the First Amendment.

In that same vein, placing Kennedy's name on the ballot against his will constitutes compelled association. "Freedom of association … plainly presupposes a freedom not to associate."[47] "[F]orced associations that burden protected speech are impermissible."[48] Here, Kennedy does not want to associate his name (or himself) with the Presidency in Wisconsin. Yet forcing his name to appear on the ballot doesn't just force him to state a message—I am running for President—it also forces him to associate with a cause (the Presidency) that he is not running for in Wisconsin.

Thankfully, the First Amendment protects Kennedy (like every other American) from being forced to convey such a message. For that reason, the Commission's decision not only violates the Equal Protection Clause, it also violates the First Amendment.

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[46] *Soltysik v. Padilla*, 910 F.3d 438, 447–48 (9th Cir. 2018) (holding state law violated speech and associational rights of minor-party candidates by requiring placing "None" next to their names on the ballot for their party affiliation).

[47] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also Janus*, 585 U.S. at 892.

[48] *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986).

C. Beyond the Constitution's guarantees, even the plain reading of the text confirms Kennedy should not be on the ballot.

The case law and principles outlined above inform *why* the Commission's decision forcing Kennedy on the ballot is problematic as a constitutional matter. These problems can and should be avoided under the "constitutional-doubt principle," which instructs that statutes should not be read in a "constitutionally suspect" manner.[49] Here, the controlling statute is Wis. Stat. § 8.35(1). It provides, in relevant part, "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination."[50] A correct interpretation of this statute avoids (for today) all of the constitutional issues.

While Kennedy clearly filed nomination papers, he does not "qualify" to "appear on the ballot." Under Wisconsin law, a person is not qualified to appear on the ballot until the Commission approves them for the ballot. In other words, the Commission's approval is the last and necessary step in the qualification process. If the person files nomination papers, but then doesn't get the requisite documents (e.g., a declaration of candidacy) or isn't thirty-five, they aren't qualified for the ballot. The qualification comes when the Commission agrees that everything is in order. But here, before the Commission could approve Kennedy's candidacy, he said: no, I'm withdrawing, I want no part of this. So, his withdrawal doesn't come within the limits of § 8.35(1) because he hadn't yet qualified to appear on the ballot before he withdraw. Put differently, and in the statutory language of Wis. Stat. § 8.30(1)(b), he was, by his own "admission," "ineligible to be nominated or elected."[51] The Commission's decision to the contrary, runs roughshod over the plain text.

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[49] *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 31, 391 Wis. 2d 497, 942 N.W.2d 900.

[50] Wis. Stat. § 8.35(1).

[51] Wis. Stat. § 8.30(1)(b).

The Commission may argue that "qualified" means "qualified" to hold office, e.g., the qualifications set forth in the United States Constitution.[52] However, that is not what the statute says. The statute says, "qualified to appear on the ballot." The phrase "to appear on the ballot" cannot be read out of the statute.[53] To do so, violates the plain-text canons and it goes contrary to the legislature's clear choice of language.

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In the end, as interesting as constitutional issues are in the midst of a Presidential election, this case is really very, *very* simple. If it's good enough for the Democrats to have until 5 p.m. on the first Tuesday in September to withdraw their candidate and replace him with someone else, then it's good enough for Kennedy and every other independent candidate. That basic principle of fundamental fairness is given force by the Equal Protection Clause and animated by the First Amendment. Neither provision of the Constitution tolerates third-party candidates being treated as second-class candidates. And the Wisconsin Statutes (properly read) prevent that as well. And thus, we ask that the Commission's order placing Kennedy on the ballot be stayed and that the Commission not be allowed to place his name on the ballot or, if it's the case that ballots have printed and been sent out (despite Kennedy's best efforts to ensure that didn't needlessly happen and no indication that it has happened) that the municipal clerks be directed to cover his name on every ballot with a sticker.

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[52] U.S. Const. art. II, §1.

[53] *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 653, 681 N.W.2d 110.

II. This Court should accept the interlocutory appeal and decide this case on its merits.

This Court is very familiar with the standards for interlocutory appeals and they won't be needlessly reiterated—though they are all present here.[54] The most important factor is likely success on the merits. As one scholar has noted:

> The most important criterion for determining whether an [interlocutory] appeal should be granted is not expressly included among the statutory criteria listed in section 808.03(2), although it is implicit in those criteria. This consideration is whether the petition for leave to appeal shows a substantial likelihood of success on the merits. . . .Likelihood of success on the merits is the first question the court will consider when responding to a petition for leave to appeal because the court will want to ensure that an appeal will not simply serve to delay and defeat the ends of justice, rather than expedite and clarify the proceedings.[55]

In seeking this interlocutory appeal, Kenedy isn't seeking delay, but speed; he's not seeking to defeat the ends of justice, but to make sure that justice delayed does not mean justice denied. After all, *Hawkins* counsels that there is a real fear that Kennedy's First and Fourteenth Amendment rights will be subordinated to concerns about voter confusion (even though it's the Commission that is causing the confusion by forcing his name to appear on the ballot). The only way to ensure that doesn't happen is to move with speed. And that isn't happening in the Circuit Court, where briefing

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[54] Wis. Stat. § 808.03(2); *See Cascade Mt. v. Capitol Indem. Corp.*, 212 Wis. 2d, 265, 267, 569 N.W.2d 45 (Ct. App. 1997).

[55] Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 9.4 (6th ed. 2014); *see also State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991).

will be set on Wednesday. Instead, it has to happen here, where this Court can quickly enter the appropriate order. Indeed, this is not the case where any deference would be given to the trial court because there is no factual issue in dispute.

To that end, this request for an interlocutory appeal is appropriate. Denying the temporary restraining order was an error of law. As his petition, motion, and brief all set out, Kennedy had met the statutory criteria for granting the order. It is per se an erroneous exercise of discretion when the Circuit does (as it did here) refuse to consider the most important factor at play: the irreparable harm that flows from inaction.

Looking at the four factors that a court considers when ordering injunctive relief—whether it's a preliminary injunction or a temporary restraining order—the two most important considerations are success on the merits and the harm that results from denial.[56] Here, the success has been covered for twenty pages, so too has the harm. If the ballots get released, the Commission will have created the very problem it will cite as the reason for denying relief: voter confusion because ballots have already issued. Granting the injunction is the only way to stop that. Considering the other two factors, there is no other means to stop this and preserved the status quo—Kennedy tried withdrawing his name, now judicial intervention is all that he has left to ensure that ballots are not printed with his name on them.

CONCLUSION

In the no-holds barred world of presidential elections, few things should come as a surprise. Yet, the Commission (again, made up of appointees from the two major parties) has accomplished that. It's used Kennedy, a third-party candidate as a means of creating voter confusion. And it has done so by creating a tiered system for a politician's ability to withdraw from the ballot; it has done so by compromising Kennedy's First

[56] *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, 370 Wis. 2d 644, 883 N.W.2d 154.

Amendment rights; and it has done so by misreading the very statutes it's supposed to be governed by. It is up to this Court to dispel that confusion and the violation of Kennedy's rights by accepting this interlocutory appeal and entering the preliminary injunction against the ballots going out.

Dated at Madison, Wisconsin, September 9, 2024.

Respectfully submitted,

Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff *Pro Hac Vice* Motion forthcoming	ROBERT F. KENNEDY, JR., *Petitioner* *Electronically signed by Joseph A. Bugni* Joseph A. Bugni *Wisconsin Bar No.* 1062514 HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com (608) 257-0945

CERTIFICATION

I certify that this brief conforms with the rules contained in Wis. Stat. § 809.50(1) and (4) for a petition produced with a proportional serif font. The length of this petition is 6,057 words.

Electronically signed by Joseph A. Bugni
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September 20, 2024

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You are hereby notified that the Court has entered the following order:

No. 2024AP1872 Kennedy v. Wisconsin Elections Comm'n, L.C.# 2024CV2653

The court having considered the petition to bypass the court of appeals submitted on behalf of respondent-respondent, Wisconsin Elections Commission, and the response to the petition filed by petitioner-appellant, Robert F. Kennedy, Jr.;

IT IS ORDERED that the petition to bypass is granted, and the appeal is accepted for consideration in this court; and

IT IS FURTHER ORDERED that the expedited briefing schedule established by the court of appeals shall continue to apply to the filing of the remaining merits briefs in this court. Given the need for a prompt resolution of this appeal, the court does not contemplate holding oral argument in this matter. The court will endeavor to issue a written decision as expeditiously as possible.

REBECCA GRASSL BRADLEY, J. (*dissenting*). A majority of this court grants the Wisconsin Elections Commission's (WEC) petition to bypass the court of appeals before the WEC has filed its response brief, despite the majority's professed practice in prior cases of "generally den[ying] as premature petitions for bypass prior to the filing of briefs in the court of appeals." See Jeffrey Becker v. Dane County, No. 2021AP1343 unpublished order (Wis. Nov. 16, 2021). The members of the majority do not follow their ostensible "rule" regarding so-called "premature" petitions with any consistency.[1]

Process matters. The members of the majority sometimes enforce a rule against "premature petitions" but sometimes they don't, without disclosing any standards by which they will choose whether to apply it. Such arbitrariness by courts is antithetical to the original understanding of the judicial role. See The Federalist No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961). ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."). The majority's arbitrariness in following its professed procedure in one case while discarding it in another sends a message to litigants that judicial process will be invoked or ignored based on the majority's desired outcome in a politically-charged case. I dissent.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

Samuel A. Christensen
Clerk of Supreme Court

[1] For example, the court unanimously granted a petition to bypass the court of appeals in State ex rel. Kaul v. Prehn, No. 2021AP1673, unpublished order (Wis. Nov. 16, 2021), at the same time it denied the petition in Becker. Just a few months before that, the court granted the Wisconsin Legislature's petition to bypass in Waity v. LeMahieu, No. 2021AP802, unpublished order (Wis. July 15, 2021), before the parties filed all of their briefs with the court of appeals. In those cases, the court neglected to explain its reasoning for granting the petitions while denying the petition in Becker, despite all three petitions having been filed before the completion of briefing in the court of appeals.

2024 WI 37

Supreme Court of Wisconsin

ROBERT F. KENNEDY, JR.,
Petitioner-Appellant,
v.
WISCONSIN ELECTIONS COMMISSION,
Respondent-Respondent.

No. 2024AP1872
Filed September 27, 2024

The Court entered the following order on this date:

This is a review of a circuit court order denying Robert F. Kennedy, Jr.'s request for a temporary injunction requiring the Wisconsin Elections Commission (WEC) to remove Kennedy as a candidate for President on the November 5, 2024 Wisconsin general election ballot. The case is before this court on bypass of the court of appeals pursuant to WIS. STAT. § (Rule) 809.60.

The facts relevant to this matter are as follows. On August 6, 2024, Kennedy and Nicole Shanahan submitted nomination papers and declarations of candidacy to WEC as independent candidates for President and Vice President in the November 2024 general election. On August 23, 2024, Kennedy sent a letter to WEC stating that he was "withdraw[ing] his candidacy from the 2024 United States Presidential Election" and requesting that his name not be printed on the ballot in Wisconsin. WEC considered Kennedy's request at an August 27, 2024 statutorily mandated meeting, at which WEC was required to certify the candidates to be placed on the ballot. *See* WIS. STAT. § 10.06(1)(i). The commissioners voted 5-1 to deny Kennedy's request to withdraw from the ballot based on WIS. STAT.

§ 8.35(1), which provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person." WEC included Kennedy's name on the certified list of candidates for President.

On September 3, 2024, Kennedy filed a petition for judicial review of WEC's decision under WIS. STAT. § 227.52 in the Dane County circuit court. Kennedy also immediately filed a motion for a temporary injunction that would compel WEC to remove his name from the ballot. After receiving briefing from the parties and declarations from WEC staff and various municipal clerks, and after having afforded Kennedy an evidentiary hearing at his request, the circuit court issued an oral ruling denying the temporary injunction motion on September 16, 2024. The circuit court memorialized its oral ruling in a written order that same day.

On September 17, 2024, Kennedy filed a petition for leave to appeal the denial of his motion for a temporary injunction, which the court of appeals granted on September 18, 2024. The following day, WEC filed a petition to bypass the court of appeals, which we granted on September 20, 2024.

In the circuit court ruling under review, the court examined whether Kennedy had satisfied the criteria for issuing a temporary injunction. A temporary injunction may be granted if: (1) the movant is likely to suffer irreparable harm if an injunction is not issued; (2) the movant has no other adequate remedy at law; (3) an injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35. The circuit court noted that a motion for injunctive relief is addressed to the sound discretion of the circuit court. Temporary injunctions are not to be issued lightly; the cause must be substantial. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).

The circuit court focused on the first, third, and fourth temporary injunction factors.[1] Regarding the first factor, the circuit court concluded that Kennedy had not demonstrated irreparable harm since Kennedy had voluntarily submitted his nomination papers and declaration of candidacy, thereby choosing to place his name before the voters. The circuit court also pointed to the fact Kennedy had simultaneously claimed harm in some states from not being removed from the ballot and harm in other states from not being placed on the ballot. On the other side of the balance, the circuit court noted the harm that would be inflicted on the public if the requested injunction were granted, including the high cost of reprinting ballots or the logistical problems in conducting an election with ballots on which stickers were placed to obscure Kennedy's name, as he requested. While the circuit court did not rely solely on this court's decision in *Hawkins v. WEC*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877, it said it was mindful of the admonition there that court orders issued during or close to elections can cause harm to the public in the form of voter confusion or an incentive for voters to refrain from voting. The circuit court further determined that Kennedy's requested injunction would alter the status quo and grant him the ultimate relief he sought in his petition, rather than maintain the status quo. *See School District of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997) ("The purpose of 'a temporary injunction is to *maintain the status quo*, not to change the position of the parties or *compel the doing of acts which constitute all or part of the ultimate relief sought*.' *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29, 34 (1964) (emphasis added)."). With respect to the likelihood of success on the merits of Kennedy's claim, the circuit court agreed with WEC's interpretation of WIS. STAT. § 8.35(1) that once a candidate has submitted nomination papers and a declaration of candidacy that meet the required qualifications to be on the ballot, the candidate's name must be placed on the ballot, unless the candidate dies prior to the election. The circuit court further concluded that Kennedy's claims of constitutional violations of his equal protection and free speech rights lacked legal merit, which meant that Kennedy had no likelihood of success on the merits. Considering all of these factors, the circuit court denied the motion for a temporary injunction.

[1] Regarding the second factor, there appears to be no dispute that money damages would not be an adequate remedy for Kennedy's alleged harm. *See Sprecher v. Weston's Bar, Inc.*, 78 Wis. 2d 26, 50, 253 N.W.2d 493, 504 (1977).

In this appeal our task is not to decide the merits of the case, but simply to review whether the circuit court properly exercised its discretion in denying the requested temporary injunction. *Serv. Emps. Int'l Union*, 393 Wis. 2d 38, ¶93 (circuit court's decision to grant or deny a motion for a temporary injunction is reviewed for an erroneous exercise of discretion). We will sustain a discretionary decision as long as the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898.

As the party challenging the circuit court's exercise of discretion, Kennedy has the burden of demonstrating an erroneous exercise of discretion. *See Colby v. Colby*, 102 Wis. 2d 198, 207–08, 306 N.W.2d 57 (1981). The challenger must demonstrate that the circuit court did not examine the relevant facts, apply a proper standard of law, or reach a conclusion that a reasonable judge could reach by applying a demonstrated rational process. We conclude that he has failed to satisfy this burden.

It is worth pointing out that, in addition to the case law that places the burden of demonstrating an erroneous exercise of discretion on the appellant, the court of appeals' order granting leave to appeal twice explicitly directed Kennedy's counsel to address the merits of his appeal in his appellate briefs, as well as to answer specific questions posed by the court of appeals. *Kennedy v. WEC*, No. 2024AP1872, unpublished order at 2 (Wis. Ct. App. Sept. 18, 2024) ("Granting Kennedy's leave petition now will allow briefing on the merits of Kennedy's claim to commence immediately—specifically, whether the circuit court erred by denying Kennedy's motion for a temporary injunction."); *id.* at 3 ("In addition to whatever arguments the parties wish to make in their briefs on whether the circuit court erred by denying Kennedy's request for a temporary injunction, the parties shall address the following questions in their briefs: . . . . ").

Despite this additional admonition from the court of appeals, Kennedy's appellate briefs fail to develop arguments showing an erroneous exercise of discretion. We focus initially on the fourth injunction factor—whether Kennedy has demonstrated that the circuit court erred in concluding that he lacked a reasonable probability of success on the merits. First, we note that Kennedy's appellate briefs omit any argument that the circuit court misinterpreted WIS. STAT. § 8.35(1). While Kennedy's appellate briefs do mention his constitutional arguments (equal protection, free

speech, and freedom of association) in cursory terms, they fail to develop those arguments to even a minimal standard sufficient for us to consider their merits. Kennedy's appellate briefs focus primarily on the additional questions posed by the court of appeals, but they wholly fail to provide legal arguments on the merits of his constitutional claims, supported by citation to legal authority, from which we could make a legal determination as to whether the circuit court erred in finding them to be without merit.[2] The inadequacies of Kennedy's appellate briefs therefore render us unable to perform the required review of the circuit court's exercise of discretion with respect to the fourth factor. *See Southwest Airlines Co. v. DOR*, 2021 WI 54, ¶32 n.10, 397 Wis. 2d 431, 960 N.W.2d 384 ("Further, Southwest's due process and equal protection arguments are undeveloped, and we generally do not address undeveloped arguments." (citation omitted)); *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212 ("'[W]e do not usually address undeveloped arguments,' and we will not do so here." (alteration in original) (citation omitted)).

The inadequacy of Kennedy's briefs on the fourth factor also impact our ability to review the first factor regarding whether Kennedy will suffer any irreparable harm in the absence of a temporary injunction. His claims of harm are based on his alleged constitutional violations. Since he does not provide us a sufficient basis to assess those claims, we cannot determine whether the circuit court erred in finding that he will not suffer irreparable harm in these circumstances.

Having failed to demonstrate error by the circuit court on both the probability of success on the merits and the presence of irreparable harm, it is unnecessary to address the other factors. We conclude that Kennedy has failed to satisfy his burden of demonstrating an erroneous exercise of discretion. We emphasize that we are not making any legal determinations on our own regarding the claims made by Kennedy and we are not agreeing with the circuit court's legal conclusions on those claims. We simply are unable to make such determinations, given the inadequate briefing presented to us. Consequently, because there is no basis in this appeal on which we could determine that the circuit court erroneously exercised its

[2] It is worthwhile to note that, after we granted the petition for bypass and Kennedy filed a motion for oral argument in which he lamented that WEC's response brief had addressed the merits of his claims, we gave Kennedy's counsel extra time to file an amended and longer reply brief.

discretion, we must affirm the circuit court's order denying Kennedy's motion for a temporary injunction.

The order of the circuit court denying the motion for temporary injunction is affirmed.

KENNEDY *v.* WEC
JUSTICE REBECCA GRASSL BRADLEY, concurring

REBECCA GRASSL BRADLEY, J., with whom ANNETTE KINGSLAND ZIEGLER, C.J., joins, concurring.

Robert F. Kennedy Jr. withdrew his candidacy and requested his name not appear on the ballot—before any ballots were approved or printed. WEC refused, fomenting voter confusion in a battleground state that could decide who will be the next President of the United States. Under state statutes, different rules apply to major party candidates, triggering colorable federal constitutional claims. *See, e.g.*, WIS. STAT. § 8.35(1). The manner in which the case is postured places the court in the position of not deciding the merits, but reviewing what is a circuit court's discretionary decision to deny a request for an injunction. This court concludes the constitutional arguments are insufficiently developed, preventing us from determining whether the circuit court erred in rejecting them. I do not disagree, but the timelines under which WEC—and this court—operate hamstring candidates in Kennedy's situation, leaving little time to brief and argue substantial issues lest this court ultimately invoke the doctrine of laches against a party for any delay. *See, e.g.*, *Trump v. Biden*, 2020 WI 91, ¶¶13-22, 394 Wis. 2d 629, 951 N.W.2d 568.

Kennedy could have filed an original action petition with this court rather than proceeding in circuit court, but this court's decisions to grant or deny original action petitions lack predictable standards, leaving parties to guess the right avenue for challenging WEC's decisions. *See, e.g.*, *Trump v. Evers*, No. 2020AP1971, unpublished order (Wis. Dec. 3, 2020); *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930, unpublished order (Wis. Dec. 4, 2020); *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 995 N.W.2d 779; *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; *Phillips v. Wis. Elections Comm'n*, 2024 WI 8, 410 Wis. 2d 386, 2 N.W.2d 254. Proceeding in the circuit court first leaves a party with less time for meaningful appellate review. Filing an original action risks wasting time that could have been spent litigating in circuit court.

The ramifications in this case are immense. Important constitutional claims go unreviewed. Voters may cast their ballots in favor of a candidate who withdrew his candidacy, thereby losing their right to cast a meaningful vote. Ballots listing a non-candidate mislead voters and may skew a presidential election. In this case, the damage to voter participation in electoral democracy is real.

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Respondent.

ROBERT F. KENNEDY, JR.'S MOTION FOR RECONSIDERATION

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

ROBERT F. KENNEDY, JR,
Petitioner-Appellant

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I. In arriving at its decision, this Court may have missed a substantial amount of the briefing from the lower court.

Election cases, especially this time of year, are always rushed. And in this case's haste, with two interlocutory appeals and a non-conventional briefing schedule from the Court of Appeals and a bypass petition, things can get lost. On Friday evening, less than a week after briefing was complete, the Court denied Kennedy's appeal.[1] The Court's reasoning rested on the Appellant's failure "to address the merits of his appeal in his appellate briefs."[2] It added: "We emphasize that we are not making any legal determinations on our own regarding the claims made by Kennedy and we are not agreeing with the circuit court's legal conclusions on those claims. *We simply are unable to make such determinations, given the inadequate briefing presented to us. Consequently, because there is no basis in this appeal on which we could determine that the circuit court erroneously exercised its discretion*."[3] Kennedy respectfully submits that the briefing this Court was looking for was filed, and it was his two petitions for interlocutory appeals, which the Court of Appeals accepted and ordered further *memorandum* briefing upon.[4] Those briefs (containing the heart of his argument) are attached. In five pages, this is everything the Court needs to know to grant this motion for reconsideration.[5]

A. The procedural history of this case makes plain the arguments that were made and presented to this Court when it accepted bypass.

Almost a month ago to the day, Kennedy moved for a preliminary injunction and a temporary restraining order based on the same arguments—his Equal Protection and First Amendment rights were violated by keeping him on the ballot.[6] When the temporary restraining order was denied, Kennedy filed leave to take an interlocutory appeal.[7] In

[1] 2024-09-27 Order of the Court.

[2] *Id.* at 4.

[3] *Id.* at 5-6 (emphasis added).

[4] 2024-09-18 Court Order.

[5] Wis. S. Ct. IOP III.J; *see Koepsell's Olde Popcorn Wagons v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 6.

[6] Dkt. #2 at 3.

[7] Dkt. #33.

that brief, and over the course of 27 pages, Kennedy raised two arguments around his First Amendment and Equal Protection Clause claims.[8] The Commission then filed a 36-page brief in response, citing and discussing those very same cases and whether those seminal cases provided a basis for relief.[9] The next day, Kennedy filed leave to file a reply brief in the Court of Appeals and a reply brief.[10] The Court of Appeals accepted the reply brief, which was 11 pages long and dealt with the bedrock of Kennedy's constitutional claims.[11]

In response to all of that briefing, the Court of Appeals held the appeal in abeyance while the Circuit Court ruled imminently on the preliminary injunction question.[12] Again, the request for the temporary restraining order and the preliminary injunction all stemmed from the same allegations and legal arguments made in the briefing before the Circuit Court.

After the Circuit Court denied relief on the preliminary injunction, Kennedy petitioned to appeal that decision building on the briefing that was held in abeyance.[13] Kennedy's brief began: "*There's no reason to just copy-and-paste last week's brief*, and so this petition is streamlined to focus on the circuit court's denial of the temporary injunction and the problems with its reasoning."[14] Over the next 23 pages, the brief focused entirely on *how* and *why* the Circuit Court erred in denying the temporary injunction.[15] And those arguments dovetailed with the constitutional arguments that had been raised in the first petition to appeal that had been held in abeyance.

Immediately *after* filing that brief, the Court of Appeals issued its order granting the interlocutory appeal.[16] And this is where it's clear that the Court was abandoning the normal course for an interlocutory appeal

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[8] Dkt. #33 at 2.

[9] 2024-09-11 Respondent Response to Petition.

[10] 2024-09-12 Motion for Leave.

[11] 2024-09-12 Reply Brief.

[12] Dkt. #36.

[13] 2024-09-17 Petition for Leave to Appeal (emphasis added).

[14] *Id.* at 5.

[15] *Id*.

[16] 2024-09-18 Court Order.

and relying on the cumulative knowledge and familiarity it had from the petitions:

> We recognize that WEC has not yet responded to Kennedy's current petition. However, this court has thoroughly reviewed the response WEC filed to Kennedy's petition in appeal No. 2024AP1798-LV, and we are well aware of WEC's position and arguments. *Because of the extreme time pressure on this case, we have decided to review Kennedy's current petition ex parte. We are persuaded that sufficient leave criteria are satisfied and grant Kennedy's leave petition*.[17]

That is, the Court saw the briefs as one whole and it fully understood the arguments in support of Kennedy's claims and the Commission's response.

This is also where (counsel respectfully submits) the previous 61-pages of briefing were lost when this Court rendered its decision. In most cases of an interlocutory appeal, the granting of the petition acts as the notice of appeal and then a full briefing schedule commences with merit briefing. That didn't happen here. Instead, given the "extreme time pressure," the Court of Appeals issued an order calling for *memorandum* briefing to commence on consecutive days on the question of remedy, while giving leave to make "whatever arguments the parties wish to make on whether the circuit court erred in denying the request for a temporary injunction."[18] This briefing on remedy and "whatever" other arguments the parties wanted to raise was only 5,500 words—less than half of what would come with normal merits briefs. That is, the Court of Appeals order suggested (if not established) that it was familiar with all of the arguments and didn't want to hear everything again; it wanted the briefing it called for.

Kennedy went first focusing almost entirely on the question of remedies and the Court's equitable powers because those were what the

[17] *Id*. at 2.

[18] *Id*. at 3.

Court asked for briefing on.[19] After that filing and in the span of a few hours, there was a flurry of briefing on bypass and whether it was premature.[20] This Court granted bypass, but did *not* order a new set of merits briefs.[21] Instead, it kept the Court of Appeals *memorandum* briefing schedule in place, which meant that the Commission had to file a brief that day at noon and Kennedy a few hours later.

The Commission filed a very fine brief on the merits of Kennedy's claims.[22] Importantly, at no place in the brief did it argue that Kennedy's claims were undeveloped because they hadn't been made or briefed leaving the Commission to guess at what Kennedy's claims were. Instead, the brief took the issues head on with the very same cases that Kennedy had used and argued in the two petitions about the Equal Protection Clause.[23] After addressing *that* argument for four more pages, it turned to his First Amendment argument.[24] That argument went on for 4 pages, setting out the First Amendment arguments and wrestling (again) with the *very* same cases that Kennedy had cited in the petitions.[25] Again, and making this point pellucid: the Commission *never* argued that Kennedy's claims were *not* made or were undeveloped. They took them on the merits—merits they understood from the original briefing.

With the next brief due in a few hours, and knowing that there was a lot to throw on this Court's plate with the bypass petition having been granted, counsel filed a motion for oral argument—asking that it be held over the weekend (if needed).[26] After filing that, Kennedy responded in the ten pages allotted by the Court of Appeals' order for memorandum briefing and did his best to focus the argument, believing that this Court had the

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[19] 2024-09-19 Brief of Appellant.

[20] 2024-09-19 Petition for Bypass; 2024-09-19 Response to Petition for Bypass.

[21] 2024-09-20 Court Order (Petition to Bypass).

[22] 2024-09-20 Response Brief.

[23] 2024-09-20 Response Brief at 15-18.

[24] *Id*. at 18.

[25] *Id*. at 18-22.

[26] 2024-09-20 Motion Requesting Orgal Argument.

benefit (as the Court of Appeals did) of the Petitions and the 61 pages of briefing they contained.[27]

An email from the Clerk of Court alerted counsel to expect an after-hours-order. In it, the Court denied oral argument but allowed Kennedy to file an amended reply Saturday by noon.[28] And he did. Expanding on some points and adding additional cases, counsel did not copy-and-paste from the original petitions.[29] Counsel had very limited space and given the unusual nature of the briefing order—not asking for full merit briefing—he went with addressing the salient points, anticipating that this Court had access to the 60 pages of briefs that had been previously filed in the petitions and that the Court of Appeals was familiar with. In those pages, all of the arguments that this Court needed to understand *why* the Circuit Court erred in denying the preliminary injunction were set out. This table spells it all out, and (again) those briefs are attached.

Brief	Equal Protection Clause	First Amendment
Petition for Leave to Appeal	3, 6-9, 12, 16-19,	7-9, 15-16, 20-23
Reply in Support of Petition for Leave to Appeal	3, 8-10	3, 4-5, 8-10
Second Petition for Leave to Appeal	6-7, 15-16	17-18

[27] 2024-09-20 Reply Brief.

[28] 2024-09-20 Court Order (Motion for Oral Agument).

[29] 2024-09-23 Amended Reply Brief.

B. In cases where the Court has overlooked a critical fact in the record, reconsideration is proper.

Under Wis. Stat. § 809.64, a party may seek reconsideration. And this Court's internal operating procedures provide guidance on *when* reconsideration is appropriate: "A change of decision on reconsideration will ensue only when the court has overlooked controlling legal precedent or important policy considerations or has overlooked or misconstrued a controlling or significant fact appearing in the record."[30] Here, the Court has *respectfully* overlooked a significant fact in the record—namely, Kennedy made and developed his claims that were briefed before the Court of Appeals and when this Court granted bypass they were all part of the record before it.

That is, Kennedy's claims about the Circuit Court's erroneous exercise of discretion were not undeveloped, especially when you consider the briefing and what constitutes an "undeveloped claim." Case law provides guidance on what is (and is not) a developed claim. In its order, this Court cited two cases: *Southwest Airlines Co. v. DOR*, 2021 WI 54, ¶ 32 n.10, 397 Wis. 2d 431, 960 N.W.2d 384; *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶ 39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212. Both stand for the proposition that the Supreme Court does not address undeveloped arguments. Both cases provide good examples of what an undeveloped argument is. In *Parsons,* this Court noted: "The circuit court rejected that argument, characterizing it as 'superficial.' Despite this warning, the Parsons' argument on this issue before this court is a single paragraph long and does not cite to any legal authorities." *Parsons,* 2017 WI 39, n.8. In *DOR,* this Court noted "[w]e need not address this argument because the record before us in[sic] insufficient, as it does not include the necessary underlying data." 2021 WI 54, ¶ 32, n.10. And both cases cited to this Court's decision in *Gracia,* where this Court gave a clear indication of what fits the "undeveloped bar" and it was this: "In a footnote in his brief, Gracia states, '[e]ven if he had been injured, Mr. Gracia would have a constitutional right to decline unwanted medical assistance.' This argument is undeveloped, and we do not usually address undeveloped

[30] Wis. S. Ct. IOP III.J.

arguments." *State v. Gracia*, 2013 WI 15, ¶ 28 n.13, 345 Wis. 2d 488, 826 N.W.2d 87 (internal citations omitted).

A bald assertion, a passing argument with no data, or a mere footnote, all of those would be improper vehicles to frame and present an argument to this Court. But that's not what happened here. Kennedy developed those arguments and provided the relevant case law; it was his core argument, developed in sixty pages, over two petitions to the Court of Appeals. Agree or disagree with the First Amendment and Equal Protection argument, but the claim wasn't undeveloped. Rather, given the unusual way this case proceeded, those arguments (the briefs) simply got overlooked.

II. Conclusion

This Court is the highest body in this State and the people come to it looking for fair and impartial justice. And sometimes, mistakes are made, a point is missed. Under these circumstances, it's appropriate to vacate the order, allow Kennedy to present oral argument, and address the merits of his claim.

Dated at Madison, Wisconsin, October 1, 2024.

Respectfully submitted,

Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff *Pro Hac Vice* Motion forthcoming	ROBERT F. KENNEDY, JR., *Petitioner* *Electronically signed by Joseph A. Bugni* Joseph A. Bugni *Wisconsin Bar No.* 1062514 HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com (608) 257-0945

CERTIFICATION

I certify that this brief conforms with the rules contained in Wis. Stat. § 809.50(1) and (4) for a petition produced with a proportional serif font. The length of this petition is 2,263words.

Electronically signed by Joseph A. Bugni
Joseph A. Bugni

FILED
09-06-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV002653

BY THE COURT:

DATE SIGNED: September 6, 2024

Electronically signed by Stephen E Ehlke
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 15 DANE COUNTY

ROBERT F. KENNEDY, JR.,

Petitioner,

v. Case No. 2024-CV-2653

WISCONSIN ELECTIONS COMMISSION, et al.,

Respondents.

DECISION AND ORDER
DENYING PETITIONER'S MOTION FOR AN EX PARTE ORDER

Petitioner Robert F. Kennedy, Jr., originally filed a petition commencing a chapter 227 judicial review action to challenge the Commission's decision approving his nomination papers and the inclusion of his name as an independent candidate for President on the November 5, 2024 General Election ballot. Petitioner subsequently filed a motion for emergency *ex parte* temporary restraining order, asking the court to rule on it, without hearing, by 5:00 p.m. today. In his motion for an *ex parte* order Petitioner asks this court to stay enforcement of the Commission's order placing him on the November ballot. Respondent Wisconsin Elections Commission opposes any *ex parte* temporary restraining order and urges the Court to deny Petitioner's request.

Having considered Petitioner's request for an *ex parte* temporary restraining order, it is denied. A matter of such consequence deserves a full development of the record with appropriate briefing by all sides. Accordingly, a telephonic scheduling conference is scheduled for September 11, 2024 at 2:15 p.m. IT IS SO ORDERED.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP____

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondents-Respondents.

ROBERT F. KENNEDY, JR.'S PETITION FOR LEAVE TO APPEAL

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

ROBERT F. KENNEDY, JR,
Petitioner-Appellant

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INTRODUCTION

The Supreme Court has been clear: third-party candidates can't be treated as second-rate candidates, burdened by laws and restrictions that don't apply to the two major-party candidates. Yet, that's what's happened here. Robert F. Kennedy, Jr., told the Wisconsin Elections Commission that he wanted to be off Wisconsin's ballot. They said no, he doesn't have the right. Even though the two major parties had until September 3 to do so—the day Kennedy filed suit to get off the ballot—he was supposed to let the Commission know a full month earlier. A deadline that was actually *before* the DNC had even met and nominated Vice President Harris.

This is a Presidential election and entrenched political parties play games.[1] We all know it. And so, it's not surprising that this isn't the first time that a third-party candidate has been treated differently. When that's happened the Supreme Court has given extremely clear guidance on what the Constitution tolerates.[2] And it's not unequal treatment: "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment."[3] Giving that unimpeachable principle teeth, the Court went on to make clear exactly what it meant: "[I]n a Presidential election[,] a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries."[4] In other words, two-tiered treatment with different standards

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[1] *E.g.*, Sarah Lehr, *Democrats Ask Wisconsin Supreme Court to Boot Green Party from Ballot*, WPR (Aug. 20, 2024).

[2] *Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983).

[3] *Id.*

[4] *Id.* at 794–95.

for third-party candidates will not be tolerated, especially in a Presidential election.[5]

After all, unequal treatment violates the very core principles of Equal Protection, and it trounces on the very promises that the First Amendment is supposed to hold inviolate—namely, being free from compelled speech and association. Indeed, Kennedy's rights are no less precious (or protected) than Biden's or Harris's, yet he's being treated differently because he's an independent candidate and did not (as his relatives did) march under the Democrat's banner.

Demanding that his rights not be diminished on that basis, Kennedy filed suit in Dane County—as he must.[6] He filed for a preliminary injunction and a temporary restraining order, seeking immediate relief and for the Commission to strike his name from the ballot.[7] That motion was denied late Friday afternoon, and the Court set a status conference more than a full week after he filed suit.[8] At that conference, a briefing schedule will be set, and Kennedy's claim will likely be mooted.

Kennedy made such haste in filing suit and now seeking an interlocutory appeal because once the ballots are printed and sent out, the Wisconsin Supreme Court in *Hawkins* has indicated that the claims may be moot.[9] The risk of voter confusion is too great.[10] And so Kennedy is running against the clock: as soon as the ballots are approved and sent out, the Commission (who has already rejected his request) will simply assert that *Hawkins* controls—arguing purported voter confusion trumps Kennedy's

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[5] *Id*.

[6] Wis. Stat. § 227.53(1)(a)3.

[7] App. 8–9, 19–20.

[8] App. 19–20.

[9] *Hawkins v. WEC*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W. 877.

[10] *Id*.

constitutional rights. Put differently, where the Constitution and the law don't favor the Commission, time does. Its victory will not be one of principle and precedent but procrastination.

Kennedy needs the Court to act and to act quickly; he needs the Court to address his constitutional arguments and take him off the ballot. It's supposed to be that "when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed."[11] To call foul (as the law demands), this Court cannot wait for the Circuit Court to act and the parties to take their time with the briefing.[12] Rather, Kennedy needs this Court to exercise its discretion, take this interlocutory appeal, and take the rare—but appropriate—step of addressing this claim immediately on the merits and granting Kennedy the relief he seeks: order his name not added to the ballot.

[11] *James v. Heinrich*, 2021 WI 58, n.18, 397 Wis. 2d 517, 960 N.W.2d 350 (lead opinion) (quoted source omitted).

[12] *See In re Fort Worth Chamber of Com.*, 100 F.4th 528, 534–35 (5th Cir. 2024) ("Given the Chamber's diligence in seeking to expedite briefing and consideration, and its repeated requests for a ruling by specific dates so as to avoid substantial compliance with the new rule, the district court effectively denied the [preliminary injunction] motion by failing to rule on it by those dates," even though the "district court found good cause to expedite the briefing schedule.").

STATEMENT OF ISSUES PRESENTED

In deciding this appeal there are three issues concerning the merits.

1. The Equal Protection clause prevents states from unfairly burdening third-party candidates. Here, Wisconsin law demands that third-party candidates move to withdraw from the ballot a full month before the major parties. Is that arbitrary distinction based on party designation consistent with the Equal Protection Clause's guarantees?

2. The First Amendment forbids coerced speech and association. Here, Kennedy does not want his name on the ballot, which makes a statement he's explicitly disavowed—namely, I am seeking votes in Wisconsin a bid for President of the United States. Does forcing that statement and his association with the candidacy violate his First Amendment rights?

3. Wisconsin law provides that any person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The term "qualifies" has been misread by the Commission. Before the ballot was approved, Kennedy withdrew his candidacy and since he cannot be drafted into being a candidate—against his will—he no longer "qualifies" as one. Did the Commission err in its reading of the statue's text?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues raised in this appeal can be fully addressed by briefing, but if the Court has questions, Kennedy would ask for immediate oral argument. The decision of the Court should be published if the matter is decided on the merits.

STATEMENT OF THE FACTS

Like President Biden, Kennedy thought it was a good idea to run for President. Both have been lifelong politicians and have great name recognition. Hoping to win the Presidency, both sought to have their names appear on Wisconsin's ballot. Biden timely submitted his documents and so did Kennedy. As the presidential campaigns raged on, both men had second thoughts about continuing their pursuit. Initially, both pushed off calls to withdraw—some vehement, others caustic. And into the middle of the summer, both forged ahead with their campaigns, stating for the world to hear: they wanted to be President.

Yet, they both eventfully changed their minds. And Wisconsin (like almost every other state) allows for that—sometimes a candidate drops off for personal reasons, sometimes it's a scandal, sometimes it's health-related. Whatever the reason, the law recognizes that no one should be compelled to continue with a campaign for office—and having the ballot declare they want citizens to vote for them—if they don't want it. Ours is a free country, rooted in liberty and the promise that everyone (even politicians) aren't compelled to give a message they disavow.[13]

But while Biden had until the first Tuesday in September to withdraw, Kennedy had to let the Commission know a full month before that. (Again, he was supposed to withdraw even before the DNC had announced its candidate.) Indeed, it's helpful to imagine the competing candidates' situations this way:

	BIDEN	KENNEDY
Announced their withdrawal	Before September 3, 2024	Before September 3, 2024 (but after August 6, 2024)
Deadline to submit a declaration of candidacy	September 3, 2024	August 6, 2024
Allowed to withdraw?	Yes	No

[13] Wis. Const. art. I, §§ 1, 3; *see also McCutcheon v. FEC*, 572 U.S. 185, 191–92 (2014).

The issue in the circuit court and on appeal is why? Why the different playbook for Kennedy as opposed to Biden. It can't be because of some compelling state need to check the signatures and makes sure that every "i" is dotted and "t" is crossed. Kennedy simply wants off the ballot, there is no rigorous testing of a candidate's qualifications when they want off the ballot—you simply do not include his name. It can't be that this is some impossible administrative task. Again, Kennedy is simply asking to not be put on the ballot. And getting off the ballot isn't something that *never* happens that these ballots. State law provides a mechanism for removing someone in case of death—so it can be done.[14] Without any reason—let alone a compelling reason—the only difference in the treatment rests on the prohibited fact that third-party candidates are treated differently (read: worse) than the two mainstream party candidates. Put in the constitutional parlance of our claims, this unequal treatment subordinates Kennedy's First Amendment rights beneath those of Biden and other major party candidates.

Refusing to tolerate that treatment, Kennedy sued the Commission and every other interested party.[15] He asked for a preliminary injunction and (knowing the importance of timing) a temporary restraining order.[16] The initial complaint and motion were filed on Tuesday, September 3, a follow-up motion the next day, and service was perfected a day later.[17] In the motion for a temporary restraining order, Kennedy asked for an order by 5:00 on Friday. Grant it, great. Deny it, fine—we'll appeal. All the while,

[14] Wis. Stat. § 8.35(1).

[15] App. 1–7.

[16] App. 8–9.

[17] App. 10–12.

every newspaper and political talk show and news station in Wisconsin covered the story.[18]

As the hours passed, the WEC's attorneys put in their notice and we waited for a brief to follow.[19] Something that would defend Kennedy's unequal treatment. None came. Instead, on Friday, the WEC sent in a letter, asking that the motion be dismissed because they weren't properly served.[20] Again, it wasn't that they didn't have notice or that this wasn't an important issue or that time wasn't of the essence. They quibbled about who got the complaint. Again, ducking the merits would mean Kennedy's claim could be denied through procrastination and not principle.

Late Friday afternoon, the Circuit Court weighed in.[21] No temporary restraining order would come. No denial on the merits. Instead, in five days the lawyers would leisurely convene and set a briefing schedule on the merits. The principle has always been: justice delayed is justice denied. And the greater the delay in reaching the merits, the more likely it is (closing in on certainty) that they will never be heard and Kennedy's claims denied. Hence, the need for this interlocutory appeal.

The following is a brief but comprehensive timeline of the case, the filings, and Kennedy's attempts to get off the ballot and not have his name associated with something he has disavowed. The statutory deadlines are on the left and Kennedy's or WEC's actions are on the right.

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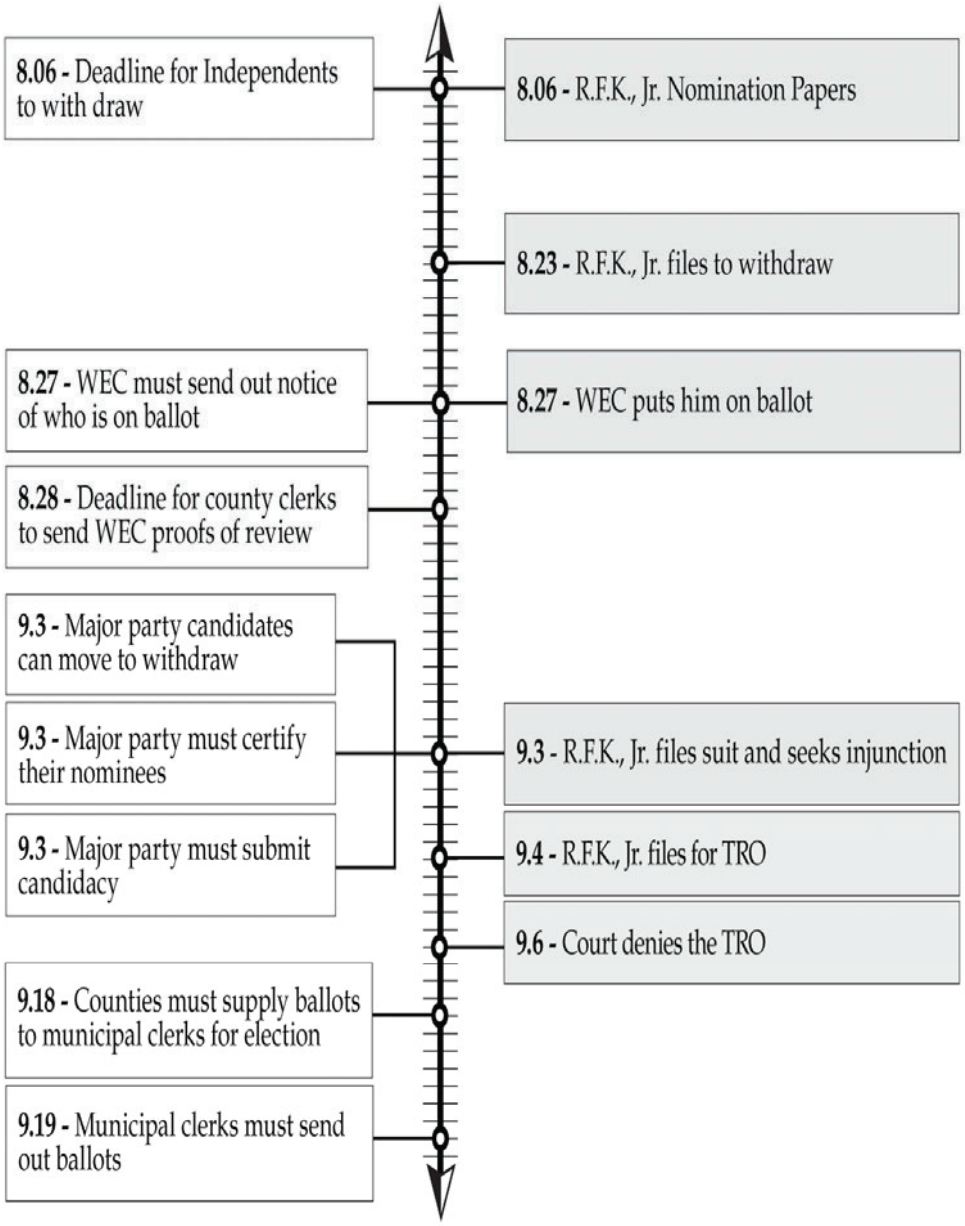
[18] Rich Kremer, *RFK Jr. Suing to Remove His Name from Wisconsin Presidential Ballot*, WPR (Sept. 4, 2024), https://tinyurl.com/yx3nzhyp.

[19] App. 13–18.

[20] App. 21.

[21] App. 19–20.


8.06 - Deadline for Independents to with draw
8.06 - R.F.K., Jr. Nomination Papers
8.23 - R.F.K., Jr. files to withdraw
8.27 - WEC must send out notice of who is on ballot
8.27 - WEC puts him on ballot
8.28 - Deadline for county clerks to send WEC proofs of review
9.3 - Major party candidates can move to withdraw
9.3 - Major party must certify their nominees
9.3 - Major party must submit candidacy
9.3 - R.F.K., Jr. files suit and seeks injunction
9.4 - R.F.K., Jr. files for TRO
9.6 - Court denies the TRO
9.18 - Counties must supply ballots to municipal clerks for election
9.19 - Municipal clerks must send out ballots

ARGUMENT

I. The trial court erred in refusing to enter the temporary restraining order and instead setting briefing

The facts outlined above and alleged in the complaint make it plain: there's a different set of rules for Kennedy than Biden; there's a different playbook for the Democrats than for Independents. That violates the promise of equal protection for candidates. And it violates Kennedy's rights to free speech and association. What follows makes that plain. Indeed, little case law needs to be cited to know that Biden shouldn't be treated better than Kennedy. And everyone knows that putting someone on the ballot against their will—compelling their speech—is repugnant to the First Amendment. It's worth adding that suits like this have been filed in two other states and so far Kennedy has triumphed in both.[22] As much as political games and maneuvering are expected and tolerated every four years, once they trample on a person's constitutional rights, courts have to stop them: "when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed."[23]

But maybe this Court doesn't want to delve into those heady constitutional waters, and Kennedy is agnostic about how he gets off the ballot. If the Court wants an easy out from the constitutional issues, it simply has to read the statute. Wis. Stat. § 8.35, which falls under the heading "Vacancies after nomination," states in relevant part: "Any person who files nomination papers **and qualifies to appear on the ballot** may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person." The text is "qualified to be on a ballot," which isn't simply a person who is over thirty-five and a citizen (the demands of

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[22] Paul Egan, *Appeals Court Reverses Earlier Rulings, Says RFK Jr.'s Name Should Be Removed from Ballot*, Detroit Free Press (Sept. 7, 2024, 5:37 AM), https://tinyurl.com/yeywa59y; App. 22–28.

[23] *Heinrich*, 2021 WI 58, n.18 (lead opinion) (quoted source omitted).

Article II); rather, a qualified candidate is one who has put himself out there and declared that he wants to be a candidate, **and one whom the Commission deems to be "qualified" to appear on the ballot**. Hence why the WEC requires all presidential candidates (including the major parties) to file a declaration of candidacy.[24] After all, a person isn't actually a viable (read: qualified) candidate until the Commission puts him on the ballot. And here, on August 23, 2024, Kennedy let the Commission know he wasn't interested far before the Commission made that decision on August 27, 2024. That is, he withdrew his declaration and with it any possibility that he could be considered a person who is "qualified to appear on the ballot."

Whether this Court engages with the concrete demands of the Equal Protection Clause, the lofty promises of the First Amendment, or the technical reading of the statute, the result is the same: The Commission must be ordered to not send out any ballot with Kennedy's name on it. To the extent that may have already happened—despite the haste that has attended Kennedy's every move and no indication any ballot has been printed yet—this Court should require the Commission to follow the procedures that govern what happens when a candidate dies.[25] In those instances, the Commission supplies the municipal clerks with stickers to put over the candidate's name. To be absolutely clear, Kennedy doesn't care *how* his name is excised from the ballot—he just doesn't want a single voter in Wisconsin to be confused and believe (for one second) that he's interested in their vote.

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[24] *Deadline to Certify Presidential & Vice Presidential Candidates*, WEC (last visited Sept. 7, 2024), https://tinyurl.com/mr2su3hv.

[25] Wis. Stat. § 8.35(2)(d).

A. Treating third-party candidates differently, with additional burdens and restrictions, violates the Equal Protection Clause's guarantees.

The Supreme Court has consistently held: statutes cannot "unfairly or unnecessarily" burden an independent candidate's interest in the "availability of political opportunity."[26] To do so, violates the First Amendment. The precedents surrounding ballot-access issues embody a deep-seated fear of two-party entrenchment and what it portends for those outside the two parties—a marginalized and compromised voice.[27] (It's worth noting that *all* of the members of the Commission are from the two major parties – party leaders in the legislature are in charge of appointing commissioners.)[28] Consistent with that principle, the Supreme Court has held that a statute restricting ballot access is unconstitutional when it practically prohibited a minor political party with a "very small number of members" from appearing on the ballot.[29] It reasoned, voters have a right to "associate for the advancement of political beliefs" and to "cast their votes effectively," regardless of their "political persuasion."[30] Axiomatically, the First and Fourteenth Amendments, viewed together, require that whatever opportunity the major political parties have to associate or disassociate from a particular candidate be provided on equal terms to independent, third-party candidates.[31] In a word, what's good for the goose is good for the gander.

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[26] *See Lubin v. Panish*, 415 U.S. 709, 716 (1974).

[27] *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

[28] *Members and Administrator*, WEC (last visited Sept. 7, 2024, 1:24 PM), https://tinyurl.com/43kdwxs4; Wis. Stat. § 15.61(1)(a).

[29] *Williams,* 393 U.S. at 24.

[30] *Id.* at 30.

[31] *See Janus v. AFSCME*, 585 U.S. 878, 891–92 (2018).

Yet, from time to time (as we have here), third-party candidates have been treated differently from those inside the entrenched two-party system. In 1980, the Natural Law Party chose its candidate, but when scandal swirled around the Vice Presidential candidate, the powers-that-be didn't want to allow the Natural Law Party the ability to switch out the Vice Presidential candidate—despite the Republicans and Democrats having that exact same ability on an extended timeline.[32] This was challenged on various grounds, and when consulted, the Attorney General gave his opinion:

> Preventing Anderson from considering relevant issues and events in the selection of his running mate during this critical period of electoral activity, *as are the major parties, is a substantial disability for his campaign*.[33]

The opinion added in a note that resonates here:

> Further, the interest of all the citizens of Wisconsin in having their presidential electors cast meaningful votes in the event the Anderson ticket should gain a plurality in the November election counsels against including anyone but Lucey on the Anderson ticket.[34]

Put differently, the voters don't benefit from different rules for different parties, and for that matter, the Equal Protection Clause doesn't allow it.[35]

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[32] OAG 55-80 (Sept. 17, 1980) (Unpublished Opinion) (1980 WL 119496 (Wis.A.G.)); *see also Brown County v. Brown Cnty. Taxpayers Ass.*, 2022 WI 13, ¶ 32, 400 Wis. 2d 781, 971 N.W.2d 491.

[33] *Id.*

[34] *Id.*

[35] *Id.*

Here, Wisconsin's deadlines for ballot access violate this rule. They hamstring third-party candidates, while giving Democrats and Republicans a greater opportunity to disassociate from a candidate or for a candidate to dissociate from the campaign—as Biden did. Specifically, Wis. Stat. § 8.16(7) provides that these political parties have until "5 p.m. on the first Tuesday in September preceding a presidential election" to "certify the names of the party's nominees for president and vice president" to the Commission. In contrast, Wis. Stat. § 8.20(8)(am) says that an Independent candidate must commit a full month earlier: "Nomination papers for independent candidates for president and vice president, and the presidential electors designated to represent them . . . may be filed not later than 5 p.m. on the first Tuesday in August preceding a presidential election."[36] It's worth adding (for a third time) that Kennedy had to withdraw *before* the DNC had even announced its candidate or his opponent.

These statutory deadlines advantage the Democrats and Republicans in multiple ways. They get more time to vet a candidate. Should a candidate have a scandal (or health issues) just a few months out from the election, the major parties can potentially backtrack and try to get someone else on the ballot. An Independent candidate, however, must move faster—a full month earlier. Not only does the statute give the Democrats and Republicans more time for vetting, but it also gives them more time to contemplate the best course of action for the *candidate*.

Here, upon reflection, Kennedy has (like President Biden) decided that for associational and expressive reasons, he does not want to run for President anymore. And Kennedy (like President Biden) decided he wanted to not just be off the ballot, he also wanted to give his endorsement to someone else. Kennedy for Trump: Biden for Harris. And Kennedy (like President Biden) wanted to make sure that there was no voter confusion in Wisconsin—no one thinking that he was soliciting votes. Yet, Wisconsin's

[36] Wis. Stat. § 8.20(8)(am).

arbitrary, two-tiered deadlines prevent Kennedy (unlike President Biden) from withdrawing and making sure that his message is clear.

The First Amendment safeguards fundamental rights, and unequal treatment of such rights triggers strict scrutiny.[37] In First Amendment parlance: the major parties had an additional month to ensure that Biden was not coerced into speaking a message he didn't desire—I want votes for President—and he was not compelled to associate with a campaign he's not part of. And put in terms of the Equal Protection Clause, if the first Tuesday in September is "good enough" for the Democrats and Republicans to withdraw, then it's "good enough" for Kennedy and any other independent candidate who wants to remove himself or herself from the ballot. If nothing else, when it comes to fundamental rights, the promise of Equal Protection provides that "good enough" for the major parties applies with equal force to independents.

B. Printing Kennedy's name on the ballot against his will violates the First Amendment's guarantees against compelled speech and association.

The Equal Protection Clause assures Kennedy the same footing as the major parties, but his First Amendment's rights are even greater.[38] Here, forcing Kennedy to remain on the ballot constitutes compelled speech—he must state that he's a candidate for something in Wisconsin he has publicly avowed he's not. And it doubles as compelled association: the right to associate also entails the right not to associate.

Those principles are more than an academic matter to be debated in Constitutional law seminars. Compelling Kennedy's association with the campaign comes with real world health and safety risks. After all, President

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[37] *Monroe Cnty. Dep't of Health & Hum. Servs. v. Kelli B.*, 2004 WI 48, ¶ 17, 271 Wis. 2d 51, 678 N.W.2d 831.

[38] *McCutcheon*, 572 U.S. at 191.

Biden ordered the U.S. Secret Service to protect Kennedy in July, and *after* Kennedy suspended his campaign that protection was yanked.[39] Continued association as a candidate in the presidential race in Wisconsin thus brings obvious health and safety risks. After all, why give Kennedy Secret Service protection if it didn't, and why pull it once he quit the race. Yet including Kennedy's name on the ballot (as the Commission insists) forces his association in this political process against his will and with obvious threat to his person. The First Amendment does not allow for such involuntary action, especially as it relates to speech and association.

Defendants are free to write and share with the world their opinion about Mr. Kennedy. That message will be viewed as coming **from Defendants**. But when they place Mr. Kennedy's name on the ballot, voters believe that is because Mr. Kennedy wanted his name on the ballot, and that he is asking for their support and their vote. That message will be viewed as coming **from Mr. Kennedy**, not from Defendants. This is precisely the form of compelled speech that the Wisconsin Constitution and U.S. Constitution are intended to protect against. While Defendants are not harmed in any way by simply leaving Mr. Kennedy's name off of the ballot, compelling Mr. Kennedy to convey a false message to every citizen of Wisconsin that he is vying for their vote in this state, when he is not, and then subjecting him to the reputational and irreparable harm, and the loss of good will, that flows from this compelled speech.

Among the great promises of the U.S. and Wisconsin Constitutions is the right to free speech.[40] As the Supreme Court has explained, when it comes to political speech, those assurances are at their "fullest and most urgent application precisely to the conduct of campaigns for political

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[39] Zeke Miller and Colleen Long, *Biden Orders Secret Service to Protect RFK Jr. After Attempt on Trump's Life*, Associated Press (July 15, 2024, 4:48 PM), https://tinyurl.com/zn3w2w6j; Kaia Hubbard and Allison Novelo, *RFK Jr.'s Scret Service Protection Ends After Campaign Suspended*, CBS News (Aug. 25, 2024, 2:49 PM), https://tinyurl.com/4tctyzkj.

[40] Wis. Const. art. I, § 3.

office.'"[41] Put another way, "[p]olitical speech is thus a fundamental right and is afforded the highest level of protection. Indeed, freedom of speech, especially political speech, is the right most fundamental to our democracy."[42] That right "includes both the right to speak freely and the right to refrain from speaking at all."[43] "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning," which is why "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command[.]"[44] And that support extends even to candidate-eligibility requirements.[45]

Here, Kennedy is a national political figure and he does not want to tell, yell, or even hint to the great citizens of Wisconsin that he is vying for their votes. Placing his name on the ballot against his will subjects him to derision, anger, reputational harm, and loss of good will by those who would vote for him based on this speech only to later find out their vote was wasted. Imagine the serviceman or woman stationed overseas who doesn't get the bombardment of political advertisements most Wisconsinites receive, who's on the front lines and doesn't have the luxury to check-in and see that Kennedy has dropped out. That serviceman shouldn't have their vote wasted because Kennedy was compelled to give a message he didn't endorse. Free speech means a free flow of information within the economy of ideas. The Commission cannot, however, make Kennedy a conduit for a message that he does not want to promote and that isn't even accurate.

Beyond that simple (yet critical) point, Kennedy has publicly endorsed President Donald Trump's candidacy for the November 2024

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[41] *McCutcheon*, 572 U.S. at 191–92.

[42] *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 47, 363 Wis. 2d 1, 866 N.W.2d 165.

[43] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[44] *Janus*, 585 U.S. at 892–93.

[45] *Anderson*, 460 U.S. at 786.

presidential election. By forcibly including Kennedy's name on the ballot, the Commission is falsely representing to the people of Wisconsin that Kennedy is running against President Trump in Wisconsin and is opposed to President Trump's candidacy. Nothing could be further from the truth. Yet, by forcing him to remain on the ballot that message is unmistakably conveyed.[46] Such compelled speech is anathema to the First Amendment.

In that same vein, placing Kennedy's name on the ballot against his will constitutes compelled association. "Freedom of association … plainly presupposes a freedom not to associate."[47] "[F]orced associations that burden protected speech are impermissible."[48] Here, Kennedy does not want to associate his name (or himself) with the Presidency in Wisconsin. Yet forcing his name to appear on the ballot doesn't just force him to state a message—I am running for President—it also forces him to associate with a cause (the Presidency) that he is not running for in Wisconsin.

Thankfully, the First Amendment protects Kennedy (like every other American) from being forced to convey such a message. For that reason, the Commission's decision not only violates the Equal Protection Clause, it also violates the First Amendment.

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[46] *Soltysik v. Padilla*, 910 F.3d 438, 447–48 (9th Cir. 2018) (holding state law violated speech and associational rights of minor-party candidates by requiring placing "None" next to their names on the ballot for their party affiliation).

[47] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also Janus*, 585 U.S. at 892.

[48] *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986).

C. Beyond the Constitution's guarantees, even the plain reading of the text confirms Kennedy should not be on the ballot.

The case law and principles outlined above inform *why* the Commission's decision forcing Kennedy on the ballot is problematic as a constitutional matter. These problems can and should be avoided under the "constitutional-doubt principle," which instructs that statutes should not be read in a "constitutionally suspect" manner.[49] Here, the controlling statute is Wis. Stat. § 8.35(1). It provides, in relevant part, "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination."[50] A correct interpretation of this statute avoids (for today) all of the constitutional issues.

While Kennedy clearly filed nomination papers, he does not "qualify" to "appear on the ballot." Under Wisconsin law, a person is not qualified to appear on the ballot until the Commission approves them for the ballot. In other words, the Commission's approval is the last and necessary step in the qualification process. If the person files nomination papers, but then doesn't get the requisite documents (e.g., a declaration of candidacy) or isn't thirty-five, they aren't qualified for the ballot. The qualification comes when the Commission agrees that everything is in order. But here, before the Commission could approve Kennedy's candidacy, he said: no, I'm withdrawing, I want no part of this. So, his withdrawal doesn't come within the limits of § 8.35(1) because he hadn't yet qualified to appear on the ballot before he withdraw. Put differently, and in the statutory language of Wis. Stat. § 8.30(1)(b), he was, by his own "admission," "ineligible to be nominated or elected."[51] The Commission's decision to the contrary, runs roughshod over the plain text.

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[49] *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 31, 391 Wis. 2d 497, 942 N.W.2d 900.

[50] Wis. Stat. § 8.35(1).

[51] Wis. Stat. § 8.30(1)(b).

The Commission may argue that "qualified" means "qualified" to hold office, e.g., the qualifications set forth in the United States Constitution.[52] However, that is not what the statute says. The statute says, "qualified to appear on the ballot." The phrase "to appear on the ballot" cannot be read out of the statute.[53] To do so, violates the plain-text canons and it goes contrary to the legislature's clear choice of language.

* * * * * *

In the end, as interesting as constitutional issues are in the midst of a Presidential election, this case is really very, *very* simple. If it's good enough for the Democrats to have until 5 p.m. on the first Tuesday in September to withdraw their candidate and replace him with someone else, then it's good enough for Kennedy and every other independent candidate. That basic principle of fundamental fairness is given force by the Equal Protection Clause and animated by the First Amendment. Neither provision of the Constitution tolerates third-party candidates being treated as second-class candidates. And the Wisconsin Statutes (properly read) prevent that as well. And thus, we ask that the Commission's order placing Kennedy on the ballot be stayed and that the Commission not be allowed to place his name on the ballot or, if it's the case that ballots have printed and been sent out (despite Kennedy's best efforts to ensure that didn't needlessly happen and no indication that it has happened) that the municipal clerks be directed to cover his name on every ballot with a sticker.

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[52] U.S. Const. art. II, §1.

[53] *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 653, 681 N.W.2d 110.

II. This Court should accept the interlocutory appeal and decide this case on its merits.

This Court is very familiar with the standards for interlocutory appeals and they won't be needlessly reiterated—though they are all present here.[54] The most important factor is likely success on the merits. As one scholar has noted:

> The most important criterion for determining whether an [interlocutory] appeal should be granted is not expressly included among the statutory criteria listed in section 808.03(2), although it is implicit in those criteria. This consideration is whether the petition for leave to appeal shows a substantial likelihood of success on the merits. . . .Likelihood of success on the merits is the first question the court will consider when responding to a petition for leave to appeal because the court will want to ensure that an appeal will not simply serve to delay and defeat the ends of justice, rather than expedite and clarify the proceedings.[55]

In seeking this interlocutory appeal, Kenedy isn't seeking delay, but speed; he's not seeking to defeat the ends of justice, but to make sure that justice delayed does not mean justice denied. After all, *Hawkins* counsels that there is a real fear that Kennedy's First and Fourteenth Amendment rights will be subordinated to concerns about voter confusion (even though it's the Commission that is causing the confusion by forcing his name to appear on the ballot). The only way to ensure that doesn't happen is to move with speed. And that isn't happening in the Circuit Court, where briefing

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[54] Wis. Stat. § 808.03(2); *See Cascade Mt. v. Capitol Indem. Corp.*, 212 Wis. 2d, 265, 267, 569 N.W.2d 45 (Ct. App. 1997).

[55] Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 9.4 (6th ed. 2014); *see also State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991).

will be set on Wednesday. Instead, it has to happen here, where this Court can quickly enter the appropriate order. Indeed, this is not the case where any deference would be given to the trial court because there is no factual issue in dispute.

To that end, this request for an interlocutory appeal is appropriate. Denying the temporary restraining order was an error of law. As his petition, motion, and brief all set out, Kennedy had met the statutory criteria for granting the order. It is per se an erroneous exercise of discretion when the Circuit does (as it did here) refuse to consider the most important factor at play: the irreparable harm that flows from inaction.

Looking at the four factors that a court considers when ordering injunctive relief—whether it's a preliminary injunction or a temporary restraining order—the two most important considerations are success on the merits and the harm that results from denial.[56] Here, the success has been covered for twenty pages, so too has the harm. If the ballots get released, the Commission will have created the very problem it will cite as the reason for denying relief: voter confusion because ballots have already issued. Granting the injunction is the only way to stop that. Considering the other two factors, there is no other means to stop this and preserved the status quo—Kennedy tried withdrawing his name, now judicial intervention is all that he has left to ensure that ballots are not printed with his name on them.

CONCLUSION

In the no-holds barred world of presidential elections, few things should come as a surprise. Yet, the Commission (again, made up of appointees from the two major parties) has accomplished that. It's used Kennedy, a third-party candidate as a means of creating voter confusion. And it has done so by creating a tiered system for a politician's ability to withdraw from the ballot; it has done so by compromising Kennedy's First

[56] *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, 370 Wis. 2d 644, 883 N.W.2d 154.

Amendment rights; and it has done so by misreading the very statutes it's supposed to be governed by. It is up to this Court to dispel that confusion and the violation of Kennedy's rights by accepting this interlocutory appeal and entering the preliminary injunction against the ballots going out.

Dated at Madison, Wisconsin, September 9, 2024.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms with the rules contained in Wis. Stat. § 809.50(1) and (4) for a petition produced with a proportional serif font. The length of this petition is 6,057 words.

Electronically signed by Joseph A. Bugni
Joseph A. Bugni

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2024AP1798-LV

ROBERT F. KENNEDY, JR.,

Petitioner-Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Respondent.

ON PETITION FOR LEAVE TO APPEAL A NON-FINAL ORDER OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

RESPONDENT WISCONSIN ELECTIONS COMMISSION'S OPPOSITION TO PETITION FOR LEAVE TO APPEAL

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INTRODUCTION

Contrary to its dramatic rhetoric, the petition for leave to appeal is not about the struggles of an independent candidate to gain access to the ballot. Petitioner easily complied with Wisconsin's August 6 deadline for independent candidates to submit their nomination papers and declarations of candidacy. That statutory deadline is about four weeks sooner than the deadline for major parties to certify their selected candidates, but Petitioner does not even argue that the difference is unconstitutional: the deadlines easily pass muster under U.S. Supreme Court and other case law.

Petitioner is the opposite of a beleaguered candidate seeking to gain access to the ballot: at least in Wisconsin, he no longer wants to run, seeking instead to demonstrate his support for a major party candidate. Of course, Petitioner is free to express his support for that candidate in a myriad of fora for public expression. What Petitioner cannot do is require his name to be removed from the ballot: Wis. Stat. § 8.35(1) prohibits candidates from withdrawing once they have qualified.

Petitioner's novel constitutional challenges, not yet even considered by the circuit court, do not justify granting permissive appeal.

Most basically, fulfilling Petitioner's wish cannot be accomplished without forcing county and municipal elections officials to miss state and federal deadlines for providing ballots to absentee voters, including military and overseas voters. The timing barrier here is just as acute as in *Hawkins*, where the Wisconsin Supreme Court held it was too late for a change to the general election ballot. That harm far outweighs Petitioner's desire to convey to voters his support for another candidate through his absence from Wisconsin ballots.

Beyond that insurmountable hurdle, Petitioner cannot satisfy the high bar for this Court's assumption of jurisdiction from a petition for leave to appeal.

Petitioner seeks to appeal the circuit court's denial of an ex parte motion for an injunction. The circuit court did not erroneously exercise its discretion in denying an ex parte motion that sought to stop the issuance of ballots until it could hear from the Commission. And Petitioner failed to provide any factual support for the four factors required to justify temporary relief, much less demonstrate that he met them. Petitioner never even tried to explain how his interest in supporting a different candidate through his absence on the ballot could justify requiring clerks to miss statutory deadlines to send voters their ballots.

On the underlying merits, Petitioner's equal protection and First Amendment arguments are novel and unsupported. He presumes that the right to access the ballot creates a constitutional right *not* to be on the ballot. He offers no precedent for that premise, and for good reason: the case law shows the opposite. And his statutory argument ignores that a candidate's qualifications depend on no approval from the Commission.

This Court should deny the petition for leave to appeal.

STATEMENT OF THE CASE

This matter comes before this Court on a petition for leave to appeal a non-final order of the circuit court. Petitioner seeks leave to appeal the circuit court's September 6 denial of his emergency motion for an ex parte temporary restraining order.

Petitioner Robert F. Kennedy, Jr. and Nicole Shanahan submitted nomination papers and declarations of candidacy on August 6, 2024, as independent candidates for President and Vice President on the November 5, 2024, general election

ballot. (Declaration of Riley P. Willman ("Willman Decl.") ¶¶ 3–6, Ex. A, Ex. C; Declaration of Steven C. Kilpatrick ("Kilpatrick Decl.") ¶ 7, Ex. E.) As part of their nomination papers, Petitioner and Shanahan indicated that they are the candidates for the We the People Party and listed the electors for that Party. (Kilpatrick Decl. ¶ 7, Ex. E.)

On August 19, 2024, the Commission received a Certification of Nomination from the Democratic Party nominating Kamala Harris as its candidate for President and Tim Walz as its candidate for Vice President for the November 5, 2024, general election. The Commission received declarations of candidacy from Kamala Harris and Tim Walz on that date as well. (Willman Decl. ¶ 8, Ex. D.)

The Commission did not receive a declaration of candidacy from current President Joe Biden. Nor did the Commission receive a Certification of Nomination from the Democratic Party nominating Joe Biden as its candidate for President for the November 5, 2024, general election. (Willman Decl. ¶¶ 9–10.)

On August 23, 2024, Petitioner sent a letter to the Commission stating that he was withdrawing his candidacy "from the 2024 United States Presidential Election" and requesting that his name not be printed on the ballot in Wisconsin. (Willman Decl. ¶ 7 , Ex. B.)

The Commission must provide required election notices to county clerks "no later than the 4th Tuesday in August," Wis. Stat. § 10.06(1)(i), which was August 27 this year. The required election notices contain candidate and statewide referenda information that county clerks need to begin preparing ballots. The Commission convened on August 27 to perform this responsibility, consider challenges to nomination papers, and certify candidate names for the November 2024 general election ballot. (Kilpatrick Decl. ¶¶ 5–6, Ex. C–D.)

The Commission placed the matter of Petitioner's requested withdrawal on the Commissioners' agenda for the August 27, 2024, meeting. Regarding the ability to decline nomination, Wis. Stat. § 8.35(1) provides that

> Any person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person. A person who is appointed to fill a vacancy in nomination or who is nominated by write-in votes is deemed to decline nomination if he or she fails to file a declaration of candidacy within the time prescribed under sub. (2) (c) or s. 8.16 (2).

At the meeting, based on Wis. Stat. § 8.35(1), the commissioners voted 5-1 to deny Petitioner's request and certify his name as an independent candidate for President on the November ballot.[1] (Kilpatrick Decl. ¶ 6, Ex. D.)

Wisconsin law requires that, "immediately upon receipt" of the Commission's notices, county clerks must prepare the ballot forms. Wis. Stat. § 7.10(2). County clerks must also integrate ballot information for local races and referenda onto ballot styles for each municipality in their county. (Declaration of Robert Kehoe ("Kehoe Decl.") ¶¶ 5, 12.) County clerks then must finalize and proof their ballots, place the print order, send them to the printer, and ensure that they have sufficient ballots. (Declaration of Robert Kehoe ("Kehoe Decl.") ¶ 5; Declaration of Scott McDonell ("McDonell Decl.") ¶ 8; Declaration of Michelle R. Hawley ("Hawley Decl.") ¶¶ 8–9; Kilpatrick Decl. ¶ 4, Ex. B.) For printing, the vast majority of county clerks utilize third-party vendors because of the technical requirements for ballots to be accurately

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[1] This August 27, 2024, meeting of the Wisconsin Elections Commission was recorded and appears on Wisconsin Eye. It may be accessed with an account. *See* WEC Speacial Meeting, *WisconsinEye*, https://wiseye.org/2024/08/27/wisconsin-elections-commission-special-meeting-31/ (last visited Sep. 11, 2024).

scannable and fed through electronic voting machines. Declaration of (Robert Kehoe, ¶¶ 13–17.)

All this work, including the printing of ballots, must be completed by September 17: county clerks must deliver printed ballots to municipal clerks no later than September 18, 48 days before the general election. Wis. Stat. § 7.10(3). (Kehoe Decl. ¶¶ 7–10; McDonell Decl. ¶ 3–6; Hawley Decl. ¶¶ 5–6.)

Municipal clerks, in turn, must deliver absentee ballots to electors who request them no later than September 19, 47 days before the general election. Wis. Stat. § 7.15(1). (Kehoe Decl. ¶ 7. And under the federal Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311, municipalities must send ballots to all military and overseas voters no later than September 21, 45 days prior to the election. (Kehoe Decl. ¶¶ 8–10.)

Following the August 27 meeting, Wisconsin county clerks followed these statutory commands, finalizing the hundreds of individual ballot forms and placing orders with third-party vendors to print their ballots. (Kehoe Decl. ¶ 22; McDonell Decl. ¶¶ 7–8; Hawley Decl. ¶ 9.)

As of this date, counties are in different places in completing the process, but the vast majority can no longer begin anew. As of September 10, some counties had received their ballots from the printer and delivered their ballots to municipalities, and a few municipalities had mailed out absentee ballots to voters. The print orders for the largest counties are in process and require approximately two weeks to complete: the ongoing jobs are scheduled to be completed and ballots delivered a day or two before the September 17 deadline for providing ballots to municipal clerks. (Kehoe Decl. ¶ 22; McDonell Decl. ¶¶ 7–8; Hawley Decl. ¶ 9.)

Procedural history of the case.

Petitioner brought suit against the Commission on September 3, 2024. On September 5, only two days after filing his matter and temporary injunction motion, Petitioner filed an ex parte motion in circuit court for an emergency temporary restraining order, requesting a decision without a hearing by 5:00 p.m. on Septmber 6. App. 1–12. Although Petitioner served neither the Commission nor the Attorney General, the Commission learned of the filing and filed a letter with the circuit court promptly the next morning, September 6. The Commission explained that Petitioner was not entitled to relief under Wis. Stat. § 813.025 for lack of service and that Petition had not discussed, much less demonstrated, an entitlement to relief under the four factors for temporary relief. (Kilpatrick Decl. ¶ 8, Ex. F.)

On September 6, 2024, the circuit court denied that motion, stating that "[a] matter of such consequence deserves a full development of the record with appropriate briefing by all sides," and setting a scheduling conference for September 11. (App. 19–20.) On September 9, 2024, Petitioner filed a petition for leave for appeal with this Court.

Meanwhile, Petitioner's interest in having voters choose him for President has continued in some states but not others. He has indicated that he does not seek support in states like Wisconsin where the presidential election is predicted to be close, but otherwise hopes voters will choose him in states where he has successfully been placed on the ballot.[2] (Kilpatrick Decl. ¶ 3, Ex. A;) *See* Caitlin Yilek

[2] Petitioner stated in his petition for leave to appeal that he has filed similar lawsuits seeking to have his name removed from the ballot in two other states "and so far, [he] has triumphed in both." Pet. Leave 15. As of Monday, the Michigan Supreme Court has rejected Petitioner's effort to have his name removed from the

& Allison Novelo, *Map Shows Where RFK Jr. Is on the Ballot in the 2024 Election*, CBS News (Sept. 6, 2024), https://www.cbsnews.com/news/rfk-jr-map-on-theballot-states/. Petitioner's Wisconsin electors have indicated that they want him to remain on the Wisconsin ballot. (Kehoe Decl. ¶ 26.)

ARGUMENT

I. This Court should deny the petition under the supreme court's *Hawkins* precedent.

Petitioner's motion be denied because it is not possible for Wisconsin's county clerks to re-order new ballots for printing and deliver them to municipal clerks in time to meet state and federal deadlines to provide ballots to voters voting absentee.

In *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877, the supreme court recognized that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." In that case, the court considered a petition for leave to commence an original action filed by two Green Party candidates who were excluded from the 2020 general election ballot due to insufficient signatures on their nomination papers. *Id.* ¶¶ 1–2. The petitioners also asked for preliminary relief—adding their names to new ballots for President and Vice President—after absentee ballots had already been sent out by municipal clerks. *Id.* ¶¶ 2–6, 8, n.2. The supreme court concluded that under the circumstances, including the fact that the general election had "essentially

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ballot in that state. *See* Isabella Volmert & Gary Robertson, *RFK Jr. wins effort to leave ballot in North Carolina, but stays on in Michigan,* Associated Press (Sept. 9, 2024), https://apnews.com/article/rfk-jr-michigan-ballot-lawsuit-4aa84852759b5f3fe9ac7e5790af54d0 (last visited Sep. 11, 2024).

begun," it was "too late" to grant them any form of relief that would be feasible and not cause undue damage to the election. *Id.* ¶ 5. The court determined that the "best exercise" of its discretion was to deny the petitioners' petition and motion for preliminary relief. *Id.* ¶ 10.

Here, the clash between Petitioner's late request and the realities of election administration is just as acute as in *Hawkins*. The vast majority of counties have already placed their orders to print the general election ballots, including the state's two most populous counties. Many counties have already received the printed ballots. Some counties have provided their ballots to municipalities. A few municipalities have sent out absentee ballots. (Kehoe Decl. ¶ 22.) *See* Wis. Stat. §§ 5.72(1), 7.10(2).

For larger counties where print jobs are still being processed, due to the hundreds of thousands of ballots needed, vendors need a two-week time period to complete the print orders. There is not enough time for these counties to seek a reprint and still comply with the September 18 deadline to provide ballots to municipalities and the September 19 deadline for municipal clerks to send ballots to voters. (Hawley Decl. ¶¶ 9–10; McDonell Decl. ¶¶ 11–12.)

Requiring the clerks to begin anew is exactly the consequence our state and nation's highest courts have cautioned against. *See Hawkins*, 393 Wis. 2d 629, ¶ 5; *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("As an election draws closer," "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls."). Beyond the non-compliance with state law and confusion for voters, if the counties' initial printing of the ballots were to be for naught, the cost of reprinting would cost tens of thousands of unbudgeted dollars for several of the states' counties.

Petitioner suggests that this could be remedied by hand-affixing blank stickers over his printed name on each and every ballot in the state. It's difficult to conjure up a worse idea.

First, placing stickers on ballots is not legal. State law prohibits election officials from attaching any type of sticker to a ballot. Wis. Stat. § 5.51(4). The only exception is a vacancy caused when a candidate dies after his name has been printed on the ballot, *see* Wis. Stat. §§ 5.51(4), 7.37(6), 7.38, and even then, the choice is left to the discretion of the municipal clerk. *See* Wis. Stat. § 7.37(6).

Second, even beyond those limitations, Petitioner's sticker proposal would be a logistical nightmare and create significant risks about the accurate processing and counting of ballots.

The placing of stickers on each and every ballot in Wisconsin would be, to put it mildly, a herculean task. It is unreasonable to believe that it could even be accomplished without causing the counties and municipalities to miss their required deadlines.

And Petitioner's proposal would cause significant disruption to the proper administration of the general election and, most importantly, could jeopardize the accurate tabulation of the ballots. The voting equipment to be used for the upcoming election has not been tested with stickers applied to ballots. The stickers could peel off, get jammed or stuck in the voting tabulator, or stick to and rip other ballots, to name a few possible likelihoods. (Kehoe Decl. ¶ 25.)

Moreover, more than 80% of ballots cast in Wisconsin are optical scan ballots, which rely on a series of "timing marks"—lines along the top and sides of the ballot that serve as coordinates to allow the voting equipment to read what candidate to tally a vote for. To ensure that these marks work accurately, ballots samples are tested in voting machines

before they are sent to the printer. Here, no such testing could occur, and election officials have no idea how voting equipment would count ballots with stickers over the printed name of a candidate. (Kehoe Decl. ¶¶ 23–25.)

Given the impossibility of granting Petitioner relief without violating state and federal deadlines and jeopardizing the safe and secure administration of the election, this Court should decline to step in and accept Petitioner's petition for leave to appeal.

II. Even beyond the harm to the current election, Petitioner has not justified this Court's acceptance of the petition for leave to appeal.

Even beyond the impossibility of accommodating Petitioner's desire without missing deadlines to mail ballots, confusing voters, and jeopardizing election administration, Petitioner has not justified this Court's accepting the petition for leave to appeal.

An order not appealable as of right may be appealed to this Court if this Court determines that the appeal will (1) materially advance termination of the litigation or clarify further proceedings in the litigation; (2) protect the petitioner from substantial or irreparable injury; or (3) clarify an issue of general importance in the administration of justice. Wis. Stat. § 808.03(2). The court must also examine whether the defendant has a substantial likelihood of success on the merits. *State ex rel. Hass v. Wis. Ct. of Appeals*, 2001 WI 128, ¶ 13, 248 Wis. 2d 634, 636 N.W.2d 707. But "[i]nterlocutory reviews are discouraged to avoid unnecessary interruptions and delays in the circuit courts and to reduce the burden on the appellate courts." *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 222, 369 N.W.2d 743 (Ct. App. 1985); *see also Heaton v. Larsen*, 97 Wis. 2d 379, 395–96, 294 N.W.2d 15 (1980) (noting the need to "protect trial proceedings" and

"reduce the burden on the court of appeals" by avoiding "piecemeal appeals").

Here, Petitioner's effort interrupts the job of the circuit court to make a decision about temporary relief—one left to the discretion of the circuit court. *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, ¶ 18, 989 N.W.2d 561, 566.

A. The circuit court did not erroneously exercise its discretion in denying Petitioner's ex parte motion for a temporary restraining order.

Petitioner's petition for leave to appeal should be denied at the outset because he has failed to show that the circuit court erroneously exercised its discretion in denying his ex parte request for a temporary restraining order. Petitioner did not serve the Attorney General or Commission, and the court recognized the seriousness of the issues warranted input from the other side; at any rate, any *ex parte* relief would have expired within five days. And Petitioner's temporary injunction papers did not even discuss, much less demonstrate, his entitlement to that extraordinary relief. Petitioner cannot show that the circuit court erroneously exercised its discretion.

The circuit court properly exercised its discretion in deciding that granting the ex parte relief Petitioner sought—to order the cessation of all mailing of ballots—was not warranted without gathering input from the other side. And the ex parte relief the circuit court could have ordered under Wis. Stat. § 813.025 would have been limited to five days—that relief would already have expired by today. Wis. Stat. § 813.025(2).

Further, Petitioner's request for a temporary injunction failed to even cite the factors for such extraordinary relief—must less demonstrate that he met them.

A court may issue a temporary injunction only if four criteria are met by the moving party: "(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Serv. Emps. Int'l Union , Loc. 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (quoting *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154).

Notably, "injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction." *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Temporary injunctions "are not to be issued lightly. The cause must be substantial." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Further, "[t]emporary injunctions are to be issued *only when necessary* to preserve the status quo." *Id.* (emphasis added).

Here, Petitioner's request did not even state that standard, much less explain his entitlement to relief under it. For example, Petitioner did not explain why the injunction was "necessary to preserve the status quo," a requirement in Wisconsin. *Id.* Indeed, his requested injunction is improper because it would do the opposite: it would *change* the status quo by removing his name from the ballot. Petitioner also did not discuss the potential harm to the public, provide affidavit or other evidentiary support for his own asserted harms, or explain why those harms outweighed the harm to the public.

For those reasons alone, the circuit court appropriately exercised its discretion in denying emergency relief.

B. Petitioner forfeited his constitutional and statutory interpretation challenges by failing to raise them with the Commission.

Petitioner cannot show a probability of success on the merits of his claims because he has failed to raise them before the Commission.

"It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency." *Bunker v. LIRC*, 2002 WI App 216, ¶ 15, 257 Wis.2d 255, 650 N.W.*2d 864. This includes constitutional issues. Omernick* v. DNR, 100 Wis. 2d 234, 247–48, 301 N.W.2d 437 (1981) (noting that even where constitutional issues arise that an "administrative agency is not empowered to resolve," parties "must raise known issues and objections . . . [to] develop[ ] a record that is as complete as possible in order to facilitate subsequent judicial review"). "Because [court] review of an administrative agency's decision contemplates review of the record developed before the agency, a party's failure to properly raise an issue before the administrative agency generally forfeits the right to raise that issue before a reviewing court." *State of Wisconsin Dep't of Just. v. State of Wisconsin Dep't of Workforce Dev.*, 2015 WI App 22, ¶ 18, 361 Wis. 2d 196, 861 N.W.2d 789, *aff'd*, 2015 WI 114, ¶ 18, 365 Wis. 2d 694, 875 N.W.2d 545.

Here, Petitioner makes no claim that he raised the issues he has now raises with the Commission. Based on Petitioner's failure to raise these issues before the Commission, (Willman Decl. ¶ 7, Ex. B), he has forfeited them, and the Court may ignore them.

C. Petitioner's constitutional challenges fail.

Setting aside forfeiture, Petitioner's constitutional claims are unlikely to succeed on the merits.

Petitioner provides no relevant legal support for his novel constitutional claim that he had a constitutional right to be removed from the Wisconsin ballot after submitting nomination papers and a declaration of candidacy. Pursuant to the balancing test applied to state election regulations, the ballot access deadlines challenged by Petitioner easily pass constitutional muster. And at the end of the day, Petitioner is not even challenging access deadlines: he is asserting that he has a constitutional right to have his name removed from the ballot. No case has held or even suggested such a right.

1. Petitioner misunderstands the standard of review for laws governing the administration of elections.

Petitioner asserts that the ballot access deadlines for submitting nomination papers and a declaration of candidacy is subject to "strict scrutiny" because they implicate fundamental rights. (Pet. 20.) This is incorrect. Whether as a matter of equal protection or First Amendment jurisprudence, challenges to ballot access deadlines are reviewed under a balancing test that weighs the state's important interest in orderly and reliable election administration against the alleged burden on the rights of the candidate or voter. Unless the burden is severe, reasonable requirements are upheld.

States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder. "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). So while election

regulations invariably pose some burden on voters or candidates, the U.S. Supreme Court has long rejected the notion that strict scrutiny applies in every instance. *Id.* ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.") And the mere fact that election laws create barriers tending to limit the field of candidates from which voters might choose "does not of itself compel close scrutiny." *Id.* (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

Instead, "a more flexible standard" applies: a court considering a challenge to a state election law on First and Fourteenth Amendment grounds, as here, must weigh the "character and magnitude" of the burden the law imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Under this standard, regulations imposing a "severe" burden on the plaintiff's rights must be narrowly tailored and advance a compelling state interest, but lesser burdens trigger less exacting review. Id. (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The State's "important regulatory interests are generally sufficient to justify" an election law that imposes only "reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights. *Id.* (quoting *Celebrezze*, 460 U.S. at 788).

2. Ballot access deadlines are constitutional as long as they are reasonable regulations on the conduct of elections.

Petitioner asserts that the differing ballot access deadlines for independent and major party candidates give major parties an "advantage" because they have "more time to vet a candidate" and to "contemplate the best course of action." (Pet. 19.) These "advantages" are not constitutionally significant. The U.S. Supreme Court has determined that "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Celebrezze*, 460 U.S. at 788 n.9. Wisconsin's ballot access deadlines fall well within the type of requirements accepted by courts.

The statutes Petitioner points to, Wis. Stat. § 8.16(7) and 8.20(8)(am), reflect two different nomination procedures: independent candidates submit nomination papers, while major party candidates are nominated and certified by their party. *See* Wis. Stat. § 8.16(7), 8.20(8)(am). Petitioner claims these different deadlines must be unconstitutional, but that is incorrect.

In *Celebrezze*, the U.S. Supreme Court considered what nomination paper deadlines were reasonable restrictions on independent candidates. It rejected the March deadline then in Ohio statutes as unrelated to the time for petition signatures to be counted and verified or to permit ballots to be printed, but it noted that, based on the facts stipulated to in the district court, a 75-day statutory deadline would have been reasonable. *Celebrezze,* 460 U.S. 800 & n.28. In 1983, when *Celebrezze* issued, two-thirds of the states had nomination paper deadlines for independent candidates in August or September, with many others in June or July.

Celebrezze, 460 U.S. at 795 n.20; *see also U.S. Taxpayers Party of Fla. v. Smith*, 871 F. Supp. 426, 436–37 (N.D. Fla. 1993). Wisconsin is in the mainstream of those deadlines.

Wisconsin's nomination procedure provides a reasonable, nondiscriminatory process—and reasonable deadlines—by which candidates must demonstrate sufficient support.

Independent candidates are nominated by nomination papers: they demonstrate sufficient elector support to qualify for the ballot by circulating and submitting nomination papers with the requisite number of signatures from throughout the state. *See* Wis. Stat. § 8.20(2)–(10). The nomination papers must be submitted to the Commission by "the first Tuesday in August preceding [the] presidential election," which, this year, was August 6. Wis. Stat. § 8.16(7). Major party candidates—meaning candidates of parties entitled to partisan primary ballots (*see* Wis. Stat. § 8.16(7))—have demonstrated sufficient elector support through their party's performance in prior elections or other means. *See* Wis. Stat. § 5.62(1)(b)1., (2)(a). Rather than nomination papers, major parties select their nominees for president and vice president at their respective conventions and then certify the names of the nominees. *See* Wis. Stat. § 8.16(7). The certification must be submitted to the Commission no later than "the first Tuesday in September preceding [the] presidential election," which, this year, was September 3. *Id.*

Those deadlines reasonably reflect the time needed to review nomination papers with signatures of thousands of electors for sufficiency and to process any challenges to those papers from voters and opposing candidates. The extra time is not needed for major party candidates because they do not file nomination papers.

Here, Petitioner makes no claim that the August 6 deadline was a burden of such a "character and magnitude" such that the challenged ballot access deadlines run afoul of the constitution. *See Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 789). He makes no effort to assert that it was a burden at all, much less a severe burden, to comply with the August 6 deadline to submit his nomination papers. He does not assert that he struggled to gather his signatures or complete the declaration of candidacy, attesting to his qualifications to be on the ballot, by the statutory deadline. He does not even show (or assert) that he felt ambivalent about running for President and wanted to wait longer to see how the race shook out. Petitioner has no legal or factual basis to claim that the August 6 deadline is unconstitutional, either facially or as applied to him.

Petitioner's embedded argument is that the combination of the August 6 deadline and the prohibition on withdrawing under Wis. Stat. § 8.35(1) combine to create a different deadline for withdrawal between independent candidates and major party candidates.[3] But as a matter of law, that difference is a function of the time needed to review independent candidate nomination papers, a difference in deadline that courts endorse.

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[3] Contrary to Petitioner's characterization, Wis. Stat. §§ 8.16(7) and 8.20(8)(am) do not differentiate between "third-party candidates" and "the two mainstream candidates." Rather, Wis. Stat. § 8.20(8)(am) applies to independent candidates, while Wis. Stat. § 8.16(7) applies to candidates of parties that have qualified for partisan primary ballots. Presently, those include not just the Democratic and Republican parties but also the Libertarian, Constitution, and Green parties.

Wisconsin's deadlines for submitting nomination papers and declarations of candidacy pose only a modest, reasonable restriction on ballot access that further the State's legitimate interest in requiring candidates to make a preliminary showing of substantial support to qualify for a place on the ballot. They are plainly constitutional.

3. Equal protection principles provide no right for a candidate to be removed from a ballot.

The broad recognition that states have a legitimate interest in requiring presidential candidates to demonstrate sufficient electoral support before appearing on the ballot, including requiring independent candidates to submit nomination papers, answers the constitutional question here. Petitioner's view—that equal protection affords a right to be *removed* from the ballot—is legally unsupported.

To the extent Wisconsin law addresses at all the ability of a candidate to "disassociate" with a party, the law makes no reference to political party. Wisconsin Stat. § 8.35(1) provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person."

Petitioner implies that he has been treated differently than President Biden—and in a way that violates his equal protection rights—because Biden was permitted to withdraw from the election but Petitioner was not. (*See* Pet. 20 (Wisconsin's "arbitrary, two-tiered deadlines prevent Kennedy (unlike President Biden) from withdrawing").) Simply as a matter of fact, that is wrong. The Commission received no declaration of candidacy from Biden, nor did it receive a certification from the Democratic Party nominating Biden pursuant to Wis. Stat. § 8.16(7). Petitioner's complaint

that Biden was treated differently—and better—than him is simply untrue.

Petitioner also asserts that "the First and Fourteenth Amendments, viewed together, require that whatever opportunity the major political parties have to associate or disassociate from a particular candidate be provided on equal terms to independent, third-party candidates." (Pet. 17.) To the contrary, Petitioner offers *no* case suggesting that there is such a right of "disassociation." The ballot access cases and the 1980 Attorney General opinion he cites are inapposite because all involve the right of access to the ballot, not the ability to *withdraw* from the ballot once granted access. *See Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (law restricting a new political party's ability to place candidate on the ballot was unconstitutional); *Lubin v. Panish*, 415 U.S. 709, 716–20 (1974) (law barring an indigent candidate from ballot for failure to pay filing fee was unconstitutional); OAG 55-80 (Sept. 17, 1980) (Wis. A.G.) (opining as to the constitutionality of an abbreviated timeline for a minor party's selection of a vice presidential candidate when the party wanted to, but could not, place someone new on the ballot).

Petitioner complains that that the earlier deadline for submitting nomination papers gave him less time to *change his mind* about running for president as compared to major party candidates, given that, pursuant to Wis. Stat. § 8.35(1), candidates cannot withdraw from the ballot after submitting nomination papers and qualifying to appear. But "the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), and Petitioner does not cite a single case finding an equal protection violation where the alleged harm relates not to ballot access but to having to commit to running for office earlier than major party candidates.

Petitioner's equal protection claim lacks merit and has no reasonable probability of success.

4. Petitioner has no First Amendment right to be removed from the ballot.

Petitioner also argues that he has a First Amendment right to remove himself from the ballot after submitting his nomination papers and his declaration of candidacy. He announces that his name on the ballot violates his own associational rights or compels him to speak. Relevant case law holds to the contrary.

a. Petitioner's name on Wisconsin ballots is not compelled speech for First Amendment purposes.

Petitioner raises the novel argument that a candidate who has submitted his nomination papers and declaration of candidacy is "compelled to speak" for First Amendment purposes if he cannot subsequently withdraw from the race, no matter what the deadline. (Pet. 20–23.) No case has so held.

First, as a factual matter, Petitioner is not forthcoming about the speech he even wants to avoid making. Petitioner suggests it is anathema to him to be listed as a presidential candidate because he no longer wants to be President. But that is not correct: he still seeks to be on the ballot in many states, and is encouraging voters to choose him as President.

More basically, as a legal matter, a candidate's presence on a ballot is government speech with the purpose of electing a candidate, not a forum for political expression. Petitioner asserts that he wants voters (at least Wisconsin voters) to know that he actually supports a different candidate—Donald Trump—for the Presidency. (Pet. 22–23.) But the ballot is not the way to express such views.

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997), the U.S. Supreme Court rejected a political party's claim that Minnesota's fusion ban—which prevented a candidate from appearing on the ballot for two different parties—violated the First Amendment on the theory it prevented the party from communicating its support of that candidate:

> We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.

Id. at 362–63. The Court reasoned that the party retained many options in speaking about who it supported:

> The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate.

Id. at 363.

The U.S. Court of Appeals for the Ninth Circuit similarly declined to treat ballot language as compelled speech in *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005). In that case, plaintiff challenged required words in a ballot initiative title, arguing that it compelled him to be associated with that state's message. *Id.* at 858. The court disagreed, holding that the language did not require him to use his private property to transmit any message, which appeared only on ballots—materials created by State and local governments. *Id.* The court also noted that Caruso remained free to publicly disassociate himself from the message. *Id.*

The same is true here. Contrary to Petitioner's characterization of a ballot as his own speech (Pet. 22), it is the government, not Petitioner himself, that is "stating" he is a candidate. Petitioner acknowledges that it is the government, not he, that is including his name on the ballot. (Pet. 23.) Petitioner says he wants to express his support for Donald Trump, but the ballot is not the forum to advance those views, and he has numerous avenues to express that interest through campaign appearances and endorsements. If Petitioner wants Wisconsin voters to choose former President Trump, he can communicate that message through the myriad of speech platforms available to him.

b. Petitioner has no First Amendment associational rights in having his name removed from the ballot.

Petitioner asserts that his name's appearance on the ballot violates his rights of free association. (Pet. 13.) To be clear, Petitioner chose to be on the ballot, filing nomination papers and a declaration of candidacy. His premise is that he now has a constitutional right to remove himself, but that is incorrect.

The First Amendment associational right to a candidate's appearance on a ballot belongs to the voter. A free association right may be implicated when a candidate's name is removed from the ballot because a voter wishes to associate with the candidate by casting his or her vote in the candidate's favor. *Bullock,* 405 U.S. at 134; *see also Berg v. Egan*, 979 F. Supp. 330, 336 (E.D. Pa. 1997) (citing *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973)). Here, such interests favor keeping Petitioner on the ballot because voters—namely, his electors in the We the People Party—have objected to his removal from the ballot.

Regardless, no case holds that there is a parallel associational right even for voters, much less candidates, to have a candidate's name *removed* from the ballot. In a case brought by voters seeking to remove a candidate's name from a Maryland ballot after that state's deadline to do so, the Maryland court of appeals explained why that state's prohibition on removal violated no constitutional right:

> This case is therefore unlike cases in which candidates were denied access to the ballot, and the challenged provisions restricted the pool of candidates on the ballot from whom voters could readily choose. As applied in this case, these provisions did not limit candidate access to the ballot or the ability of a voter to select a preferred candidate. Appellees conceded that, while early candidacy filing deadlines have sometimes been held unconstitutional when they restrict access to the ballot, they were unable to find a case holding that a withdrawal deadline was unconstitutionally early. This should not be surprising, as a withdrawal deadline by itself does not restrict access to the ballot.

Lamone v. Lewin, 190 A.3d 376, 391 (Md. App. 2018).

Petitioner's desire to be removed here similarly violates no voters' associational rights. Whether a voter's rights or a candidate's, where a candidate *remains* on the ballot, no associational interests are implicated.

Petitioner has no constitutional right to have clerks remove his name from the ballot.

D. Petitioner's statutory challenge fails.

The Commission did not violate Wis. Stat. § 8.35(1), what Petitioner calls the "controlling statute," (Pet. 24), by allowing his name to appear on the ballot for President in November, because he timely filed nomination papers and a declaration of candidacy and, thus, he "may not decline nomination" under its clear, plain language.

1. Petitioner's name must appear on the ballot because he fulfilled the statutory requirements.

"[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, [courts] ordinarily stop the inquiry.'" *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Wisconsin Stat. § 8.35(1) states that "[a]ny person who [1] files nomination papers and [2] qualifies to appear on the ballot *may not decline nomination*. The name of that person *shall appear upon the ballot* except in case of death of the person." *Id.*

Here, Petitioner filed nomination papers with the Commission on August 6, 2024, thereby fulfilling the "nomination papers" requirement of Wis. Stat. § 8.35(1). Petitioner also filed a declaration of candidacy with the Commission the same day, and this declaration fulfills the "qualified to appear on the ballot" requirement of Wis. Stat. § 8.35(1).

A declaration of candidacy is a sworn declaration that states the candidate's name and "[t]hat the signer meets, or will at the time he or she assumes office meet, applicable age, citizenship, residency, or voting *qualification requirements*, if any, prescribed by the constitutions and laws of the United States and of this state. . . . . [And t]hat the signer will otherwise *qualify for office* if nominated and elected." Wis. Stat. § 8.21.2(a)–(c). By way of his declaration of candidacy, Petitioner acknowledged and admitted that he "qualifies to appear on the ballot" for President. Thus, Petitioner met the two requirements under Wis. Stat. § 8.35(1) to have his name placed on the ballot as a matter of law when he filed his nomination papers and declaration of candidacy on August 6, 2024.

"In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt,* 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967). Because these two statutory requirements were met here, Petitioner "may not decline nomination," and his name "shall appear upon the ballot." Wis. Stat. § 8.35(1). The statutory language could not be clearer. The Commission could not ignore this mandatory language of the statute; there was only one possible result—Petitioner cannot decline nomination and his name shall appear on the ballot.

A purpose of Wis. Stat. § 8.35(1) is to force candidates to be certain about the filing of their papers; once filed, there is no going back (absent death). Based on the undisputed facts that Petitioner filed nomination papers and a declaration of candidacy, and under a plain language reading of Wis. Stat. § 8.35(1), Petitioner's name must appear on the ballot for President in Wisconsin. The Commission did not err.

2. Petitioner's arguments to the contrary lack merit.

Petitioner makes a number of arguments about how to interpret Wis. Stat. § 8.35, but none are persuasive.

Petitioner says that "qualified" actually means official Commission approval, but that has no foundation in Wis. Stat. § 8.35(1): the statute references no Commission ballot access approval process based on a withdrawal statement. A cardinal "maxim[ ] of statutory construction . . . [is] that courts should not add words to a statute to give it a certain meaning." *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165. Petitioner's argument would add a Commission approval process for withdrawal statements to Wis. Stat. § 8.35(1) that does not exist. Moreover, the Commission was not addressing any challenge to Petitioner's ballot access, so it had no basis to convene to hear any such challenge at that August 27 hearing.

Petitioner reads "qualifies to appear on the ballot" as *not* a reference to the federal qualification requirements for President found in art. II, § 1, of the U.S. Constitution. (Pet. 24–25.) But that wholly ignores the legal authority concerning the required declaration of candidacy, Wis. Stat. §§ 8.20(6) and 8.21(2)(a) through (c). Those provisions illustrate that "qualifies to appear on the ballot" refers to the federal qualifications for President in art. II, § 1 of the U.S. Constitution.

Petitioner argues that his withdrawal statement operated to remove his name from the ballot, but that would render the statute a nullity. Wisconsin Stat. 8.35(1) provides that, once a candidate files nomination papers and qualifies to appear on the ballot, he "may not decline nomination." Wis. Stat. § 8.35(1). If a candidate can make himself "unqualified" by simply announcing he's changed his mind, a candidate can decline nomination whenever he wants.

The Legislature created one statutory exception to a candidate's name appearing on the ballot even when the two statutory requirements are met—"in case of death of the person." Wis. Stat. § 8.35(1). If the Legislature had intended to provide another express exception to a candidate's name appearing on the ballot after fulfilling the statutory requirements, it could have so provided, but it didn't. Petitioner's argument fails because it attempts to add words to the statute. *Fitzgerald*, 387 Wis. 2d 384, ¶ 30.

Petitioner's claim is at odds with other statutes, as well.

First, the statutes require voters to vote for a ticket of both the President and Vice President: "[w]hen voting for president and vice president, the ballot shall permit an elector to vote only for the candidates on one ticket *jointly* or write the names of both persons in both spaces." Wis. Stat. § 5.64(1)(ar)1m. In other words, candidates for President and Vice President appear, or do not appear, on the ballot as a

ticket. Here, the We the People Party's vice-presidential candidate, Shanahan, submitted no withdrawal statement.

Second, Petitioner forgets that Wis. Stat. § 8.35(1) protects electors, not just candidates. No elector may sign more than one candidate's nomination papers. *See* Wis. Stat. § 8.04; *see also* Wis. Admin. Code EL § 2.05(11). By not allowing candidates to withdraw after submitting their papers, Wis. Stat. § 8.35(1) ensures that a voter's signatures do not go to waste on a candidate that had second thoughts after submitting his nomination papers and declaration of candidacy. Petitioner's view of the statute would cast aside the decisions of the voters of Wisconsin who support him.

Lastly, Petitioner complains that "he cannot be drafted into being a candidate—against his will." (Pet. 9.) Nothing could be further from the truth. Petitioner affirmatively filed nomination papers and a declaration of candidacy to get on the ballot for President in Wisconsin on August 6. That is the opposite of being "drafted"; he took it upon himself to run for President in Wisconsin. Once he filed those papers, he could no longer decline nomination, and his name was required to appear on the ballot under Wis. Stat. § 8.35(1). State law simply did not allow the Commission to give effect to his request to have his name removed from the ballot.

CONCLUSION

Respondent Wisconsin Elections Commission asks this Court to deny Petitioner Robert F. Kennedy, Jr.'s Petition for Leave to Appeal.

Dated this 11th day of September 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,034 words.

Dated this 11th day of September 2024.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of September 2024.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP1798-LV

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondents-Respondents.

ROBERT F. KENNEDY, JR.'S MOTION FOR LEAVE TO FILE A REPLY BRIEF

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

ROBERT F. KENNEDY, JR,
Petitioner-Appellant

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Robert F. Kennedy, Jr. (Petitioner), through counsel, moves the Court for leave to file a reply brief in this matter. On September 9, 2024, Kennedy submitted a Petition for Leave to Appeal a decision made on September 6, 2024 by the Dane County Circuit Court. This Court granted that request, and given the urgency of the matter, ordered that the WEC (Respondent) file a response brief on September 11, 2024. The Court did not, however, specifically grant Kennedy an opportunity to file a reply brief.

Kennedy's Petition for Leave to Appeal was filed under Wis. Stat. § 808.03(2). Wis. Stat. § 809.50 provides a briefing schedule for petitions for leave to appeal, however a reply brief is not considered under this. Kennedy should be granted the opportunity to reply to the WEC's brief. Given the importance and urgency of Kennedy's appeal, Petitioner respectfully requests that this Court grant Kennedy's Motion for Leave to Submit a Reply Brief.

Dated at Madison, Wisconsin, September 12, 2024.

Respectfully submitted,

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP1798-LV

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Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondents-Respondents.

ROBERT F. KENNEDY, JR.'S REPLY IN SUPPORT OF HIS PETITION FOR LEAVE TO APPEAL

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

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Cases

I. Introduction

The reply brief can be boiled down to two questions that expose whether the Commission's position is correct. First, can any independent candidate ever get off the ballot? Under its logic, no. After all, Kennedy had to submit his nomination papers on August 6 and give notice of withdrawal the same day. Under that theory, there's no getting off the ballot—ever—for an independent candidate, unless they submit the forms in the morning and withdraw them by 5 p.m. that same day. Second, does that fact treat Kennedy differently (read: worse) than the major-party candidates? Well, Harris or Biden or Trump could submit their papers on August 6 and then withdraw by September 5. There's a definite benefit there—the major parties have the right to swap out candidates or withdraw that does not extend to the independents. It's not just a benefit tactically, but it also elevates their Free Speech and Association rights over Kennedy's. The major-party candidates have flexibility in promoting or extinguishing the message "I am running for President" on the ballot that is not likewise extended to independents.

Those points can't be ignored or cast aside as incidental or ancillary as if this is no big deal—in the Commission's terms this is "a novel challenge," a point the Commission repeatedly makes.[1] But this isn't novel, the issue is being raised successfully elsewhere. And the reason cases about getting off the ballot aren't enshrined in the U.S. Reporter is that any time a person wants off the ballot and actually has the means to sue, the claim is quickly mooted by the election—evading (as the Commission tries to here) appellate review. Thus, the lack of precedent isn't a reflection on whether the principles are correct, but whether there is sufficient reason (and ability) to pursue the point.

To be clear and firm on this point: the Commission's continual reference to this being a novel argument is incorrect. The principles of

[1] Commission Br. at 9, 10, 22, 25.

compelled speech and association are firmly rooted in our jurisprudence. So while the Commission limits the case law as providing a right to access the ballot—but not withdraw from the ballot—it misses the first principles of constitutional law: "Freedom of association … plainly presupposes a freedom not to associate."[2] And that's not some outlier of a case; it's a principle deeply rooted in the fabric of constitutional law.

That leads to the other core problem with the Commission's brief: it represents positions not supported by the cases it cites. The most glaring example appears in its strongest argument: forfeiture—Kennedy had to argue these points to the Commission.[3] In support, it cites paragraph 18 of *State of Wisconsin Dep't of Just. v. State of Wisconsin Dep't of Workforce Dev*, for the proposition that "a party's failure to properly raise an issue before the administrative agency generally forfeits the right to raise that issue before a reviewing court."[4] Yet, the case doesn't say what the Commission wants (or really needs) it to say. Quite the opposite of supporting forfeiture, the case makes it clear this Court has not just the ability but the duty to reach the constitutional issues raised. Here's the *actual* quote, from the very next paragraph of the Commission's very case: "The supreme court has stated that '[w]hen [a forfeited] issue involves a question of law rather than of fact, when the question of law has been briefed by both parties and when the question of law is of sufficient public interest to merit a decision,' it is appropriate for an appellate court to exercise its discretion and address an otherwise forfeited issue."[5]

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[2] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

[3] Comm. Br. at 21.

[4] *Id.* (quoting *State of Wisconsin Dep't of Just. v. State of Wisconsin Dep't of Workforce Dev.*, 2015 WI App 22, ¶ 18, 361 Wis. 2d 196, 861 N.W.2d 789, *aff'd*, 2015 WI 114, 365 Wis. 2d 694, 875 N.W.2d 545).

[5] *State of Wisconsin Dep't of Just. v. State of Wisconsin Dep't of Workforce Dev.*, 2015 WI App 22, ¶ 19 (quoting *Apex Elecs. Corp. v. Gee*, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998)).

Finally, the Commission over-reads *Hawkins*, and its impact on this case.[6] For one, *Hawkins* is not settled precedent—it's the order of a denial of review setting out pragmatic considerations that are not present here.[7] Indeed, Hawkins wanted *on* the ballot, Kennedy wants *off* the ballot. For Hawkins, new ballots had to be created, for Kennedy stickers only need to be applied. And while the Commission argues that this is a bridge-too-far in terms of logistics, it has to be remembered that this is a State law. The legislature has provided this very same mechanism to be used. The Commission and the clerks do not have free reign to ignore the legislature's commands or brand them as difficult and thus to be ignored. And in all this, it has to be remembered that Kennedy asked to be removed far before the ballots were approved and printed. The Commission cannot create this problem and then cite it as a reason for the Court not to honor Kennedy's rights and cure the very problem that it created.

Those are the fundamental, thematic problems with the Commission's arguments. What follows is a *brief* rundown of the particular arguments that it makes about the record and the law. And this brief addresses *why* they do not prevent this Court from accepting this appeal and entering the appropriate order removing Kennedy from the ballot.

[6] Comm. Br. at 15.

[7] *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877.

II. The Commission's brief fails to grapple with Kennedy's arguments in any meaningful way.

The Commission's brief does everything it can to elide the first principles that inform Kennedy's claims. It does that in five particular ways, and each are addressed below.

First, the Commission tries to rely on procedural roadblocks of service as a means to deny this appeal. But it doesn't argue that it was without service of the TRO. Nor could it: its lawyers responded to the TRO below. So there is no reason to dodge this issue.

Second, the Commission cites the circuit court's discretion, but the trial judge didn't show he exercised discretion, he just denied the TRO—deference to a trial judge's discretion presupposes the exercise of it and the appellate court's ability to review it.[8] The case law could not be clearer on that point: "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards."[9] Put more simply, "there must be evidence that discretion was in fact exercised."[10] Kennedy set out below (and in the petition) why the factors for the TRO are satisfied. If the circuit court thought he'd fallen short on one of them, say it. But it's not an exercise of discretion for the circuit court to cite this being an important issue and so the TRO is denied. Rather, it's quite the opposite: the issue is important and meritorious, and that's why the TRO had to be granted.

Third, the Commission cites "forfeiture" as means of escaping review. But as discussed above, the case doesn't say what the Commission wants (or needs) it to say. Indeed, the vehemence of the Commission's efforts to

[8] Comm. Br. at 10, 19.

[9] *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

[10] *State v. Gallion*, 2004 WI 42, ¶ 3, 270 Wis. 2d 535, 678 N.W.2d 197.

escape review show precisely *how* important this issue is and why this Court has to tackle it. Again, the law is not as the Commission represents; rather, "'[w]hen an issue involves a question of law rather than of fact, when the question of law has been briefed by both parties and when the question of law is of sufficient public interest to merit a decision,' it is appropriate for an appellate court to exercise its discretion and address an otherwise forfeited issue."[11]

Fourth, it argues that Kennedy has fundamentally misunderstood First Amendment and Equal Protection law.[12] The way it gets there (like the forfeiture argument) is to provide a cribbed reading of the caselaw. It cites and quotes *Timmons* in one breath and then disavows all that the case actually says in the next.[13] In *Timmons*, the Supreme Court looked at fusion ballots—the candidate's name appearing for two parties. It used to happen a lot, but Minnesota banned it. The Supreme Court noted (as Kennedy did in the petition) that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."[14]

The Supreme Court then continued with the key provisos that the Commission left out, namely, while it's clear that we're talking about core First Amendment activity, "States may, and inevitably must, enact *reasonable* regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."[15] No question there. The Supreme Court continued: "When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and

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[11] *State of Wisconsin Dep't of Just. v. State of Wisconsin Dep't of Workforce Dev.*, 2015 WI App 22, ¶ 19 (quoting *Apex Elecs. Corp.*, 217 Wis. 2d at 384).

[12] Br. at 29–30.

[13] *See* Br. at 29–30.

[14] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (quoting *Colorado Republican Federal Campaign Comm. v. Federal Election Comm.*, 518 U.S. 604, 616 (1996)).

[15] *Id.* (emphasis added).

magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary."[16] That is, there's a balancing test that courts must strike. We have a fundamental right at issue—Kennedy's Associational and Free Speech rights, that's on one side of the ledger. And we have the State's ability to cure confusion on the other.

The Supreme Court broke it down this way, in a point that echoes here: "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate."[17] That makes sense, it reasoned, because "[a] particular candidate might be ineligible for office, unwilling to serve, or, as here, another party's candidate. *That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's association rights*."[18] That is, while there is not an absolute right to be on the ballot, there is an important right at issue, and that right has to be weighed against the State's compelling interests—namely "avoiding voter confusion and overcrowded ballots."[19]

But that's not what's going on here. Kennedy is not trying to get *on* the ballot and bring confusion, he's trying to stay *off* the ballot to avoid confusion. The Commission—not Kennedy—is the one that has created an overcrowded and confusing ballot. Properly understood, *Timmons* simply does not support that Kennedy's rights are non-existent or trivial; it says the opposite: "We conclude that the burdens Minnesota imposes on the Party's First and Fourteenth Amendment associational rights—*though not trivial*—*are not severe*."[20] And it certainly doesn't support the idea that the Commission has a compelling reason for keeping him on the ballot. Again, and to be perfectly clear about this: the very points for which the

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[16] *Id.* at 358.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 363 (emphasis added).

Commission is trying to use *Timmons*, those points actually support *why* Kennedy's rights are not outweighed by the Commission's needs. The Commission—not Kennedy—created these issues when, without any stated need, it refused to accede to his request to get off the ballot, a request that would have been granted if he was of the two major parties.

Fifth, it makes the most remarkable claim in its brief that Kennedy has no First Amendment Associational rights or Speech rights; instead, it argues that in elections, "[t]he First Amendment associational right to a candidate's appearance on a ballot belongs to the voter."[21] No citation followed that claim, though in the next paragraph there's a few scattered cites to a Maryland case and a Pennsylvania case from 1997. Rather, the Supreme Court has been clear of how broad those protections actually are and that they can't be separated one from the other: "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[22] That observation was made in the context of an Equal Protection Clause argument, which Kennedy has also made. But it informs why the lines that the Commission wants enforced don't actually exist.

Instead, as the Supreme Court has made clear, the First Amendment is alive and well for all people, candidates and voters alike: "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[23] In other words, contrary to the Commission's position, Associational and Free Speech rights belong to Kennedy just as much as to anyone else. Put differently, you cannot divorce Kennedy's right to appear on the ballot from his right not to appear on the ballot. They are one in the same—both convey and invoke Free Speech and Associational rights.

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[21] Br. at 31.

[22] *Bullock v. Carter*, 405 U.S. 134, 143 (1970).

[23] *Janus v. AFSCME, Council 31*, 585 U.S. 878, 892 (2018).

III. Conclusion

In the end, the Commission's attempts to escape review should be rejected. There is no reason to let the concepts of service or forfeiture keep these claims from being reviewed. What's more, the Commission's other arguments do not carry the day. The cases don't actually say what it wants (or needs) and they do not preclude this Court from granting relief.

Dated at Madison, Wisconsin, September 12, 2024.

Respectfully submitted,

Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff *Pro Hac Vice* Motion forthcoming	ROBERT F. KENNEDY, JR., *Petitioner* *Electronically signed by Joseph A. Bugni* Joseph A. Bugni *Wisconsin Bar No.* 1062514 HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com (608) 257-0945

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DISTRICT II

September 12, 2024

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You are hereby notified that the Court has entered the following order:

2024AP1798-LV Robert F. Kennedy, Jr. v. Wisconsin Elections Commission
(L.C. # 2024CV2653)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Robert F. Kennedy, Jr., petitioned for leave to appeal a non-final order dated September 6, 2024, that denied Kennedy's motion for an emergency, *ex parte* temporary restraining order. On Tuesday, September 3, 2024, Kennedy sought judicial review of the Wisconsin Election Commission's ("WEC") decision to include his name on the November 5, 2024 General Election Ballot as a candidate for President of the United States despite Kennedy's request that his name not be included on the ballot. Also on September 3, Kennedy moved for a temporary injunction requesting the circuit court to order WEC to not include Kennedy's name on the general election ballot and to prevent absentee ballots from being mailed.

On Wednesday, September 4, citing the rapidly approaching statutory deadlines for the county clerks to deliver ballots to the municipal clerks and for the municipal clerks to mail out absentee ballots to voters, Kennedy then moved for an emergency, *ex parte* temporary restraining order. In this motion, he asked the circuit court to "'[p]reliminarily order WEC to advise all municipal clerks in this state that they should not print or mail any absentee ballots until this court has issued a ruling on the merits" of his case. Kennedy requested the circuit court to decide his motion without a hearing by 5:00 p.m. on Friday, September 6.

On Friday, September 6, the circuit court denied Kennedy's motion for an emergency, *ex parte* temporary restraining order. The circuit court explained, "A matter of such consequence deserves a full development of the record with appropriate briefing by all sides." It then set a telephonic scheduling conference for five days later, on Wednesday, September 11 at 2:15 p.m.

On Monday, September 9, Kennedy petitioned this court for leave to appeal the circuit court's order. That same day, we ordered WEC to file a response to Kennedy's petition by 5:00 p.m. on Wednesday, September 11. WEC timely filed its response and supplemental appendix.

Also on September 11, the circuit court held its telephonic scheduling conference. Online circuit court records indicate the circuit court has set an accelerated briefing schedule and is cognizant of the rapidly approaching ballot deadlines. WEC's response brief is scheduled to be filed on Friday, September 13 by 12:00 p.m. Kennedy's reply brief is also set to be filed on Friday, September 13 by 4:30 p.m. The circuit court has scheduled an oral ruling on Kennedy's motion for a temporary injunction for Tuesday, September 17 at 9:45 a.m.

This morning, Kennedy filed a motion for leave to file a reply brief and a proposed brief, replying to WEC's response brief that we received at 5:00 p.m. on September 11. We grant his motion, and we accept the reply brief for filing.

Because the circuit court has now set an accelerated schedule to promptly decide Kennedy's motion for a temporary injunction, we will hold Kennedy's current petition in abeyance to allow the circuit court to proceed as it has scheduled. This will allow for better development of the record if, following the circuit court's oral decision, an aggrieved party asks this court to address this matter.

Following the circuit court's oral ruling on Tuesday, we would expect the circuit court to immediately issue a written order. Any aggrieved party may file a petition for leave to appeal or, if appropriate, a notice of appeal. If a party petitions for leave to appeal, we would expect any leave petition to include an analysis of the criteria for permissive appeal. *See* WIS. STAT. § 808.03(2); *see also* ***State ex rel. Hass v. Wisconsin Court of Appeals***, 2001 WI 128, ¶13, 248 Wis. 2d 634, 636 N.W.2d 707. This means that any leave petition following the circuit court's decision also must include a proper analysis of this court's standard of review and an examination of the four criteria necessary for a temporary injunction. *See* ***Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.***, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154.

Finally, to expedite matters, we will require any petitioning party to include in an appendix to a petition the briefs and other material filed in the circuit court along with Kennedy's brief in support of his motion for temporary injunction, which he did not include in his current appendix in this court.

Therefore,

IT IS ORDERED that Kennedy's motion for leave to file a reply brief is granted. His proposed reply brief is accepted for filing.

IT IS FURTHER ORDERED that Kennedy's petition for leave to appeal is held in abeyance.

Samuel A. Christensen
Clerk of Court of Appeals

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You are hereby notified that the Court has entered the following order:

2024AP1872 Robert F. Kennedy, Jr. v. Wisconsin Elections Commission
(L.C. # 2024CV2653)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Robert F. Kennedy, Jr., petitions for leave to appeal the circuit court's September 16, 2024 order denying Kennedy's request for a temporary injunction. Kennedy originally sought a temporary injunction in the circuit court requiring the Wisconsin Elections Commission ("WEC") "to not include Kennedy as a candidate on the November 5, 2024 General Election ballot and preventing them from mailing any absentee ballots until this Court has issued a ruling on the merits" of his case.

A leave to appeal may be granted by this court when it will materially advance the termination of the litigation or clarify further circuit court proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance to the administration of justice. WIS. STAT. § 808.03(2). When deciding whether to grant a permissive appeal, this court must also examine whether the petitioner has a substantial likelihood of success on the merits. *See* ***State ex rel. Hass v. Wisconsin Court of Appeals***, 2001 WI 128, ¶13, 248 Wis. 2d 634, 636 N.W.2d 707.

We recognize that WEC has not yet responded to Kennedy's current petition. However, this court has thoroughly reviewed the response WEC filed to Kennedy's petition in appeal No. 2024AP1798-LV, and we are well aware of WEC's position and arguments. Because of the extreme time pressure on this case, we have decided to review Kennedy's current petition ex parte. We are persuaded that sufficient leave criteria are satisfied and grant Kennedy's leave petition. Granting Kennedy's leave petition now will allow briefing on the merits of Kennedy's claim to commence immediately—specifically, whether the circuit court erred by denying Kennedy's motion for a temporary injunction.

Procedurally, entry of this order has the effect of filing a notice of appeal. WIS. STAT. RULE 809.50(3). We will waive the requirements of a docketing statement and the filing of a statement on transcript. Online circuit court entries indicate a transcript of the circuit court's September 16, 2024 oral ruling has already been filed in the circuit court.

The clerk of the circuit court is directed to compile and transmit the record to this court by today, September 18, 2024, at 1:00 p.m. If any transcript is filed after the record is

transmitted, the circuit court clerk shall immediately transmit that transcript as a supplemental return to this court.

Given the time-sensitive nature of this court's review, we also conclude an accelerated briefing schedule is appropriate. *See* WIS. STAT. RULE 809.82(2)(a). Kennedy shall file a memorandum brief by Thursday, September 19, 2024 at 11:00 a.m. WEC shall file a memorandum response by Friday, September 20 at 11:00 a.m. Those briefs shall not exceed 25 pages if a monospaced font is used or 5,500 words if a proportional font is used. Kennedy may file a reply brief by Friday, September 20 at 4:00 p.m. The reply brief shall not exceed 10 pages or 2,220 words.

The parties have discussed Kennedy's requested relief of applying stickers to ballots to cover his name thereon as an alternative to reprinting of ballots with his name removed. In addition to whatever arguments the parties wish to make in their briefs on whether the circuit court erred by denying Kennedy's request for a temporary injunction, the parties shall address the following questions in their briefs:

1. The legislature has permitted applying a sticker to cover the name of a candidate on a ballot when a vacancy is caused by a candidate's death after ballots have been printed. *See* WIS. STAT. §§ 7.37(6), 7.38(3), 8.35(2)(d). In light of this, does it matter if ballots with stickers on them have not been tested with voting equipment?

2. If there was a vacancy in a statewide office race due to the death of a candidate, such as for the Office of Attorney General, and presuming "the chairperson of the committee filling the vacancy" supplied the stickers with the

name of a substitute candidate, see WIS. STAT. §§ 7.37(6) & 7.38(3), would the stickers have to be placed on the ballots statewide?

3. WISCONSIN STAT. § 7.37(6), 7.38(3) & 8.35(2)(d) appear to collectively provide that if a candidate dies after ballots have been printed and if stickers with the name of a replacement candidate have been provided pursuant to those statutory provisions, "the inspectors *shall* … properly apply the stickers to the official ballots before endorsement" and shall do so "at the direction of the municipal clerk." (Emphasis added.) Do clerks, as WEC has suggested, have discretion to *not* have the stickers applied to the ballots?

Therefore,

IT IS ORDERED that the petition for leave to appeal is granted. The entry of this order has the effect of the filing of a notice of appeal. WIS. STAT. RULE 809.50(3).

IT IS FURTHER ORDERED that the requirements of a docketing statement and statement on transcript are waived.

IT IS FURTHER ORDERED that the clerk of the circuit court is directed to compile and transmit the record to this court by today, September 18, 2024, at 1:00 p.m. If any transcript is filed after the record is transmitted, the circuit court clerk shall immediately transmit that transcript as a supplemental return to this court.

IT IS FURTHER ORDERED that Kennedy shall file a memorandum brief by Thursday, September 19, 2024 at 11:00 a.m. WEC shall file a memorandum response by Friday, September 20 at 11:00 a.m. Those briefs shall not exceed 25 pages if a monospaced font is used

or 5,500 words if a proportional font is used. Kennedy may file a reply brief by Friday, September 20 at 4:00 p.m. The reply brief shall not exceed 10 pages or 2,220 words.

IT IS FURTHER ORDERED that the parties' briefs also address the questions included in the body of this order.

Samuel A. Christensen
Clerk of Court of Appeals

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Petitioner.

APPEAL OF A NON-FINAL ORDER DENYING A PRELIMINARY INJUNCTION, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

PETITION FOR BYPASS OF THE WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

The Wisconsin Elections Commission seeks bypass so this Court may review the circuit court's denial of Robert F. Kennedy, Jr.'s quest for extraordinary relief: a temporary injunction requiring clerks to create and place stickers on four million Wisconsin ballots to remove his name.

Kennedy filed nomination papers and a declaration of candidacy to run for U.S. President in early August, but he changed his mind at the eleventh hour. Rather than run as a third-party candidate, he now prefers (at least in Wisconsin) to support a major party candidate. Kennedy's late request to remove his name from the ballot was barred by Wis. Stat. § 8.35(1), and so the Commission denied it. Undeterred, he proceeded to circuit court, seeking a temporary injunction, and losing there, petitioned for leave to appeal to the court of appeals. That court accepted his petition.

This question justifies prompt, final resolution by this Court: it is highly time sensitive and hugely consequential for the people of Wisconsin.

Kennedy appears to recognize that it is too late to reprint the ballots, which already are on their way to municipal clerks and absentee voters, including overseas and military voters. He proposes that all can be solved by requiring local clerks to create and affix stickers to every Wisconsin ballot, but that solution would ignore state law; force clerks to spend tens of thousands of hours creating and affixing stickers; and, as the circuit court put it, create a "logistical nightmare" that could threaten the accuracy of the election results and confidence in the election.

Kennedy's temporary injunction motion did not begin to justify such a poorly conceived remedy, and the circuit court appropriately exercised its discretion in denying it. The circuit court considered the law and facts in light of the temporary injunction factors and concluded that the balancing of equities favored clerks, voters, and the public; that Kennedy's asserted

harm flowed from his choice to put himself on the ballot in a state where the law prohibits withdrawing after qualifying for the ballot; and that Kennedy failed to demonstrate a reasonable likelihood of success on the merits where his reading of Wis. Stat. § 8.35(1) was unreasonable and he provided no support for the premise that a candidate has a constitutional right to be removed from the ballot.

The Commission asks this Court to grant bypass and affirm the circuit court's denial of relief.

ISSUE PRESENTED

Whether the circuit court appropriately exercised its discretion in denying a temporary injunction that would have required election clerks to reprint or hand-affix stickers to four million Wisconsin ballots to remove Kennedy's name.

RELIEF REQUESTED

The Commission respectfully requests that this Court take jurisdiction of this appeal and affirm the circuit court on an expedited basis.

STATEMENT OF THE CASE

Kennedy has appealed the circuit court's September 16 denial of a motion for temporary injunction. The following summarizes the relevant facts.

I. The Commission receives candidate papers for the November 2024 general election, including Kennedy's nomination papers and declaration of candidacy.

Robert F. Kennedy, Jr. and Nicole Shanahan submitted nomination papers and declarations of candidacy to the Commission on August 6, 2024, as independent candidates for President and Vice President in the November 2024 general election. (R. 44 (Declaration of Riley P. Willman ("Willman Decl.")) ¶¶ 3–6, Ex. A, Ex. C; 45 (Declaration of Steven C.

Kilpatrick ("Kilpatrick Decl.")) ¶ 7, Ex. E.) As part of their nomination papers, Kennedy and Shanahan indicated that they are the candidates for the "We the People" Party and listed the electors for that Party. (R. 45 (Kilpatrick Decl.) ¶ 7, Ex. E.)

On August 19, 2024, the Commission received a Certification of Nomination from the Democratic Party nominating Kamala Harris as its candidate for President and Tim Walz as its candidate for Vice President for the November 2024 general election. The Commission also received declarations of candidacy from Harris and Walz. (R. 44 (Willman Decl.) ¶ 8, Ex. D.) The Commission received no declaration of candidacy from current President Joe Biden or a Certification of Nomination from the Democratic Party nominating Biden. (R. 44 (Willman Decl.) ¶¶ 9–10.)

On August 23, 2024, Kennedy sent a letter to the Commission stating that he was "withdraw[ing] his candidacy from the 2024 United States Presidential Election" and requesting that his name not be printed on the ballot in Wisconsin. (R. 44 (Willman Decl.) ¶ 7, Ex. B.)

II. The Commission meets on August 27 to certify candidate names for the general election ballot and considers Kennedy's request to withdraw.

The Commission must provide required election notices to county clerks "no later than the 4th Tuesday in August," Wis. Stat. § 10.06(1)(i), which was August 27 this year. The required election notices contain the candidate and statewide referenda information that county clerks need to begin preparing ballots. The Commission convened on August 27 to perform this responsibility, consider challenges to nomination papers, and certify candidate names for the November 2024 general election ballot. (R. 45 (Kilpatrick Decl.) ¶¶ 5–6, Ex. C–D.)

Based on Wis. Stat. § 8.35(1), which provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person," the commissioners voted 5-1 to deny Kennedy's request to withdraw from the ballot. (R. 45 (Kilpatrick Decl.) ¶ 6, Ex. D.)

III. Clerks begin creating the ballots.

Wisconsin law requires that, "immediately upon receipt" of the Commission's notices, county clerks prepare the ballot forms. Wis. Stat. § 7.10(2). County clerks must integrate ballot information for local races and referenda onto ballot styles for each municipality. (R. 42 (Declaration of Robert Kehoe, dated September 13, 2024 ("Kehoe Decl.")) ¶¶ 5, 12.) They then must finalize and proof their ballots, place the print order, and ensure that they have sufficient ballots. (R. 42 (Kehoe Decl.) ¶ 5; 46 (Affidavit of Scott McDonell ("McDonell Aff.")) ¶ 8; 43 (Declaration of Michelle R. Hawley ("Hawley Decl.")) ¶¶ 8–9; 40 (Declaration of Lisa Tollefson ("Tollefson Decl.")) ¶ 9; 45 (Kilpatrick Decl.) ¶ 4, Ex. B.) The vast majority of county clerks must utilize a third-party vendor because of the technical requirements for ballots to be accurately scannable and fed through electronic tabulation machines. (R. 42 (Kehoe Decl.) ¶¶ 13–17; 43 (Hawley Decl.) ¶¶ 9, 11.)

This work must be completed by September 18, the last date by which county clerks must deliver printed ballots to municipal clerks — 48 days before the general election. Wis. Stat. § 7.10(3). (R. 42 (Kehoe Decl.) ¶¶ 7–10.)

Municipal clerks, in turn, must deliver absentee ballots to electors who request them no later than September 19, 47 days before the general election. Wis. Stat. § 7.15(1). (R. 42 (Kehoe Decl.) ¶ 7; 46 (McDonell Aff.) ¶¶ 5–6, 9.) And under the federal Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311, municipalities

must send ballots to all military and overseas voters no later than September 21, 45 days prior to the election. (R. 42 (Kehoe Decl.) ¶¶ 8–10.)

Following the Commission's August 27 meeting, Wisconsin county clerks followed these statutory commands, finalizing the hundreds of individual ballot forms and placing orders with third-party vendors to print their ballots. (R. 42 (Kehoe Decl.) ¶ 22; 46 (McDonell Aff.) ¶¶ 7–8; 43 (Hawley Decl.) ¶¶ 8–9; 40 (Tollefson Decl.) ¶¶ 8–9.) There will be approximately four million ballots printed in the state. (R. 42 (Kehoe Decl.) ¶ 24.)

Print orders for ballots were scheduled to be completed by the September 18 deadline for providing ballots to municipal clerks. (R. 42 (Kehoe Decl.) ¶ 22; 46 (McDonell Aff.) ¶¶ 7–10; 43 (Hawley Decl.) ¶ 9.) If counties are required to reprint ballots, clerks would be unable to meet statutory deadlines to get ballots into the hands of the voters. (R. 42 (Kehoe Decl.) ¶ 18; 46 (McDonell Aff.) ¶¶ 11–12; 43 (Hawley Decl.) ¶ 10; 40 (Tollefson Decl.) ¶ 10.)

More than 80 percent of ballots cast in Wisconsin are optical scan ballots, which rely on a series of "timing marks"—lines along the top and sides of the ballot that serve as coordinates to allow the voting equipment to read which candidate to tally a vote for. Ballots must be thoroughly tested to make sure the timing marks work correctly before printing. (R. 42 (Kehoe Decl.) ¶ 13.)

IV. Kennedy files suit against the Commission and continues his campaign efforts elsewhere.

On September 3, Kennedy brought suit against the Commission, filing a chapter 227 petition for judicial review and a motion for a temporary injunction. (R. 2–4.) On September 4, Kennedy filed an ex parte motion for an emergency temporary restraining order. (R. 11.) On

September 6, the circuit court denied that motion and set a scheduling conference for September 11. (R. 29.)

On September 9, Kennedy filed a petition for leave for appeal the denial of his motion in District II. (R. 33.) On September 12, the court of appeals issued an order holding the petition in abeyance while the circuit court resolved Kennedy's motion for a temporary injunction. (R. 36.)

Meanwhile, Kennedy's interest in having voters choose him for President has continued in some states but not others. He has indicated that he does not seek support in states like Wisconsin where the presidential election is predicted to be close, but otherwise hopes voters will choose him in states where he has successfully been placed on the ballot. (R. 45 (Kilpatrick Decl.) ¶ 3, Ex. A).[1] Some of Kennedy's Wisconsin electors have indicated that they want him to remain on the Wisconsin ballot. (R. 42 (Kehoe Decl.) ¶ 26.)

V. Clerks express concern that Kennedy's sticker plan is unfeasible and would lead to the inaccurate tabulation of ballots.

On September 10, Kennedy's counsel stated in a letter to the court that, if Wisconsin's general election ballots were already being printed, Kennedy would seek an order requiring blank stickers to be placed over his name on every ballot. (R. 34.) The Commission is unaware of any situation where this has occurred. (R. 42 (Kehoe Decl.) ¶ 24.)

County clerks have expressed their serious concerns about that suggestion. (R. 43 (Hawley Decl.) ¶ 17; 40 (Tollefson Decl.) ¶ 15; 41 (Declaration of Trent Miner ("Miner Decl.")) ¶ 12; 46 (McDonell Aff.) ¶ 14.) The tabulation machines used for the upcoming election have not been tested

[1] Caitlin Yilek & Allison Novelo, *Map Shows Where RFK Jr. Is on the Ballot in the 2024 Election*, CBS News (Sept. 6, 2024), https://www.cbsnews.com/news/rfk-jr-map-on-the-ballot-states/ (last visited September 19, 2024).

with stickered ballots. (R. 42 (Kehoe Decl.) ¶ 25; 43 (Hawley Decl.) ¶ 17; 40 (Tollefson Decl.) ¶ 15; 41 (Miner Decl.) ¶ 14.) Misplaced stickers would produce errors in how the voter's choices are made. (R. 41 (Miner Decl.) ¶ 13.) Stickers could peel off, get jammed or stuck in the voting tabulator, or stick to and rip other ballots, making a jammed scanner unavailable on Election Day. (R. 42 (Kehoe Decl.) ¶ 25; 43 (Hawley Decl.) ¶ 17; 40 (Tollefson Decl.) ¶ 15; 41 (Miner Decl.) ¶ 14.)

In addition, machines are programmed to read ballot paper of a certain weight to avoid feeding more than one ballot into the machine at once. Placing a sticker on a ballot may produce a double ballot error, resulting in the return of the ballot to the voter. (R. 43 (Hawley Decl.) ¶ 17; 41 (Miner Decl.) ¶ 12.) Further, Ballot machines are designed to discern light marks in the target zone of a ballot where voters mark the ovals or arrows. Even a shadow or wrinkle (for instance, caused by how the sticker is applied) can cause the machine to register an overvote. On the presidential ballot, Kennedy's name is directly next to the oval for the We the People Party ticket. (Declaration of Robert Kehoe, dated September 19, 2024 ("Kehoe Decl.")) ¶¶ 4–6 & Ex. A.)

Placing stickers on four million paper ballots would be a herculean task for clerks and staff. (R. 40 (Tollefson Decl.) ¶ 13; 43 (Hawley Decl.) ¶ 16; 42 (Kehoe Decl.) ¶ 25; 41 (Miner Decl.) ¶ 13 (discussing that clerks in rural areas are part-time and have other, full-time jobs).) Even if sufficient volunteers could be gathered, the stickers might not fully obscure Kennedy's name. (R. 40 (Tollefson Decl.) ¶ 13.)

VI. The parties brief the temporary injunction motion, and the circuit court denies relief; Kennedy files a new petition for leave to appeal.

The circuit court held a status conference and set a briefing schedule on the temporary injunction motion. On September 13, the Commission and Kennedy filed briefs.

(R. 39; 53.) The Commission provided declarations from Commission staff and clerks around the State. (R. 40–44; 46.)

On September 16, at Kennedy's request, the circuit court held an evidentiary hearing for Kennedy to present evidence. (R. 70:2–3.) Kennedy did not present any affidavits or witnesses. He also noticed no Commission declarants and subpoenaed no clerks. (R. 70:3, 12, 16; R. 13.)

Later that day, the circuit court issued an oral ruling denying the temporary injunction. (R. 59; 60.) The court held that the equities of harms to clerks, voters, and the public outweighed Kennedy's asserted interests. The court pointed to the unbudgeted costs for clerks, missed deadlines for sending ballots, and the "logistical nightmare" posed by Kennedy's proposal. The court cited his charge to avoid confusion and incentives not to vote in the time leading up to the election:

> In our current highly charged political environment, and given the . . impending deadlines governing absentee ballots, and given the great uncertainty whether Appellant's request to place stickers on the ballots in lieu of preprinting would even work, I conclude the balance of equities weighs heavily against Appellant's request.

(R. 60:10.) The court balanced those harms against those asserted by Kennedy and pointed out that Kennedy had chosen to submit his nomination papers despite Wisconsin's statutory bar on withdrawal.

On the preservation of the status quo, the circuit court reasoned that this factor also weighed against issuing a temporary injunction because Kennedy sought the ultimate relief in the case. (R. 60:10–11.)

On the likelihood of success on the merits, the circuit court reasoned that Wis. Stat. § 8.35(1) does not permit withdrawal from the ballot once a candidate submits his nomination papers and declaration of candidacy. And it concluded that Kennedy's constitutional challenges to that

statute were unpersuasive: Kennedy offered no support for a constitutional right to be *removed* from the ballot. (R. 60:11–20.)

On September 17, Kennedy petitioned for leave to appeal the circuit court's order. (R. 61.) The court of appeals granted that order ex parte on September 18 and ordered merits briefing, including on questions relating to stickering ballots. *Kennedy v. WEC*, 2024AP1872, order dated September 18, 2024.

VII. During these proceedings, the election process has moved forward.

Meanwhile, the election process is moving forward. The Commission collects daily data from all 72 counties regarding the status of ballot processing in three categories: "Absentee Applications," "Ballots Sent," and "Ballots Returned." (Second Kehoe Decl. ¶ 7.)

Regarding applications, as of 7:30 a.m. on September 19, there were 391,194 absentee ballot applications already been received statewide. Ballots must be sent to those voters no later than September 19. The Commission estimates that about 6,000 applications are being added to this category each day. Clerks must send out ballots in response to those requests within 24 hours. (Kehoe Decl. ¶¶ 8–9 & Ex. B.)

Regarding ballots sent, as of 7:30 a.m. on September 19, there were 343,742 ballots that had been sent statewide. (Kehoe Decl. ¶¶ 10–11 & Ex. B.)

ARGUMENT

I. This appeal warrants bypass under this Court's recognized criteria.

Wisconsin Stat. § 808.05(1) provides that this Court may take jurisdiction of an appeal if "[i]t grants direct review upon a petition to bypass filed by a party." Wisconsin Stat. § (Rule) 809.60(1)(a) provides that a party may file with this

Court "a petition to bypass the court of appeals pursuant to s. 808.05 no later than 14 days following the filing of the respondent's brief under s. 809.19 or response."

A. Bypass is warranted where this Court is very likely to review the matter and where there is a clear need to hasten the ultimate appellate decision.

This Court's internal operating procedures set forth circumstances where bypass is warranted. Two are relevant here. A matter appropriate for bypass is one the Court would ultimately choose to consider "regardless of how the Court of Appeals might decide the issues." Wisconsin Supreme Court Internal Operating Procedures, § II.B.2. Additionally, "[a]t times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision." *Id*.

B. The subject of the appeal and exigent timing support this Court's immediate review.

Bypass is appropriate here under both factors. This appeal is a type of case that this Court has considered in the past, including on bypass, and it is an urgent matter requiring finality before the November 5, 2024, general election.

1. Whether to grant relief to a candidate seeking a change in the ballot is a question this Court has historically considered.

The nature of this proceeding weighs in favor of bypass. This Court has previously considered cases, including in the recent past, involving questions about which candidates should appear on the ballot. *See Strange v. WEC*, 2024AP1643-OA, order issued August 26, 2024 (denying petition for original action but concluding that "the petitioner is not entitled to the relief he seeks"); *Phillips v. WEC*, 2024AP138-OA, order issued February 2, 2024 (granting petitioner's request to be placed on the Presidential

preference primary ballot); *Hawkins v. WEC*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying relief to two candidates who were not on the general election ballot).

This petition also warrants acceptance based on the Court's historical treatment of election-related matters during an election year. *See Priorities USA v. WEC*, No. 2024AP0164 (Wis. Sup. Ct.) (election-related issue, bypass granted); *Brown v. WEC*, No. 2024AP0232 (Wis. Sup. Ct.) (election-related issue, bypass granted). It has also done so in previous years. *See*, *e.g.*, *Jefferson v. Dane County*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556 (election-related issue, original action petition accepted); *Trump v. Biden,* 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568 (election-related issue, original action petition accepted); *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 (election-related issue, bypass granted).

2. This matter has even greater urgency because of the ongoing election.

Bypass is especially critical here because of the timing of this matter. The State is in the middle of the 2024 general election cycle. This Court should provide final resolution of this case and avoid an interim appellate court decision that disrupts or casts doubt on that process, or causes clerks to commence an all-hands-on-deck stickering effort.

The general election will take place on November 5. Municipal clerks deliver absentee ballots to electors who already requested them no later than September 19. Wis. Stat. § 7.15(1). And under the federal Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311, municipalities must send ballots to all military and overseas voters no later than September 21, 45 days prior to the election.

According to the Commission's ongoing data collection, as of the morning of September 19, there were 391,194 absentee ballot applications already received, with about 6,000 additional applications being added each day, and 343,742 ballots already sent out by clerks.

II. The record demonstrates that the circuit court appropriately exercised its discretion in denying relief.

The appellate record here features developed facts and arguments to evaluate the circuit court's order. It demonstrates that the circuit court reasonably applied the relevant factors in denying the motion for a temporary injunction, and its decision reflected an appropriate exercise of discretion.

A. Standard of review: the circuit court's order is discretionary and will be upheld unless the court erroneously exercised its discretion.

The issuance or denial of a temporary injunction is discretionary and will be upheld unless the court erroneously exercised its discretion.

A decision to grant or deny an injunction "is within the sound discretion of the circuit court," *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, ¶ 10, 262 Wis. 2d 264, 664 N.W.2d 55, "and will only be reversed for an erroneous exercise of discretion." *Sch. Dist. of Slinger v. WIAA***,** 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). "The test is not whether [this] court would grant the injunction." *Id.* Rather, the test is deferential and primarily serves to ensure that the decision was arrived at by the application of the proper legal standards and based upon the facts in the record. *See LeMere v. LeMere*, 2003 WI 67, ¶¶ 13–14, 262 Wis. 2d 426, 436, 663 N.W.2d 789, 793. "A circuit court's discretionary decision is upheld as long as the court "examined the relevant facts,

applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Long v. Long,* 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995).

B. The circuit court's order here was a reasonable exercise of discretion.

Here, the circuit court did its job: it looked at the facts in the record, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. Its decision should be affirmed.

Wisconsin Stat. § 813.02(1)(a) authorizes courts to issue temporary restraining orders and injunctions when certain factors are met. Wis. Stat. § 813.02(1)(a). Circuit courts must balance four criteria: "(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted). "The purpose of 'a temporary injunction is to maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought.'" *Sch. Dist. of Slinger*, 210 Wis. 2d at 364 (citation omitted).

1. The circuit court balanced the competing equities and found they weighed against granting the relief sought.

The circuit court reasonably determined that the balancing of equities weighed against the injunction. The injury to the Wisconsin electorate from the proposed injunction far outweighs Kennedy's asserted interest in being off the ballot in Wisconsin.

Kennedy provided no evidence of injury in the circuit court. In contrast, the Commission's filing was replete with declarations from state and local election officials explaining why Kennedy's proposed injunction would derail the state's preparations for the November general election and, in some respects, be impossible to implement.

Kennedy appears to recognize that it is too late to reprint ballots. Ignoring the fact that many ballots have already been sent to voters, he says someone (he suggests the Commission) could craft and hand-affix blank stickers over his name on every ballot. He offered no evidentiary support for the workability of this solution, and, as the circuit court observed, it would be a "logistical nightmare." (R. 60:8.)

First, Kennedy's suggestion is prohibited by statute. State law prohibits election officials from attaching any type of sticker to a ballot. Wis. Stat. § 5.51(4).[2] There is one exception—for the death of a candidate, when a replacement nominee is selected—that obviously does not apply. Kennedy offers no support for the premise that courts can order injunctive relief that violates statutory prohibitions.

Insofar as Kennedy sees the deceased candidate provision as demonstrating the factual workability of his solution, Wis. Stat. § 7.38 does not have the purpose or method he suggests. That statute allows a deceased candidate's political party to *replace* him with a different nominee by providing municipal clerks with customized, properly-sized stickers with the new candidate's name. That is a wholly different process than Kennedy's proposal.

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[2] Kennedy's court of appeals brief, filed September 19, points to a reference in the Elections Manual discussing stickers for write-in candidates. Although the manual was not updated, that option was eliminated by the legislature. 2015 Wis. Act 37 removed the ability of voters to use a sticker to indicate their choice for a candidate under Wis. Stat. § 7.50.

Simply as a matter of getting stickers hand cut and affixed, Kennedy's idea would present a herculean task. Even if stickers could be affixed at about 30 seconds per sticker (unlikely, given that stickers would need to be hand cut to cover only Kennedy's name), it would require tens of thousands of man hours to affix stickers to four million ballots. Counties and municipalities would miss federal and state deadlines for ballot distribution. Not all ballots would be the same: many ballots have already been sent to voters.

Most concerningly, Kennedy's proposal would jeopardize the accurate tabulation of the ballots. The voting equipment has not been tested with stickers applied to ballots. Stickers may peel off, get jammed or stuck in the voting tabulator, or stick to and rip other ballots. Stickers stuck in the machine could take a polling place's machine out of service for Election Day.

More than 80 percent of ballots cast in Wisconsin are optical scan ballots containing a series of "timing marks"—lines along the top and sides of the ballot—that serve as coordinates to allow the voting equipment to read what candidate to tally a vote for. Election officials have no idea how voting equipment would count ballots with stickers over a candidate's name. The machines are sensitively calibrated to recognize any difference in the weight of a ballot. The extra weight of a sticker could cause the machine to read the ballot as a double ballot and not count it. The machines are calibrated to read even a light mark so that no vote goes uncounted, and a sticker in the target area of an oval or error could register a double vote. And, as the circuit court recognized, affixing four million stickers would not be error-free. The inevitable errors would lead to miscounting, voter confusion, and potential distrust in the election results.

The circuit court weighed those equities against Kennedy's asserted interests. It concluded the equities weighed against an injunction: it noted that Kennedy chose to

file his nomination papers and declaration of candidacy in a state where candidates may not withdraw, and that Kennedy continues to ask voters in other states to select him.

The circuit court was well within its discretion in concluding that the equities weighed against an injunction.

2. The circuit court reasonably determined that Kennedy's request would upend, not preserve, the status quo.

The circuit court held that Kennedy failed the requirement that a temporary injunction only preserve the status quo, not grant the ultimate relief he sought. (R. 60:7, 10–11.) This, too, was reasonable.

3. The circuit court correctly concluded that Kennedy did not make a showing of a reasonable probability of success on the merits.

The circuit court correctly concluded that Kennedy did not show that he had a reasonable probability of success on the merits. (R. 60:11–20.) His statutory construction argument was not reasonable, and he provided no relevant legal support for his claim that the statutes are unconstitutional.

a. Kennedy's reading of Wis. Stat. § 8.35(1) is unpersuasive.

As the circuit court concluded, Kennedy's reading of Wis. Stat. § 8.35(1) is unpersuasive.

Wisconsin Stat. § 8.35(1) states that "[a]ny person who [1] files nomination papers and [2] qualifies to appear on the ballot *may not decline nomination*. The name of that person *shall appear upon the ballot* except in case of death of the person."

Kennedy filed nomination papers with the Commission on August 6, 2024. He filed a declaration of candidacy with the Commission the same day. A declaration of candidacy is a sworn declaration that states the candidate's name and "[t]hat the signer meets, or will at the time he or she assumes office meet, applicable age, citizenship, residency, or voting *qualification requirements*, if any, prescribed by the constitutions and laws of the United States and of this state. . . . [And t]hat the signer will otherwise *qualify for office* if nominated and elected." Wis. Stat. § 8.21.2(a)–(c).

Kennedy met the two requirements under Wis. Stat. § 8.35(1) to have his name placed on the ballot: he filed nomination papers and a declaration that he meets the qualifications for the office he sought. Under the statute's plain language, he "may not decline nomination," and his name "shall appear upon the ballot." Wis. Stat. § 8.35(1). The statute contains only one exception—for situations where the candidate dies—but that does not apply here.

A prior version of the statute allowed candidates to withdraw after submitting their nomination papers and declarations of candidacy. "'A review of statutory history is part of a plain meaning analysis' because it is part of the context in which we interpret statutory terms." *County of Dane v. LIRC*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (quoting *Richards v. Badger Mut. Ins. Co.,* 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581). The 1965 version of the statute permitted a candidate who had filed nomination papers to "decline the nomination," if he did so "in one week after the last day on which nomination papers can be filed." Wis. Stat. § 5.18 (1965). While Kennedy would not have even met that deadline, the option no longer exists in today's law.

Kennedy argues that "qualifies" means official Commission approval (R. 61:12), which he says cannot happen if the candidate withdraws. That theory has no foundation in Wis. Stat. § 8.35(1), which references no Commission ballot

access approval process based on a withdrawal statement. A cardinal "maxim[ ] of statutory construction . . . [is] that courts should not add words to a statute to give it a certain meaning." *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165. As the circuit court concluded, Kennedy's reading would add language that does not exist.

Kennedy's reading also conflicts with another election statute. Wisconsin Stat. § 5.64(1)(ar)1m. requires voters to vote for a ticket of both the President and Vice President: "[w]hen voting for president and vice president, the ballot shall permit an elector to vote only for the candidates on one ticket *jointly* or write the names of both persons in both spaces." The "We the People" vice-presidential candidate, Shanahan, submitted no withdrawal statement, and ticket voting would be impossible if Kennedy's name were absent.

b. Kennedy misunderstands the standard of review for laws governing the administration of elections.

Kennedy pivots to a constitutional challenge to the election statutes, but he misunderstands the standard of review for such a challenge, asserting they are subject to "strict scrutiny" review. (R. 61:20.) Whether as a matter of equal protection or First Amendment, challenges to ballot access deadlines are reviewed under a balancing test that weighs the state's interests in orderly and reliable election administration against the alleged burden on the rights of the candidate or voter. Unless the burden is severe, reasonable requirements are upheld.

States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder: "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The mere fact that election laws create barriers tending to limit the field of candidates from which voters might choose "does not of itself compel close scrutiny." *Id.* (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

Instead, "a more flexible standard" applies: a court considering a challenge to a state election law on First and Fourteenth Amendment grounds must weigh the "character and magnitude" of the burden the law imposes against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Id*. (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Under this standard, regulations imposing a "severe" burden on the plaintiff's rights must be narrowly tailored and advance a compelling state interest, but lesser burdens trigger less exacting review. *Id*. (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The State's "important regulatory interests are generally sufficient to justify" an election law that imposes only "reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights. *Id*. (quoting *Celebrezze*, 460 U.S. at 788).

c. Ballot access deadlines are constitutional so long as they are reasonable regulations on the conduct of elections.

Kennedy has asserted that the differing ballot access deadlines for independent and major party candidates give major parties an "advantage" because they have "more time to vet a candidate" and to "contemplate the best course of action." (R. 61:19.) As an initial matter, Kennedy is not making a ballot access challenge: his case is about an asserted right to be removed from the ballot.

But even if this were a case about ballot access, the "advantages" Kennedy describes are not constitutionally significant. The U.S. Supreme Court has determined that "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Celebrezze*, 460 U.S. at 788 n.9.

In *Celebrezze*, the U.S. Supreme Court considered what nomination paper deadlines were reasonable restrictions on independent candidates. It rejected the March deadline then in Ohio statutes as unrelated to the time for petition signatures to be counted and verified or to permit ballots to be printed, but it noted that, based on the facts stipulated to in the district court, a 75-day statutory deadline would have been reasonable. *Celebrezze,* 460 U.S. 800 & n.28. In 1983, when *Celebrezze* issued, two-thirds of the states had nomination paper deadlines for independent candidates in August or September, with many others in June or July. *Celebrezze*, 460 U.S. at 795 n.20; *see also U.S. Taxpayers Party of Fla. v. Smith*, 871 F. Supp. 426, 436–37 (N.D. Fla. 1993).

Wisconsin is in the mainstream of those deadlines. Wisconsin's nomination procedures in Wis. Stat. § 8.16(7) and 8.20(8)(am) reflect two different nomination procedures: independent candidates submit nomination papers, while major party candidates are nominated and certified by their party. *See* Wis. Stat. §§ 8.16(7), 8.20(8)(am). They provide a reasonable, nondiscriminatory process—and reasonable deadlines—by which candidates must demonstrate sufficient support.

Independent candidates demonstrate sufficient elector support to qualify for the ballot by submitting nomination papers with the requisite number of signatures from throughout the state. *See* Wis. Stat. § 8.20(2)–(10). The nomination papers must be submitted to the Commission by

"the first Tuesday in August preceding [the] presidential election," which, this year, was August 6. Wis. Stat. § 8.16(7). Major party candidates—meaning candidates of parties entitled to partisan primary ballots (*see* Wis. Stat. § 8.16(7))—have demonstrated sufficient elector support through their party's performance in prior elections or other means. *See* Wis. Stat. § 5.62(1)(b)1., (2)(a). Major parties thus select their nominees for president and vice president at their respective conventions and then certify the names of the nominees. *See* Wis. Stat. § 8.16(7). The certification must be submitted to the Commission no later than "the first Tuesday in September preceding [the] presidential election," which, this year, was September 3. *Id*.

Those deadlines reasonably reflect the time needed to review nomination papers with signatures of thousands of electors for sufficiency and to process any challenges to those papers from voters and opposing candidates. The extra time is not needed for major party candidates because they do not file nomination papers.

Here, Kennedy makes no claim that the August 6 deadline was a burden of such a "character and magnitude" such that the challenged ballot access deadlines run afoul of the constitution. *See Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 789). He makes no effort to assert that it was a burden at all, much less a severe burden, to comply with the August 6 deadline to submit his nomination papers. He does not even show (or assert) that he felt ambivalent about running for President and wanted to wait longer to see how the race shook out.

Wisconsin's deadlines for submitting nomination papers and declarations of candidacy are modest, reasonable restrictions on ballot access that further legitimate state interests. They are plainly constitutional.

d. Equal protection principles provide no right for a candidate to be removed from a ballot.

A state's legitimate interest in requiring presidential candidates to demonstrate sufficient electoral support before appearing on the ballot answers the constitutional question here. Kennedy's view that equal protection affords a right to be *removed* from the ballot is legally unsupported.

To the extent Wisconsin law addresses the ability of a candidate to "disassociate" with a party, the law makes no reference to political party. Wisconsin Stat. § 8.35(1) provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person."

Kennedy implies that he has been treated differently than President Biden—and in a way that violates his equal protection rights—because Biden was permitted to withdraw from the election, but Kennedy was not. That is wrong. The Commission received no declaration of candidacy from Biden, nor did it receive a certification from the Democratic Party nominating Biden pursuant to Wis. Stat. § 8.16(7). Kennedy's complaint that Biden was treated differently—and better—than him is simply untrue.

Kennedy offers *no* case suggesting that there is an equal protection right of "disassociation" or an equal protection violation based on a desire to withdraw from a race.

e. Kennedy has no First Amendment right to be removed from the ballot.

Kennedy asserts he has a First Amendment right to remove himself from the ballot despite Wis. Stat. § 8.35(1), arguing that his name on the ballot amounts to compelled

speech or a violation of his associational rights. Relevant case law counsels otherwise.

First, no case has held that a candidate's name on a ballot is compelled speech. Kennedy asserts that he wants voters (at least Wisconsin voters) to know that he actually supports a different candidate for the Presidency. (R. 3:10–11.) The ballot is not the way to express such views.

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997), the U.S. Supreme Court rejected a political party's claim that Minnesota's fusion ban—which prevented a candidate from appearing on the ballot for two different parties—violated the First Amendment on the theory it prevented the party from communicating its support of that candidate:

> We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.

Id. at 362–63. The Court reasoned that the party retained many options in speaking about who it supported:

> The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate.

Id. at 363.

The U.S. Court of Appeals for the Ninth Circuit similarly declined to treat ballot language as compelled speech in *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005). There, plaintiff challenged required words in a ballot initiative title, arguing that it compelled him to be associated with that state's message. *Id.* at 858. The court disagreed, holding that the language did not require him to use his

private property to transmit any message, which appeared only on ballots—materials created by State and local governments. *Id.* The court also noted that Caruso remained free to publicly disassociate himself from the message. *Id.*

The same is true here. Contrary to Kennedy's characterization of a ballot as his own speech, it is the government, not Kennedy himself, that is "stating" he is a candidate. Kennedy says he wants to express his support for Donald Trump, but the ballot is not the place to advance those views, and he can communicate that message through a myriad of speech platforms, including appearances and endorsements.

Second, Kennedy's free association argument is also a non-starter. The one on-point case the parties have discovered rejected the idea that there is a constitutional right to have a candidate removed.

Voters may have associational rights to have a candidate's name *included* on the ballot because a voter wishes to associate with the candidate by casting his or her vote in the candidate's favor. *Bullock,* 405 U.S. at 134; *see also Berg v. Egan*, 979 F. Supp. 330, 336 (E.D. Pa. 1997) (citing *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973)). Such interests favor keeping Kennedy on the ballot because some voters who wish to vote for him have objected to his removal from the ballot.

In contrast, no case holds that there is a converse right: that voters, much less candidates, have a constitutional right to have a candidate's name *removed* from the ballot. In a case brought by voters seeking to remove a candidate's name from a Maryland ballot after that state's deadline to do so, the Maryland court of appeals explained why that state's prohibition on removal violated no constitutional right:

> This case is therefore unlike cases in which candidates were denied access to the ballot, and the challenged provisions restricted the pool of candidates

> on the ballot from whom voters could readily choose. As applied in this case, these provisions did not limit candidate access to the ballot or the ability of a voter to select a preferred candidate. Appellees conceded that, while early candidacy filing deadlines have sometimes been held unconstitutional when they restrict access to the ballot, they were unable to find a case holding that a withdrawal deadline was unconstitutionally early. This should not be surprising, as a withdrawal deadline by itself does not restrict access to the ballot.

Lamone v. Lewin, 190 A.3d 376, 391 (Md. App. 2018).

Kennedy has no constitutional right to have clerks remove his name from the ballot.

C. *Hawkins* supports the outcome below.

While the circuit court did not decide the motion under *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877, that decision also supports the result here.

In *Hawkins*, this Court recognized that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." *Id.* ¶ 5. The court considered a petition for leave to commence an original action filed by two Green Party candidates who were excluded from the ballot due to insufficient signatures on their nomination papers. *Id.* ¶¶ 1–2. The petitioners asked for preliminary relief—adding their names to new ballots for President and Vice President—after absentee ballots had already been sent out by municipal clerks. *Id.* ¶¶ 2–6, 8, n.2. This Court concluded that under the circumstances, including the fact that the general election had "essentially begun," it was "too late" to grant them any form of relief that would be feasible and not cause undue damage to the election. *Id.* ¶ 5.

Here, the clash between Kennedy's late request and the realities of election administration is just as acute as in *Hawkins.*

* * * * *

The enormity of the relief Kennedy seeks justifies this Court's acceptance of bypass. With just weeks to go, and clerks fully engaged in ensuring that voters receive their ballots, can successfully vote, and have their votes correctly tabulated, Kennedy's unsupported legal claims do not justify redeploying local officials to sticker application and imperiling voter machine functioning, accurate tabulation, and voter confidence in the election.

The circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Long,* 196 Wis. 2d at 695. Its decision should be affirmed.

CONCLUSION

The Commission asks this Court to grant the petition for bypass and affirm the circuit court's order.

Dated this 19th day of September 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b), (bm), (c), and (g), 809.62(2), and 809.81 for a petition produced with a proportional serif font. The length of this petition is 7506 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 19th day of September 2024.

Electronically signed by Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Respondent-Petitioner.

ROBERT F. KENNEDY, JR.'S RESPONSE IN OPPOSITION TO THE PETITION FOR BYPASS OF THE WISCONSIN ELECTIONS COMMISSION

ROBERT F. KENNEDY, JR,
Petitioner-Appellant

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This Court should summarily deny the bypass petition as premature.

There are not two sets of Rules of Appellate Procedure in Wisconsin —one for the Attorney General and another for everyone else. Rather, this Court is blind to the parties' stature and proudly holds everyone, rich and poor, private or public entity, to the same rule book. That rule book contains two provisions that apply here: one written, the other an established practice forged over almost forty years of consistent practice. Those provisions demand that this Court deny the bypass petition as premature.

The statutory rule governing bypass is found at Wis. Stat. § 809.60. It provides that "no later than 14 days following the filing of the respondent's brief" a party may file a petition. The Wisconsin Elections Commission has not filed its response brief in the Court of Appeals. It is due tomorrow at 11:00 a.m., and Robert F. Kennedy Jr.'s Reply is due at 4:00 p.m. In other words, the Commission's bypass petition is premature.

What happens when parties try to skip over the statutory command of *following* the filing of the respondent's brief? In those cases, brought many times before this Court, the bypass petitions are denied as premature.[1] Most of those come in unpublished, per curiam orders from this Court.[2] A few cite the established practice.[3] But they all reflect the well-known policy that petitions for bypass filed before briefing is finished will be dismissed as premature; indeed, the leading treatise on appellate practice in Wisconsin

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[1] *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 62–63, 387 N.W.2d 245 (1986).

[2] *See State v. Flynn*, No. 2022AP1425; *Becker v. Dane County*, Nos. 2021AP1382 & 2021AP1343; *Colectivo v. Soc'y Ins.*, No. 2021AP463; *Waukesha County v. M.I.S.*, No. 2021AP105; *State v. Gebhart*, No. 2020AP1619; *State v. Stephens*, No. 2020AP855; *Eagle Point Solar, LLC v. PSC*, No. 2019AP2281; *State v. Smith*, No. 2018AP927; *State v. Boruch*, No. 2018AP152; *Gahl v. Aurora Health Care Inc.*, No. 2021AP1787-FT; *Zignego v. WEC*, No. 2019AP2397; *Bach v. LIRC*, No. 2019AP834; *Fed. Nat'l Mortg. Ass'n v. Bach*, No. 2019AP631.

[3] *See Becker v. Dane County*, No. 2021AP1343, Unpublished Order at 1 (Nov. 16, 2021) (citing *Milwaukee Brewers*, 130 Wis. 2d at 62–63).

has made that point plain: "Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent's brief is filed will be dismissed as premature."[4] And it's not as if this rule is unknown to the Commission. The appendix to this brief contains the Commission's response in opposition to bypass in *State of Wisconsin ex rel. Zignego, et al v. WEC,* which begins: "Petitioners are correct that this mandamus case, in a sense, presents a novel question of law. However, the fact that it is novel does not mean it is especially difficult or even bona fide, much less does it justify the extraordinary step of bypass prior to briefing in the court of appeals. Rather, this Court treats a bypass petition, like this one, 'as premature because briefs on the appeal ha[ve] not been filed.'"[5] Not surprisingly, that petition was (as the Commission argued) denied as premature.[6]

Here, the exact same thing should happen as has happened in scores of cases where parties have sought to ignore the rule and skip the filing of the respondent's brief. Forty years of policy and practice usually reflects two realities. First, accepting review *before* the briefs are filed can be a waste of this Court's precious resources—why take review and clear the decks when you don't even know what the respondents are going to argue. Second, there's a pragmatic concern (especially in a case like this), where the respondents' arguments have morphed over time. It is better to see what is actually going to be at issue before this Court decides to accept bypass, order a whole new set of briefs, and re-do the work that the Court of Appeals has already done.

This petition to bypass is by every account premature. If it's filed Monday, that's another matter. At least then, this Court has a firmer handle on what's at issue in the Court of Appeals. Maybe the Court of Appeals even acts by then. But more than pragmatic concerns, it sends a definite message

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[4] *See* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 24.3.

[5] App. 7 (quoting *Milwaukee Brewers*, 130 Wis. 2d at 63).

[6] *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 43 n. 18, 396 Wis. 2d 391, 957 N.W.2d 208.

to the Commission and every other party that seeks to jump right into the Supreme Court: The procedures apply equally to everyone. Follow the Rules.

Dated at Madison, Wisconsin, September 19, 2024.

Respectfully submitted,

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Respondent.

APPEAL OF A NON-FINAL ORDER DENYING A PRELIMINARY INJUNCTION, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

RESPONDENT BRIEF OF THE WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

The circuit court appropriately exercised its discretion in denying Robert F. Kennedy, Jr.'s quest for relief: a temporary injunction requiring clerks to create and place stickers on four million Wisconsin ballots to remove his name.

Kennedy filed nomination papers and a declaration of candidacy to run for U.S. President. Today, he prefers (at least in Wisconsin) to support a major party candidate. Kennedy's request to remove his name from the ballot was barred by Wis. Stat. § 8.35(1), and so the Commission correctly denied it.

Kennedy brought suit and sought a temporary injunction. The circuit court appropriately weighed the relevant factors and denied Kennedy relief. In concluding that Kennedy failed to justify a temporary injunction, the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. This Court should affirm that discretionary decision.

ISSUE PRESENTED

Whether the circuit court appropriately exercised its discretion in denying a temporary injunction that would have required election clerks to reprint or hand-affix stickers to four million Wisconsin ballots.

STATEMENT OF THE CASE

I. The Commission receives candidate papers for the November general election.

Kennedy and Nicole Shanahan submitted nomination papers and declarations of candidacy to the Commission on August 6, 2024, as independent candidates for President and Vice President in the November 2024 general election. (R. 44 ¶¶ 3–6, Ex. A, Ex. C; 45 ¶ 7, Ex. E.)

On August 19, the Commission received a Certification of Nomination from the Democratic Party nominating Kamala Harris and Tim Walz as its candidates for President and Vice President. The Commission also received declarations of candidacy from Harris and Walz. (R. 44 ¶ 8, Ex. D.) The Commission received no declaration of candidacy from current President Joe Biden or a certification of nomination from the Democratic Party nominating Biden. (R. 44 ¶¶ 9–10.)

On August 23, Kennedy sent a statement to the Commission that he was "withdraw[ing] his candidacy from the 2024 United States Presidential Election" and requesting that his name not be printed on the ballot in Wisconsin. (R. 44 ¶ 7, Ex. B.)

II. The Commission meets on August 27 and considers Kennedy's request to withdraw.

The Commission must provide required election notices to county clerks "no later than the 4th Tuesday in August," Wis. Stat. § 10.06(1)(i), which was August 27 this year. The required election notices contain the candidate and statewide referenda information that county clerks need to begin preparing ballots. The Commission convened on August 27 to perform this responsibility, consider challenges to nomination papers, and certify candidate names for the November general election ballot. (R. 45 ¶¶ 5–6, Ex. C–D.)

Based on Wis. Stat. § 8.35(1), which provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person," the commissioners voted 5-1 to deny Kennedy's request to withdraw from the ballot. (R. 45 ¶ 6, Ex. D.)

III. Clerks begin creating the ballots.

Wisconsin law requires that, "immediately upon receipt" of the Commission's notices, county clerks prepare the ballot forms. Wis. Stat. § 7.10(2). County clerks must integrate ballot information for local races and referenda onto ballot styles for each municipality. (R. 42 (Declaration of Robert Kehoe) ¶¶ 5, 12.) They then must finalize and proof their ballots, place the print order, and ensure that they have sufficient ballots. (R. 42 ¶ 5; 46 ¶ 8; 43 ¶¶ 8–9; 40 ¶ 9; 45 ¶ 4, Ex. B.) The vast majority of county clerks must utilize a third-party vendor because of the technical requirements for ballots to be accurately scannable and fed through electronic tabulation machines. (R. 42 ¶¶ 13–17; 43 ¶¶ 9, 11.)

This work must be completed by September 18, the last date by which county clerks must deliver printed ballots to municipal clerks—48 days before the general election. Wis. Stat. § 7.10(3). (R. 42 ¶¶ 7–10.)

Municipal clerks, in turn, must deliver absentee ballots to electors who request them no later than September 19, 47 days before the general election. Wis. Stat. § 7.15(1). (R. 42 ¶ 7; 46 ¶¶ 5–6, 9.) And under the federal Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301–20311, municipalities must send ballots to all military and overseas voters no later than September 21. (R. 42 ¶¶ 8–10.)

Following the Commission's August 27 meeting, Wisconsin county clerks followed these statutory commands, finalizing the hundreds of individual ballot forms and placing orders with third-party vendors to print their ballots. (R. 42 ¶ 22; 46 ¶¶ 7–8; 43 ¶¶ 8–9; 40 ¶¶ 8–9.) There will be approximately four million ballots printed in the state. (R. 42 ¶ 24.)

Print orders for ballots were scheduled to be completed by the September 18 deadline to provide ballots to municipal clerks. (R. 42 ¶ 22; 46 ¶¶ 7–10; 43 ¶ 9.) If counties are required to reprint ballots, clerks would be unable to meet statutory deadlines to get ballots into the hands of absentee voters. (R. 42 ¶ 18; 46 ¶¶ 11–12; 43 ¶ 10; 40 ¶ 10.)

IV. Kennedy files suit against the Commission and continues his campaign efforts elsewhere.

On September 3, Kennedy filed a petition for judicial review against the Commission and a motion for a temporary injunction. (R. 2–4.) On September 4, Kennedy filed an ex parte motion for an emergency temporary restraining order. (R. 11.) On September 6, the circuit court denied that motion and set a scheduling conference for September 11. (R. 29.)

On September 9, Kennedy filed a petition for leave for appeal the denial of his motion. (R. 33.) On September 12, the court of appeals ordered the petition held in abeyance while the circuit court decided Kennedy's motion for a temporary injunction. (R. 36.)

Meanwhile, Kennedy's interest in having voters choose him for President has continued in some states but not others. He has indicated that he does not seek support in states like Wisconsin where the presidential election may be close, but hopes voters will choose him in other states where he has successfully been placed on the ballot. (R. 45 ¶ 3, Ex. A).[1] Some of Kennedy's Wisconsin electors have indicated that they want him to remain on the ballot. (R. 42 ¶ 26.)

[1] Caitlin Yilek & Allison Novelo, *Map Shows Where RFK Jr. Is on the Ballot in the 2024 Election*, CBS News (Sept. 6, 2024), https://www.cbsnews.com/news/rfk-jr-map-on-the-ballot-states/.

V. Clerks express concern that Kennedy's sticker plan would lead to the inaccurate tabulation of ballots.

Kennedy wants blank stickers to be created and placed over his name on every ballot. (R. 34.) The Commission is unaware of a situation where stickers have been used this way. (R. 42 ¶ 24.) Clerks are statutorily prohibited from affixing stickers to ballots, except if a candidate dies and is replaced by his party.

County clerks have expressed serious concerns about Kennedy's request. (R. 43 ¶ 17; 40 ¶ 15; 41 ¶ 12; 46 ¶ 14.) Incorrectly placed stickers would produce errors in how the voter's choices are registered. (R. 41 ¶ 13.) Stickers could peel off, getting stuck in the voting tabulator, or stick to and rip other ballots, making a jammed scanner unavailable on Election Day. (R. 42 ¶ 25; 43 ¶ 17; 40 ¶ 15; 41 ¶ 14.)

Miscounting can result even if a clerk correctly cuts out and places the sticker. Tabulators are programmed to register the ballot's weight to avoid feeding more than one ballot into the machine at once. Added weight may produce a double ballot error, resulting in the return of the ballot. (R. 43 ¶ 17; 41 ¶ 12.) Further, tabulators are designed to discern light marks in the area of a ballot where voters mark the ovals or arrows. A shadow or wrinkle caused by a sticker can cause the machine to register an overvote. On the presidential-only ballot, Kennedy's name appears immediately next to the oval for his ticket. (Second Declaration of Kehoe (filed with petition to bypass September 19) ¶¶ 4–6 & Ex. A.)

These risks mean that tabulators may fail the required pre-election testing that municipal clerks must conduct, meaning those machines will be out of service on election day. Wis. Stat. § 5.84.

And simply as matter of resources, placing stickers on four million ballots would be a herculean task for clerks, including those who are part-time and have other, fulltime jobs. (R. 40 ¶ 13; 43 ¶ 18; 42 ¶ 25; 41 ¶ 13).)

VI. The circuit court denies a temporary injunction; Kennedy files a new petition for leave to appeal.

The circuit court set a briefing schedule on the temporary injunction motion. On September 16, at Kennedy's request, the circuit court held an evidentiary hearing for Kennedy to present evidence. (R. 70:2–3.) Kennedy did not present any affidavits or witnesses. (R. 70:3, 12, 16.)

Later that day, after reviewing the parties' briefs and declarations from Commission staff and county clerks, the circuit court issued an oral ruling denying the temporary injunction. (R. 59; 60.)

On the likelihood of success, the court concluded that Kennedy's constitutional challenges were unpersuasive: Kennedy offered no support for a constitutional right to be *removed* from the ballot. (R. 60:11–20.) The court also reasoned that Wis. Stat. § 8.35(1) does not permit withdrawal from the ballot once a candidate submits his nomination papers and declaration of candidacy.

In addition to finding that Kennedy would suffer no irreparable harm absent an injunction, on the balancing of equities, the court held that the equities of harms to clerks, voters, and the public outweighed Kennedy's asserted interests. The court pointed to the unbudgeted costs for clerks, missed deadlines for sending ballots, and the "logistical nightmare" posed by Kennedy's proposal. The court cited his charge to avoid confusion and incentives not to vote in the time leading up to the election. (R. 60:7–10.)

Taking all the factors together, the court concluded Kennedy had not demonstrated that relief was appropriate.

Kennedy petitioned for leave to appeal. (R. 61.) This Court granted the petition and ordered briefing, including questions relating to stickering ballots.

VII. During these proceedings, the election process has moved forward.

Meanwhile, the election process has moved forward. The Commission collects daily data from all 72 counties. (Second Kehoe Decl. ¶ 7.) As of the morning of September 19, 343,742 ballots had been sent statewide. (Second Kehoe Decl. ¶¶ 10–11 & Ex. B.)

ARGUMENT

The court reasonably applied the relevant factors in denying the motion for a temporary injunction, and its decision reflected an appropriate exercise of discretion.

I. The circuit court's order will be upheld unless the court erroneously exercised its discretion.

A decision to grant or deny an injunction "is within the sound discretion of the circuit court," *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, ¶ 10, 262 Wis. 2d 264, 664 N.W.2d 55, "and will only be reversed for an erroneous exercise of discretion." *Sch. Dist. of Slinger v. WIAA*, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). "The test is not whether [this] court would grant the injunction." *Id.* Rather, the test is deferential and primarily serves to ensure that the decision was arrived at by the application of the proper legal standards and based upon the facts in the record. *See LeMere v. LeMere*, 2003 WI 67, ¶¶ 13–14, 262 Wis. 2d 426, 663 N.W.2d 789.

A circuit court's discretionary decision is upheld as long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Long v. Long,* 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995).

II. The circuit court's order here was a reasonable exercise of discretion.

The circuit court looked at the facts in the record, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. Its decision should be affirmed.

Wisconsin Stat. § 813.02(1)(a) authorizes courts to issue temporary restraining orders and injunctions when certain factors are met. Wis. Stat. § 813.02(1)(a). Circuit courts must balance four criteria: "(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted). "The purpose of 'a temporary injunction is to maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought.'" *Sch. Dist. of Slinger*, 210 Wis. 2d at 364 (citation omitted).

A. The circuit court correctly concluded that Kennedy did not make a showing of likely success on the merits.

The circuit court recognized that Kennedy offered no support for his assertion that a candidate has a constitutional right to be removed from the ballot. (R. 60:11–20.) And his statutory claim under section 8.35(1) ignores the statute's plain language.

1. Kennedy misunderstands the standard of review for his constitutional challenge.

Kennedy raises a constitutional challenge to the statutes governing nomination papers, but he misunderstands the standard of review, assuming it is strict scrutiny. (R. 61:17.) Instead, such challenges are reviewed under a balancing test that weighs the state's interests in orderly and reliable election administration against the alleged burden on the rights of the candidate or voter. Unless the burden is severe, reasonable requirements are upheld.

States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots: "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted).

Instead, "a more flexible standard" applies: courts weigh the "character and magnitude" of the burden the law imposes against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Regulations imposing a "severe" burden on the plaintiff's rights must be narrowly tailored and advance a compelling state interest, but lesser burdens trigger less exacting review. *Id.* (citation omitted). The State's "important regulatory interests are generally sufficient to justify" an election law that imposes only "reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights. *Id.* (quoting *Celebrezze*, 460 U.S. at 788).

2. Reasonable ballot access deadlines for independent candidates are constitutional.

Kennedy complains that differing ballot access deadlines for independent and major party candidates give major parties an advantage. (R. 61:19.) Even if this were a case about ballot *access*, that difference is not constitutionally significant. Wisconsin's deadlines reasonably reflect the difference in time needed to process nominations.

The U.S. Supreme Court has held that "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Celebrezze*, 460 U.S. at 788 n.9.

In *Celebrezze*, the U.S. Supreme Court considered what nomination paper deadlines were reasonable restrictions on independent candidates. It rejected the March deadline then in Ohio law, but it noted that, based on the facts about reviewing papers and ballot preparation stipulated to in the district court, a 75-day statutory deadline would have been reasonable. *Celebrezze,* 460 U.S. 800 & n.28. In 1983, when *Celebrezze* issued, two-thirds of the states had nomination paper deadlines for independent candidates in August or September, with many others in June or July. *Celebrezze*, 460 U.S. at 795 n.20; *see also U.S. Taxpayers Party of Fla. v. Smith*, 871 F. Supp. 426, 436–37 (N.D. Fla. 1993).

Wisconsin is in the mainstream of those deadlines. Wisconsin's nomination procedures in Wis. Stat. §§ 8.20(8)(am) and 8.16(7) reflect two different procedures: independent candidates submit nomination papers, while major party candidates are nominated and certified by their party. They provide a reasonable, nondiscriminatory process—and reasonable deadlines—by which candidates must demonstrate sufficient support.

Independent candidates demonstrate sufficient elector support to qualify for the ballot by submitting nomination papers with signatures from throughout the state. *See* Wis. Stat. § 8.20(2)–(10). The nomination papers must be submitted to the Commission by "the first Tuesday in August preceding [the] presidential election," which, this year, was August 6. Wis. Stat. § 8.20(8)(am). Major party candidates—candidates of parties entitled to partisan primary ballots (*see* Wis. Stat. § 8.16(7))—have demonstrated sufficient elector support through their party's performance in prior elections or other means. *See* Wis. Stat. § 5.62(1)(b)1., (2)(a). They select their nominees for president and vice president at their respective conventions and certify the names of the nominees. *See* Wis. Stat. § 8.16(7). The certification must be submitted to the Commission no later than "the first Tuesday in September preceding [the] presidential election," which, this year, was September 3. *Id.*

Those deadlines reasonably reflect the time needed to review nomination paper signatures for sufficiency and process challenges to those papers from voters and opposing candidates. The extra time is not needed for major party candidates because they do not file nomination papers. Kennedy makes no claim here that the August 6 deadline was a burden at all, much less of such magnitude such that it ran afoul of the constitution.

3. Equal protection principles provide no right for a candidate to be removed from a ballot.

Kennedy offers no case law supporting his view that equal protection affords a right for a candidate to be *removed* from the ballot.

To the extent Wisconsin law addresses the ability of a candidate to "disassociate" with a party, Wis. Stat. § 8.35(1) makes no reference to political party. It provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person."

Kennedy suggests that he has been treated differently than President Biden—and in a way that violates his equal protection rights—because Biden was permitted to withdraw from the election, but Kennedy was not. That is wrong. The Commission received no declaration of candidacy from Biden or a certification from his party nominating him.

Kennedy's theory is based on differing nomination deadlines for independent and major party candidates, but courts recognize those are constitutional. Kennedy offers no support for his premise that those deadlines become unconstitutional because they require independent candidates to commit sooner not to withdraw.

4. Kennedy has no First Amendment right to be removed from the ballot.

Kennedy also has no First Amendment right to remove himself from the ballot, either under a compelled speech or associational rights theory.

First, a candidate's name on a ballot is not compelled speech. Kennedy asserts that he wants voters (at least Wisconsin voters) to know that he supports a different

candidate for the Presidency. (R. 3:10–11.) The ballot is not the way to express such views.

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997), the U.S. Supreme Court rejected a political party's claim that a Minnesota law violated the First Amendment on the theory it prevented the party from communicating its support of that candidate:

> We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.

Id. at 362–63. The Court reasoned that the party retained many options in speaking about who it supported:

> The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate.

Id. at 363. Similarly, in *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005), the Ninth Circuit court of appeals rejected a compelled speech claim regarding words in a ballot initiative title, and noted that plaintiff remained free to publicly disassociate himself from the message.

The same is true here. It is the government, not Kennedy, that is "stating" he is a candidate. If Kennedy wants to express his support for Donald Trump, the ballot is not the place to advance those views; he can communicate that message through a myriad of speech platforms.

Second, Kennedy's free association argument is a non-starter. Voters may have associational rights to have a candidate's name *included* on the ballot because a voter wishes to associate with the candidate by casting his vote in the candidate's favor. *Bullock v. Carter,* 405 U.S. 134 (1972);

see also Berg v. Egan, 979 F. Supp. 330, 336 (E.D. Pa. 1997) (citation omitted). Such interests favor keeping Kennedy on the ballot so that voters, including those who have objected to his removal from the ballot, can select him.

In contrast, voters and candidates have no constitutional right to have a candidate's name *removed* from the ballot. In a case brought by voters seeking to remove a candidate's name from a Maryland ballot after that state's deadline, the Maryland court of appeals explained why that state's prohibition on removal violated no constitutional right:

> This case is therefore unlike cases in which candidates were denied access to the ballot, and the challenged provisions restricted the pool of candidates on the ballot from whom voters could readily choose. As applied in this case, these provisions did not limit candidate access to the ballot or the ability of a voter to select a preferred candidate. Appellees conceded that, while early candidacy filing deadlines have sometimes been held unconstitutional when they restrict access to the ballot, they were unable to find a case holding that a withdrawal deadline was unconstitutionally early. This should not be surprising, as a withdrawal deadline by itself does not restrict access to the ballot.

Lamone v. Lewin, 190 A.3d 376, 391 (Md. App. 2018).

Kennedy has no constitutional right to have clerks remove his name from the ballot.

5. Kennedy's reading of Wis. Stat. § 8.35(1) is incorrect.

Kennedy's view that Wis. Stat. § 8.35(1) does not apply is also wrong, as the circuit court concluded.

On August 6, Kennedy filed nomination papers and a declaration of candidacy. A declaration of candidacy states the candidate's name and "[t]hat the signer meets, or will at the time he or she assumes office meet, applicable age, citizenship, residency, or voting *qualification requirements*, if

any, prescribed by the constitutions and laws of the United States and of this state. . . . [And t]hat the signer will otherwise *qualify for office* if nominated and elected." Wis. Stat. § 8.21.2(a)–(c).

Kennedy thus met the two requirements under Wis. Stat. § 8.35(1) to have his name placed on the ballot: he filed nomination papers and a declaration that he met the qualifications for the office he sought. Under the statute's plain language, he "may not decline nomination," and his name "shall appear upon the ballot." Wis. Stat. § 8.35(1).

A prior version of the law allowed candidates to withdraw, up to a week after submitting nomination papers. "'A review of statutory history is part of a plain meaning analysis' because it is part of the context in which we interpret statutory terms." *County of Dane v. LIRC*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (citation omitted). That statute permitted a candidate to "decline the nomination" if he did so "in one week after the last day on which nomination papers can be filed." Wis. Stat. § 5.18 (1965). While Kennedy would not even have met that deadline, that option no longer exists.

Kennedy argues that "qualifies" means official Commission approval (R. 61:12), which he says cannot happen if the candidate withdraws. But Wis. Stat. § 8.35(1) references no such process. A cardinal "maxim[ ] of statutory construction . . . [is] that courts should not add words to a statute to give it a certain meaning." *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165. As the circuit court concluded, Kennedy's reading would add language not in the statute.

Kennedy's reading also conflicts with another election statute. Wisconsin Stat. § 5.64(1)(ar)1m. requires voters to vote for a ticket of both the President and Vice President: "[w]hen voting for president and vice president, the ballot shall permit an elector to vote only for the candidates on one

ticket *jointly* or write the names of both persons in both spaces." Shanahan submitted no withdrawal statement, and ticket voting would be impossible if Kennedy's name were absent.

B. The circuit court found no irreparable harm and the competing equities weighed against granting the relief sought.

The circuit court reasonably determined that Kennedy would suffer no irreparable harm absent an injunction and the balancing of equities weighed against an injunction. The injury to clerks, voters, and the public from the proposed relief—illegal under Wisconsin law—far outweighs Kennedy's interest in being off the Wisconsin ballot.

Most basically, Kennedy's suggestion is prohibited: Wis. Stat. § 5.51(4) bars election officials from attaching a sticker to a ballot. There is one exception—for the death of a candidate, when a replacement nominee is selected, Wis. Stat. § 7.38(3)—but Kennedy is alive and well.

Courts cannot grant injunctions that violate state law. Courts acting in equity have discretion unless a statute clearly provides otherwise. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001). That is because "clearly-worded statutes have the power to divest courts of their equity powers." *Findlay Truck Line, Inc. v. Central States, Se. & Sw. Areas Pension Fund*, 726 F.3d 783, 753 (6th Cir. 2013). In *Findlay Truck Line,* the Sixth Circuit court of appeals held the trial court lacked authority to issue a preliminary injunction that violated plain statutory language. *Id.* Kennedy's cited case, *In Interest of E.C.*, 130 Wis. 2d 376, 388, 387 N.W.2d 72 (Wis. 1986), says that injunctive relief can include a measure not explicitly permitted in a statute, but that supports relief only when the statutes have not spoken. Here, the statute expressly prohibits the relief sought.

Even if Kennedy had died and Wis. Stat. § 7.38 were available, it would not work the way he assumes. That statute is about a political party's ability to *replace* its deceased candidate with a different nominee, allowing voters to select that candidate. It requires the political party to provide properly-sized stickers featuring the new candidate's name. That is a wholly different process than Kennedy's demand.

Kennedy also points to a reference in the Elections Manual discussing stickers for write-in candidates. (App. Br. 7.) Although the manual has not been updated, that option was eliminated by the legislature: 2015 Wis. Act 37 eliminated the option for voters to indicate their choice with a sticker at polling places with electronic voting systems.

It is for good reason that Kennedy's idea is not the law. Here, hand cutting and affixing stickers for four million ballots would be a herculean task, requiring tens of thousands of man hours—work for clerks whose hands are already full.

And it could jeopardize the proper administration of the election. Stickers may peel off, getting stuck in the tabulator or ripping other ballots. Loose stickers could jam a machine, taking it out of service. If 3.5 million ballots are cast, even an error rate of 0.010% would amount to 350 affected machines and, in turn, polling places.

Aside from machine breakdown, stickers threaten accurate reading of ballots. Tabulators are calibrated to recognize a difference in the weight of a ballot. The extra weight of a sticker could cause the machine to read the ballot as a double ballot and not count it. Tabulators are also calibrated to read light marks so that no vote goes uncounted, and a sticker in the "target area" of an oval or error—where a sticker over Kennedy's name would need to be—could register a double vote.

In enacting Wis. Stat. § 7.38(3), the legislature determined that those consequences may be justified in the case of a candidate's death so that voters may choose a party's

replacement candidate. The legislature has otherwise prohibited the practice, and for good reason. The circuit court was well within its discretion in concluding that the competing equities weighed against Kennedy's request—a remedy contrary to state law.

C. The circuit court reasonably determined that Kennedy's request would upend, not preserve, the status quo.

The circuit court held that Kennedy failed the requirement that a temporary injunction only preserve the status quo, not grant the ultimate relief he sought. (R. 60:7, 10–11.) This, too, was reasonable.

III. *Hawkins* supports the outcome below.

While the circuit court did not decide the motion under *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877, that decision also supports the result here.

In *Hawkins*, the supreme court recognized that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." *Id.* ¶ 5. The court considered a petition for leave to commence an original action filed by candidates who were excluded from the ballot due to insufficient signatures on their nomination papers. *Id.* ¶¶ 1–2. The petitioners asked for preliminary relief—adding their names to new ballots for President and Vice President—after absentee ballots had already been sent out by municipal clerks. *Id.* ¶¶ 2–6, 8, n.2. The court concluded that under the circumstances, including the fact that the general election had "essentially begun," it was "too late" to grant them any form of relief that would be feasible and not cause undue damage to the election. *Id.* ¶ 5.

Here, the undisputed evidence shows that the clash between Kennedy's request and the realities of election administration is just as acute as in *Hawkins*.

IV. Responses to Court's questions.

1. "[D]oes it matter if ballots with stickers on them have not been tested with voting equipment?"

Yes. Testing matters for two reasons. First, it would measure the risks posed by stickered ballots, but the Commission's precertification of tabulator models under Wis. Stat. § 5.91 and Wis. Admin. Code EL 7 did not test stickered ballots. Second, municipal clerks must test their tabulators with the ballots at least 10 days before the election under Wis. Stat. § 5.84; if stickered ballots are ordered and those results are not error free, the tabulators cannot be used in the election.

2. If a vacancy in a statewide office occurs because of the death of a candidate and the party supplies stickers with the name of the replacement candidate, "would the stickers have to be placed on the ballots statewide?"

Yes. The Commission has not previously needed to interpret the statute, but it would presumably be subject to situations where it could be feasibly achieved.

3. Under Wis. Stat. §§ 7.37(6), 7.38(3) & 8.35(2)(d), "[d]o clerks, as WEC has suggested, have discretion to not have the stickers applied to the ballots?"

No. Commission counsel inadvertently misread Wis. Stat. § 7.37(6) late at night while working on a prior brief. (R. 39:11.)

* * * * *

The circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. Its decision should be affirmed.

CONCLUSION

The Commission asks this Court to affirm the circuit court's order.

Dated this 20th day of September 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5368 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of September 2024.

Electronically signed by Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Respondent-Petitioner.

ROBERT F. KENNEDY, JR.'S MOTION REQUESTING ORAL ARGUMENT

ROBERT F. KENNEDY, JR,
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This Court is at a great disadvantage. In the past two weeks, there have been petitions (and appeals) based on the need for a temporary restraining order and then briefing (and appeals) on the need for a preliminary injunction. Multiple briefs were filed (and considered) by the Second District, further briefing ordered, and that additional briefing has come. More briefing will follow at 4 p.m.

This Court is stepping into a case that is both important and needs to be done right. On top of that, there are a lot of swirling pieces that this Court needs to consider. Usually, when a case comes before this Court the issues have crystallized—through the court of appeal's decision and the appellant's petition for review. If it's deemed an appropriate case, review is granted and full briefing follows. And then, as a general rule, this Court gives parties the opportunity to present oral argument. It's a chance for the Court to grapple with the questions it has and for the parties to feel heard, but also for the public to understand that justice is being done—the case is proceeding in due course. Given the importance that the Court and parties attach to oral argument, it is the rule—never the exception.

Here, so much of what lets this Court get it right has been cut out of the process. The case has moved quickly. And from the briefing, there are a lot of outstanding questions and points that this Court is (and will be) wrestling with. Those questions should not be answered without the insights and input of counsel at oral argument. We're dealing with weighty constitutional issues in a Presidential election affecting millions of voters. No one benefits from a rushed decision or one that isn't based on a full and fair opportunity for each side to be heard.

What's more, the Commission's brief in response to the Second District's *very* specific questions is not a response brief at all—it's a brief on the merits, with twenty-four pages focused on the case and a single page devoted to the Court of Appeal's questions. Kennedy now has five hours and ten pages to combat the arguments made in the lengthy by-pass petition and now an almost as long Response brief. For Kennedy to be fully heard, he needs oral argument.

For those reasons and to that end, the Petitioner/Appellant would respectfully request the opportunity for oral argument. Given the importance of the issue and the haste this Court is working in, I would be available this weekend. If that's too short a time, then I'd ask that it be held Monday or at the Court's earliest possible convenience early next week.

Dated at Madison, Wisconsin, September 20, 2024.

Respectfully submitted,

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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondent-Respondent.

ROBERT F. KENNEDY, JR.'S REPLY BRIEF

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

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I. Kennedy can't be treated worse than the major-party candidates or have his First Amendment Rights infringed.

Kennedy has an absolute right to endorse Donald Trump for President. He's done that in myriad ways: he's appeared at rallies, spoken on talk shows, and provided public endorsements whenever and wherever he could. In Wisconsin, he wants everyone who will listen to him to vote for Trump. That is core political speech and it's protected under the First Amendment. In an effort to ensure that message is conveyed clearly and without confusion, he asked that his name not appear on the Wisconsin ballot. He did so *well before* the Commission voted to put him on the ballot and *before* the major parties even had to submit a candidate. The reason he asked to withdraw his name from the race was to make sure there was no confusion in his message: in Wisconsin, I want everyone to vote for Trump! The Commission refused to honor that request and instead placed him on the ballot. In doing so, the Commission has created confusion and compelled a message that Kennedy wants no part of—namely, I still want your votes, I'm still running. I may attend rallies, I may stump for Trump, but really, where it counts, in the seclusion and secrecy of the voting booth, choose me.

The question is: in the realm of constitutional rights what does everything in that paragraph implicate? Intuitively, it feels amiss. Democrats and Republicans have an additional month to get off (and on) the ballot that Kennedy and the other independent candidates don't have. That just can't be right. And on top of that, the Commission won't allow him to withdraw even though it was before the Commission formally acted and even though it creates voter confusion—conveying a message that Kennedy himself does not endorse. The reason it feels amiss is that it's wrong. The Equal Protection Clause ensures equal treatment between the major parties and the independent candidates. And the First Amendment prevents the Commission from diminishing Kennedy's message or putting forth a message he doesn't agree with.

II. The Commission's attempts to escape that logic are unavailing and should be rejected.

Everything about this case can be summed up in those two paragraphs. Judges know that third-party candidates can't be treated differently and no one can be compelled to give a message that he or she doesn't endorse. The particulars for all those points are spelled out in the previous briefing. What follows is why the Commission's counterarguments are unavailing. To escape those basic points, the Commission lodges several arguments. It makes technical arguments about the different deadlines and how they are reasonably related to important interests. And it makes arguments that Kennedy's rights are not at issue here—all that matters is the voters' rights. But in doing so it ignores that the distinction between the rights of candidates and voters is not easily separated. Indeed, here it is Kennedy's message that matters, and the voters have a right not be confused by anything that muddles that message—in particular, the message his name being on the ballot conveys. Finally, The Commission argues that *Hawkins* controls, but properly understood, *Hawkins* is a much different situation from what we have here.

A. The Commission's arguments about the statute ignore that Kennedy wants off the ballot not *on* it and that precedent supports flexibility for independent candidates.

First, it makes technical arguments: the differing deadlines stem from different needs with verifying signatures and making sure everything complies with state law; and, it argues, there is no right to get off the ballot—once you declare, you're stuck there. But both arguments miss the point. The different deadlines and all the work that they can entail make sense for candidates getting *on* the ballot, but here Kennedy wants *off* the ballot. He wants to save the Commission the time and effort of checking those forms. So the needs prompting a two-tiered deadline don't apply. The second point also fails. Here, Kennedy had to declare by August 6 and (under the Commission's logic) withdraw that same day if he didn't want to be on the ballot. But Trump and Harris could declare on August 6 and for the next

month contemplate the situation and change their minds. They could drop out or swap out another candidate. That clearly benefits the major parties over the independents.

The only other time the issue of disparate treatment between parties has come up (and there only partially) was in the infamous 1980 National Unity Campaign. There, when scandal rocked the Vice Presidential candidate, the powers-that-be didn't want to allow the National Unity Campaign the ability to switch out the Vice Presidential candidate—despite the Republicans and Democrats having that exact same ability on an extended timeline.[1] This was challenged on various grounds, and when consulted, the Attorney General gave his opinion: "Preventing Anderson from considering relevant issues and events in the selection of his running mate during this critical period of electoral activity, *as are the major parties, is a substantial disability for his campaign*."[2] The opinion added in a note that resonates here: "Further, the interest of all the citizens of Wisconsin in having their presidential electors cast meaningful votes in the event the Anderson ticket should gain a plurality in the November election counsels against including anyone but Lucey on the Anderson ticket."[3] Put differently, the voters don't benefit from different rules for different parties, and for that matter, the Equal Protection Clause doesn't allow it.[4]

Here, Wisconsin's deadlines hamstring third-party candidates, while giving Democrats and Republicans a greater opportunity to disassociate from a candidate or for a candidate to dissociate from the campaign.[5] election."[6] It's worth adding that Kennedy had to withdraw *before* the DNC had even announced its candidate or his opponent. These statutory deadlines advantage the Democrats and Republicans in multiple ways.

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[1] No. OAG 55-80, 1980 WL 119496 (Wis. A.G. Sept. 17, 1980); *see also Brown County v. Brown Cnty. Taxpayers Ass'n,* 2022 WI 13, ¶ 32, 400 Wis. 2d 781, 971 N.W.2d 491.
[2] No. OAG 55-80, ¶ 5, 1980 WL 119496 (Wis. A.G. Sept. 17, 1980).
[3] *Id.*
[4] *Id*.
[5] *Compare* Wis. Stat. § 8.16(7), *with* Wis. Stat. § 8.20(8)(am)
[6] Wis. Stat. § 8.20(8)(am).

They get more time to vet a candidate. Should a candidate have a scandal (or health issues) just a few months out from the election, the major parties can potentially backtrack and try to get someone else on the ballot. An independent candidate, however, must move faster—a full month earlier. Not only does the statute give the Democrats and Republicans more time for vetting, but it also gives them more time to contemplate the best course of action for the *candidate.*

Here, upon reflection, Kennedy has (like President Biden) decided that for associational and expressive reasons, he does not want to run for President anymore. And Kennedy (like President Biden) decided he wanted to not just be off the ballot, he also wanted to give his endorsement to someone else. Kennedy for Trump; Biden for Harris. And Kennedy (like President Biden) wanted to make sure that there was no voter confusion in Wisconsin—no one thinking that he was soliciting votes. Yet, Wisconsin's arbitrary, two-tiered deadlines prevent Kennedy (unlike President Biden or any other major-party candidate) from withdrawing and making sure that his message is clear.

B. Kennedy (like every citizen) has the right to convey a clear message without the Commission compromising it.

The Commission argues that Kennedy has no right to use the ballot as a means to convey his message. It's worth reiterating that Kennedy is not trying to use the ballot to convey a message, but to make sure that his name being on the ballot doesn't convey a message—there's a world of difference. Kennedy is trying (as best he can) to avoid voter confusion and prevent his actual message—I'm supporting Trump for the Presidency—from being drowned out by the confusion created by his name being on the ballot. After all, the Supreme Court has been clear: "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[7] Among the principal duties of election officials is to make sure that

[7] *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

the citizens can "make informed choices in the political marketplace."[8] And that demands transparency, not confusion. Indeed, the Commission cannot argue that the same confusion would attend a major party candidate withdrawing on August 23 (the day Kennedy did); after all, the Democrats and Republicans had until September 3 to do so.

To escape that logic, the Commission cites and quotes *Timmons* in one breath and then disavows all that the case actually says in the next.[9] In *Timmons*, the Supreme Court looked at fusion ballots—the candidate's name appearing for two parties. This used to happen a lot, but Minnesota banned it. The Supreme Court noted (as Kennedy did in the petition) that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."[10]

The Supreme Court then continued with the key provisos that the Commission's brief has left out, namely, while it's clear that we're talking about core First Amendment activity, "States may, and inevitably must, enact *reasonable* regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."[11] No question there. The Supreme Court continued: "When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary."[12] That is, there's a balancing test that courts must strike. We have a fundamental right at issue—Kennedy's First Amendment rights are on one side of the ledger and the State's ability to cure confusion on the other.

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[8] *Citizen United v. FEC,* 558 U.S. 310, 366 (2010).
[9] *See* Br. at 29–30.
[10] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (quoting *Colorado Republican Federal Campaign Comm. v. Federal Election Comm.*, 518 U.S. 604, 616 (1996)).
[11] *Id.* (emphasis added).
[12] *Id.* at 358.

The Supreme Court broke it down this way, in a point that echoes here: "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate."[13] That makes sense, it reasoned, because "[a] particular candidate might be ineligible for office, unwilling to serve, or, as here, another party's candidate. *That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's association rights*."[14] That is, while there is not an absolute right to be on the ballot, there is an important right at issue, and that right has to be weighed against the State's compelling interests—namely "avoiding voter confusion and overcrowded ballots."[15]

But that's not what's going on here. Kennedy is not trying to get *on* the ballot and create confusion, he's trying to stay *off* the ballot to avoid confusion. The Commission—not Kennedy—is the one that has fabricated an overcrowded and confusing ballot. Properly understood, *Timmons* simply does not support that Kennedy's rights are non-existent or trivial; it says the opposite: "We conclude that the burdens Minnesota imposes on the Party's First and Fourteenth Amendment associational rights—*though not trivial—are not severe*."[16] And it certainly doesn't support the idea that the Commission has a compelling reason for keeping him on the ballot. Again, and to be perfectly clear about this: the very points for which the Commission is trying to use *Timmons*, those points actually support *why* Kennedy's rights are not outweighed by the Commission's needs. The Commission—not Kennedy—created these issues when, without any stated need, it refused to accede to his request to get off the ballot, a request that would have been granted if he were aligned with the two major parties.

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 363 (emphasis added).

C. *Hawkins* does not control here; instead, in equity a remedy can be fashioned.

As a final point, the Commission over-reads *Hawkins*, and its impact on this case. For one, *Hawkins* is not settled precedent—it's the order of a denial of review setting out pragmatic considerations that are not present here.[17] Indeed, Hawkins wanted *on* the ballot, Kennedy wants *off* the ballot. For Hawkins, new ballots had to be created, for Kennedy stickers only need to be applied. And while the Commission argues that this is a bridge-too-far in terms of logistics, it has to be remembered that this is a State law. The legislature has provided this very same mechanism to be used. The Commission and the clerks do not have free reign to ignore the legislature's commands or brand them as difficult and thus to be ignored. And in all this, it has to be remembered that Kennedy asked to be removed far before the ballots were approved and printed. The Commission cannot create this problem and then cite it as a reason for the Court not to honor Kennedy's rights and cure the very problem that it created.

There is no question that there is some cost to placing stickers on the ballots. But that's not the standard that *Hawkins* set, it dealt with voter confusion. The risk of voter confusion is too great to risk putting him on the ballot.[18] But there is no voter confusion when Kennedy's name is covered up. *Hawkins* does not counsel that administrative burdens trump constitutional rights; it simply provides that voter confusion will. And here, ordering that Kennedy's name be removed or covered up cures any risk of confusion.

---

[17] *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877.

[18] *Id.*

Dated at Madison, Wisconsin, September 20, 2024.

Respectfully submitted,

Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff *Pro Hac Vice* Motion forthcoming	ROBERT F. KENNEDY, JR., *Petitioner* *Electronically signed by Joseph A. Bugni* Joseph A. Bugni *Wisconsin Bar No.* 1062514 HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com (608) 257-0945

CERTIFICATION

I certify that this brief conforms with the rules contained in Wis. Stat. § 809.50(1) and (4) for a petition produced with a proportional serif font. The length of this petition is 2,198 words.

Electronically signed by Joseph A. Bugni
Joseph A. Bugni

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Supreme Court of Wisconsin

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September 20, 2024

To:

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Circuit Court Judge
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Clerk of Circuit Court
Dane County Courthouse
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You are hereby notified that the Court has entered the following order:

No. 2024AP1872 Kennedy v. Wisconsin Elections Comm'n, L.C.# 2024CV2653

The court having considered the motion of petitioner-appellant, Robert F. Kennedy, Jr., requesting oral argument in this matter;

IT IS ORDERED that the motion for oral argument is denied; and

IT IS FURTHER ORDERED that, given the compressed time limits in this matter and in order to afford petitioner-appellant a fuller opportunity to present his arguments, the court, on its own motion, hereby grants petitioner-appellant, Robert F. Kennedy, Jr., an opportunity to file an amended reply brief, which shall not exceed 20 pages if a monospaced font is used or 4,400 words if a proportional serif font is used. The amended reply brief shall be filed no later than 12:00 p.m. on Saturday, September 21, 2024.

ANNETTE KINGSLAND ZIEGLER, C.J., and REBECCA GRASSL BRADLEY, J. *(dissenting).* We would grant the motion and give the parties the opportunity to present oral argument so that the court could fully consider the merits of their positions. This would be the best way to proceed in this case, given its potential national significance.

Samuel A. Christensen
Clerk of Supreme Court

FILED
09-23-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondent-Respondent.

ROBERT F. KENNEDY, JR.'S AMENDED REPLY BRIEF

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

ROBERT F. KENNEDY, JR,
Petitioner-Appellant

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I. Kennedy can't be treated worse than the major-party candidates or have his First Amendment Rights infringed.

Kennedy has an absolute right to endorse Donald Trump for President. He's done that in myriad ways: he's appeared at rallies, spoken on talk shows, and provided public endorsements whenever and wherever he could. In Wisconsin, he wants everyone who will listen to him to vote for Trump. That is core political speech and it's protected under the First Amendment. In an effort to ensure that message is conveyed clearly and without confusion, he asked that his name not appear on the Wisconsin ballot. He did so *well before* the Commission voted to put him on the ballot and *before* the major parties even had to submit a candidate. The reason he asked to withdraw his name from the race was to make sure there was no confusion in his message: in Wisconsin, I want everyone to vote for Trump! The Commission refused to honor that request and instead placed him on the ballot. In doing so, the Commission has created confusion and compelled a message that Kennedy wants no part of—namely, I still want your votes, I'm still running. I may attend rallies, I may stump for Trump, but really, where it counts, in the seclusion and secrecy of the voting booth, choose me.

The question is: in the realm of constitutional rights what does everything in that paragraph implicate? Intuitively, it feels amiss. Democrats and Republicans have an additional month to get off (and on) the ballot that Kennedy and the other independent candidates don't have. That just can't be right. And on top of that, the Commission won't allow him to withdraw even though it was before the Commission formally acted and even though it creates voter confusion—conveying a message that Kennedy himself does not endorse. The reason it feels amiss is that it's wrong. The Equal Protection Clause ensures equal treatment between the major parties and the independent candidates. And the First Amendment prevents the Commission from diminishing Kennedy's message or putting forth a message he doesn't agree with.

II. The Commission's attempts to escape that logic are unavailing and should be rejected.

Everything about this case can be summed up in those two paragraphs. Judges know that third-party candidates can't be treated differently, and no one can be compelled to give a message that he or she doesn't endorse. The particulars for all those points are spelled out in the previous briefing. What follows is why the Commission's counterarguments are unavailing. To escape those basic points, the Commission lodges several arguments. It makes technical arguments about the different deadlines and how they are reasonably related to important interests. And it makes arguments that Kennedy's rights are not at issue here—all that matters is the voters' rights. But in doing so it ignores that the distinction between the rights of candidates and voters is not easily separated. Indeed, here, it is Kennedy's message that matters, and the voters have a right not be confused by anything that muddles that message—in particular, the message his name being on the ballot conveys. And in making that argument, the Commission misreads the *Lewin* case—there, the candidate did not sue to get off the ballot, but his opponents sued to get him off. Finally, The Commission argues that *Hawkins* controls, but properly understood, *Hawkins* was a much different situation from what we have here.

A. The Commission's arguments about the statute ignore that Kennedy wants off the ballot not *on* it and that precedent supports flexibility for independent candidates.

First, the Commission makes technical arguments: the differing deadlines stem from different needs with verifying signatures and making sure everything complies with state law; and, it argues, there is no right to get off the ballot—once you declare, you're stuck there. But both arguments miss the point. The different deadlines and all the work that they can entail make sense for candidates getting *on* the ballot, but here Kennedy wants *off* the ballot. He wants to save the Commission the time and effort of checking those forms. So the needs that prompt a two-tiered deadline just don't

apply. The second point also fails. Here, Kennedy had to declare by August 6 and (under the Commission's logic) withdraw that same day if he didn't want to be on the ballot. But Trump and Harris could declare on August 6 and for the next month contemplate the situation and change their minds. They could drop out or swap out another candidate. That clearly benefits the major parties over the independents (indeed, the DNC did not even hold its convention until well after August 6).

The only other time the issue of disparate treatment between parties has come up (and there only partially) was in the infamous 1980 National Unity Campaign. There, when scandal rocked the Vice Presidential candidate, the powers-that-be didn't want to allow the National Unity Campaign the ability to switch out the Vice Presidential candidate—despite the Republicans and Democrats having that exact same ability on an extended timeline.[1] This was challenged on various grounds, and when consulted, the Attorney General gave his opinion: "Preventing Anderson from considering relevant issues and events in the selection of his running mate during this critical period of electoral activity, *as are the major parties, is a substantial disability for his campaign*."[2] The opinion added in a note that resonates here: "Further, the interest of all the citizens of Wisconsin in having their presidential electors cast meaningful votes in the event the Anderson ticket should gain a plurality in the November election counsels against including anyone but Lucey on the Anderson ticket."[3] Put differently, the voters don't benefit from different rules for different parties, and for that matter, the Equal Protection Clause doesn't allow it.[4]

Here, Wisconsin's deadlines hamstring independent candidates, while giving Democrats and Republicans a greater opportunity to disassociate from a candidate or for a candidate to dissociate from the

[1] No. OAG 55-80, 1980 WL 119496 (Wis. A.G. Sept. 17, 1980); *see also Brown Cnty. v. Brown Cnty. Taxpayers Ass'n,* 2022 WI 13, ¶ 32, 400 Wis. 2d 781, 971 N.W.2d 491.
[2] No. OAG 55-80, ¶ 5, 1980 WL 119496 (Wis. A.G. Sept. 17, 1980).
[3] *Id.*
[4] *Id*.

campaign.[5] It's worth adding that Kennedy had to withdraw *before* the DNC had even announced its candidate. These statutory deadlines advantage the Democrats and Republicans in multiple ways. They get more time to vet a candidate. Should a candidate have a scandal (or health issues) just a few months out from the election, the major parties can potentially backtrack and try to get someone else on the ballot. An independent candidate, however, must move faster—a full month earlier. Not only does the statute give the Democrats and Republicans more time for vetting, but it also gives them more time to contemplate the best course of action for the *candidate*.

Here, upon reflection, Kennedy has (like President Biden) decided that for associational and expressive reasons, he does not want to run for President anymore. And Kennedy (like President Biden) decided he wanted to not just be off the ballot, he also wanted to give his endorsement to someone else. Kennedy for Trump; Biden for Harris. And Kennedy (like President Biden) wanted to make sure that there was no voter confusion in Wisconsin—no one thinking that he was soliciting votes. Yet, Wisconsin's arbitrary, two-tiered deadlines prevent Kennedy (unlike President Biden or any other major-party candidate) from withdrawing and making sure that his message is clear.

B. Kennedy (like every citizen) has the right to convey a clear message without the Commission compromising it.

The Commission argues that Kennedy has no right to use the ballot as a means to convey his message. It's worth reiterating that Kennedy is not trying to use the ballot to convey a message, but to make sure that his name being on the ballot doesn't convey a message—there's a world of difference. Kennedy is trying (as best he can) to avoid voter confusion and prevent his actual message—I'm supporting Trump for the Presidency—from being drowned out by the confusion created by his name being on the ballot. After all, the Supreme Court has been clear: "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect

[5] *Compare* Wis. Stat. § 8.16(7), *with* Wis. Stat. § 8.20(8)(am).

candidates always have at least some theoretical, correlative effect on voters."[6] Among the principal duties of election officials is to make sure that the citizens can "make informed choices in the political marketplace."[7] And that demands transparency, not confusion. Indeed, the Commission cannot argue that the same confusion would attend a major party candidate withdrawing on August 23 (the day Kennedy did); after all, the Democrats and Republicans had until September 3 to even declare a candidate.

To escape that logic, the Commission cites and quotes *Timmons* in one breath and then disavows all that the case actually says in the next.[8] In *Timmons*, the Supreme Court looked at fusion ballots—the candidate's name appearing for two parties. This used to happen a lot, but Minnesota banned it. The Supreme Court noted (as Kennedy did in the petition) that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."[9]

The Supreme Court then continued with the key provisos that the Commission's brief has left out, namely, while it's clear that we're talking about core First Amendment activity, "States may, and inevitably must, enact *reasonable* regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."[10] No question there. The Supreme Court continued: "When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary."[11] That is, there's a balancing test that courts must strike. We

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[6] *Bullock v. Carter*, 405 U.S. 134, 143 (1972).
[7] *Citizen United v. FEC,* 558 U.S. 310, 366 (2010).
[8] *See* Br. at 29–30.
[9] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (quoting *Colorado Republican Federal Campaign Comm. v. Federal Election Comm.*, 518 U.S. 604, 616 (1996)).
[10] *Id.* (emphasis added).
[11] *Id.* at 358.

have a fundamental right at issue—Kennedy's First Amendment rights are on one side of the ledger and the State's ability to cure confusion on the other.

The Supreme Court broke it down this way, in a point that echoes here: "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate."[12] That makes sense, it reasoned, because "[a] particular candidate might be ineligible for office, *unwilling to serve*, or, as here, another party's candidate. *That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's association rights*."[13] That is, while there is not an absolute right to be on the ballot, there is an important right at issue, and that right has to be weighed against the State's compelling interests—namely "avoiding voter confusion and overcrowded ballots."[14]

But that's not what's going on here. Kennedy is not trying to get *on* the ballot and create confusion, he's trying to stay *off* the ballot to avoid confusion. The Commission—not Kennedy—is the one that has fabricated an overcrowded and confusing ballot. Properly understood, *Timmons* simply does not support that Kennedy's rights are non-existent or trivial; it says the opposite: "We conclude that the burdens Minnesota imposes on the Party's First and Fourteenth Amendment associational rights—*though not trivial—are not severe*."[15] And it certainly doesn't support the idea that the Commission has a compelling reason for keeping him on the ballot. Again, and to be perfectly clear about this: the very points for which the Commission is trying to use *Timmons*, those points actually support *why* Kennedy's rights are not outweighed by the Commission's needs. The Commission—not Kennedy—created these issues when, without any stated need, it refused to accede to his request to get off the ballot, a request that would have been granted if he were aligned with the two major parties.

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 363 (emphasis added).

The issue then becomes where (directly) lies the harm? The harm comes to Kennedy's message that he's publicly proclaiming in Wisconsin: I am not running for President, I do not want your vote. And the contrary message that appears on the ballot: I *actually* do want your vote. As the Supreme Court has noted: the "instant before the vote is cast" is "the most crucial stage in the election process."[16] While Kennedy does not have the right to communicate a specific message on the ballot, he does have a right not be compelled to put forth a specific message—that is, I want your vote. Forcing him to remain on the ballot unmistakably compels that message.[17]

Consider it this way: the First Amendment provides "both the right to speak freely and the right to refrain from speaking at all."[18] No one can question that—after all, the "right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind."[19] Put another way, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[20] In just the same manner as Kennedy has a right to access the ballot; he has a concomitant right to get off the ballot.

Now that right is not absolute, but that right must be accorded just as much respect as what is afforded the major party candidates. The Equal Protection Clause provides that such unequal treatment will not be tolerated: "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment."[21] The major parties had the right to remove themselves from the ballot and place a different candidate on the ballot for far longer than what Kennedy was afforded. That is, if he

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[16] *Cook v. Gralike,* 531 U.S. 510, 525 (2001) (quotation omitted).
[17] *See Wooley v. Maynard,* 430 U.S. 705, 713 (1977).
[18] *Id.*; *see also Bd. of Education v. Barnette,* 319 U.S. 624, 633–34 (1943).
[19] *Id.* (quotation omitted).
[20] *Hurley v. Irish-American Gay*, 515 U.S. 557, 573 (1995); *see also Pacific Gas & Electric Co. v. Pub. Util. Comm'n of Cal,* 475 U.S. 1, 11 (1986).
[21] *Anderson v. Celebrezze,* 460 U.S. 780, 793–94 (1983).

were a major party candidate, he would not be on the ballot. And since that's true, it's clear that his rights have been violated.

C. The Commission's contrary cases—especially *Lewin*—do not provide the authority it needs to undermine those principles.

As the Circuit Court and everyone involved in this litigation accepts: there is not much law on this issue. That is for various reasons, including that these cases move quickly and once the election is over the harm cannot be remedied. But the Commission does cite and quote from a Maryland case, *Lamone v. Lewin,* for the proposition that Kennedy has no constitutional right to remove his name from the ballot.[22] But it's important to read the case, not just pluck a quote from it. In *Lewin,* it was the Plaintiffs who sued to have the candidate removed from the ballot and their names placed on the ballot—the incumbent candidate had been convicted of a federal offense and was going to soon be ineligible for office.[23] And those candidates wanted his spot.[24] Here's the quote: "Appellees Nancy Lewin, Elinor Mitchell, and Christopher Ervin—two of whom were rival candidates for the central committee—filed this suit against Appellant Linda Lamone in her official capacity as State Administrator of Elections to have Mr. Oaks' name removed from the ballot."[25]

Here's the *actual* argument made in *Lewin* about the First Amendment rights in play when removing a person from the ballot—again, in opposition to *what* the candidate wanted*:* "The [Appellees] reason that, because Mr. Oaks was at least temporarily disqualified from serving in elective office by giving up his voter registration prior to the primary election (and was likely to be disqualified in any event by virtue of serving a future prison sentence after the primary election), any vote cast for him would be 'wasted,' disenfranchising the voter who cast the vote. In Appellees' view, because [the Commission] retained Mr. Oaks' name on the ballot, those provisions were responsible for any such disenfranchisement."[26]

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[22] *See* Comm'n Br. at 20, quoting *Lamone v. Lewin,* 190 A.3d 376, 391 (Md. App. 2018).
[23] *Id.* at 377.
[24] *Id.*
[25] *Id.* at 378.
[26] *Id.* at 390.

There is just no way to read *Lewin* as the lodestar for this issue. It's not only distinguishable, but it also doesn't deal with the same core constitutional arguments that are raised here. Instead, this Court should follow the first principles of Constitutional law set out above and throughout this case and find that compelling Kennedy to stay on the ballot violates his rights—rights protected by the Equal Protection Clause and the First Amendment.

D. *Hawkins* does not control here; instead, in equity a remedy can be fashioned.

As a final point, the Commission over-reads *Hawkins*, and its impact on this case. For one, *Hawkins* is not settled precedent—it's the order of a denial of review setting out pragmatic considerations that are not present here.[27] Indeed, Hawkins wanted *on* the ballot, Kennedy wants *off* the ballot. For Hawkins, new ballots had to be created, for Kennedy stickers only need to be applied. And while the Commission argues that this is a bridge-too-far in terms of logistics, it has to be remembered that this is a State law. The legislature has provided this very same mechanism to be used. The Commission and the clerks do not have free reign to ignore the legislature's commands or brand them as difficult and thus to be ignored. And in all this, it has to be remembered that Kennedy asked to be removed far before the ballots were approved and printed. The Commission cannot create this problem and then cite it as a reason for the Court not to honor Kennedy's rights and cure the very problem that it created.

There is no question that there is some cost to placing stickers on the ballots. But that's not the standard that *Hawkins* set, it dealt with voter confusion. The risk of voter confusion is too great to risk putting him on the ballot.[28] But there is no voter confusion when Kennedy's name is covered up. *Hawkins* does not counsel that administrative burdens trump constitutional rights; it simply provides that voter confusion will. And here,

[27] *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877.
[28] *Id.*

ordering that Kennedy's name be removed or covered up cures any risk of confusion.

What's more, the reasoning behind the stickers in case of death also align with what Kennedy seeks here. We have those stickers in place so that voters aren't disenfranchised—votes wasted on someone who cannot take office. Here, we want the stickers placed on so votes aren't wasted on someone who does not want to take office. In both cases, it is voter confusion that the stickers cure and in both cases it can and should be the proper course of action.

III. Conclusion

Kennedy is not asking for much. He's seeking equal treatment under the law—that's it. That equal treatment cannot be washed away by simply ignoring his rights or adopting a "once you declare, you're forever there" reading of the statute. Indeed, had Trump or Harris sought to withdraw on August 23, there would have been no problem. That sort of two-tiered treatment is anathema to our system of government. And it cannot be tolerated, especially when it undermines Kennedy's First Amendment rights. Again, he has the right to stump for Trump—that's his undeniable right—and yet that message is compromised when voters step into the voting booth and (at that critical moment, which the Supreme Court has termed the most important) they see Kennedy's name there. And for that reason, we ask that this Court reverse the Circuit Court and order his name taken off the ballot.

Dated at Madison, Wisconsin, September 21, 2024.

Respectfully submitted,

Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff *Pro Hac Vice* Motion forthcoming	ROBERT F. KENNEDY, JR., *Petitioner* *Electronically signed by Joseph A. Bugni* Joseph A. Bugni *Wisconsin Bar No.* 1062514 HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com (608) 257-0945

CERTIFICATION

I certify that this brief conforms with the rules contained in Wis. Stat. § 809.50(1) and (4) for a petition produced with a proportional serif font. The length of this petition is 2,198 words.

Electronically signed by Joseph A. Bugni
Joseph A. Bugni

Samuel A. Christensen
Clerk

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The court has entered the following order:

District: 2
Appeal No. 2024AP001872

Date: October 7, 2024

Robert F. Kennedy, Jr. v. Wisconsin Elections Commission

Circuit Court Case No. 2024CV002653

The court having considered the **Motion for Reconsideration** filed in the above matter,

IT IS ORDERED that the Motion for Reconsideration is denied, without costs.

Samuel A. Christensen
Clerk of Supreme Court

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0236p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT F. KENNEDY, JR.,

Plaintiff-Appellant,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant-Appellee.

No. 24-1799

On Petition for Rehearing En Banc
United States District Court for the Eastern District of Michigan at Detroit.
No. 2:24-cv-12375—Denise Page Hood, District Judge.

Decided and Filed: October 16, 2024

Before: CLAY, McKEAGUE, and BLOOMEKATZ, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Brandon L. Debus, DICKINSON WRIGHT PLLC, Troy, Michigan, for Appellant. **ON RESPONSE:** Heather S. Meingast, Erik A. Grill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

The court delivered an order denying the petition for rehearing en banc. CLAY, J. (pp. 3–10), delivered a separate opinion concurring in the denial of the petition for rehearing en banc. GRIFFIN, J. (pg. 11), also delivered a separate opinion concurring in the denial of the petition for rehearing en banc, in which MATHIS, J., joined. THAPAR (pp. 12–19) and READLER (pp. 20–32), (app. 33–34), JJ., delivered separate opinions dissenting from the denial of the petition for rehearing en banc. McKEAGUE, J. (pp. 35–37), delivered a separate statement respecting the denial of rehearing and the denial of rehearing en banc.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition was then circulated to the full court.[*] Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

[*]In accordance with 6 Cir. I.O.P. 35(b), Judge McKeague, a senior judge, did not participate in the en banc proceedings; he writes separately as a member of the original panel in this case. See 6 Cir. I.O.P. 35(d)(1)–(2). Judge Davis is recused from participation in this case.

CONCURRENCE

CLAY, Circuit Judge, concurring in the denial of rehearing en banc. Plaintiff Robert F. Kennedy, Jr. and our dissenting colleagues would have us believe that Plaintiff's First Amendment rights are being trampled upon by the decision of the Michigan Secretary of State to decline to remove Plaintiff's name from Michigan's presidential ballot—notwithstanding the fact that doing so at this late stage would disrupt the orderly conduct of the presidential election in Michigan. Plaintiff and our dissenting colleagues argue that requiring Plaintiff's name to remain on the ballot is violative of Plaintiff's First Amendment rights because doing so falsely conveys that Plaintiff wishes to put himself forward as a presidential candidate and wishes, if elected, to serve as President of the United States. The argument is completely fraudulent, and lacks any connection to the protection of Plaintiff's First Amendment rights. This is because, at the same time that Plaintiff claims he wants to be off the presidential ballot in Michigan because he is no longer a candidate for President, he is suing to have his name placed on the ballot as a presidential candidate in the state of New York based on his contention that he continues to wish to campaign for the Office of President. We cannot discern Plaintiff's personal and/or political motives for advancing completely contradictory arguments in different jurisdictions; however, the duplicitous nature of his arguments, which vary from state to state, have absolutely nothing to do with any desire on Plaintiff's part to protect the sanctity of his First Amendment rights. The dissents, unfortunately, rush to align themselves with Plaintiff's bogus claims.

Plaintiff seeks to remove his name from Michigan's presidential ballot less than one month before the date of the election, in which hundreds of thousands of Michiganders have already returned their absentee ballots. This is also his second attempt to remove himself from the ballot via the courts, inasmuch as Plaintiff filed this action only after losing in state court. Plaintiff's lawsuit therefore seeks to not only disrupt the functioning of Michigan's elections, but also garner another bite at the procedural apple. For the reasons that follow, I concur in the Court's denial of the rehearing of this case en banc.

I. BACKGROUND

Plaintiff has been a candidate for President of the United States for much of the past two years. He first ran as a candidate in the Democratic Party's primaries, and after failing to win the nomination, decided to run as a third-party presidential candidate for the Natural Law Party. Plaintiff undertook a prolonged effort to gain ballot access in each of the nation's states, and he ultimately earned a place on the Michigan ballot after winning the Natural Law Party's presidential nomination on April 17, 2024. *See* Rebecca Davis O'Brien, *Surprise Tactics and Legal Threats: Inside R.F.K. Jr.'s Ballot Access Fight*, N.Y. Times, Apr. 29, 2024.

Four months later, Plaintiff withdrew from the presidential race. He sent two notices of withdrawal to the Michigan Bureau of Elections, first on August 23, 2024, and then on August 27, 2024. Defendant, Michigan Secretary of State Jocelyn Benson, rejected each of these withdrawal notices, citing Mich. Comp. Laws §§ 168.686a(2), (4). Plaintiff responded by filing suit on August 30, 2024, in the state Court of Claims. In his state court complaint, Plaintiff alleged that by refusing to remove him from the ballot, Defendant violated various state election laws and the free speech protections of the Michigan Constitution. The Court of Claims dismissed the complaint. On September 4, 2024, Plaintiff appealed to the Michigan Court of Appeals. Two days later, the Court of Appeals granted Plaintiff's appeal and remanded the case to the Court of Claims, which granted mandamus and ordered Defendant to remove Plaintiff's name from the ballot. That same day, Defendant appealed to the Michigan Supreme Court, and on September 9, 2024, the court granted Defendant's appeal and affirmed the Court of Claims' order.

On September 6, 2024—in between the time of the Court of Appeals' and the Michigan Supreme Court's decisions—Defendant sent the certification of candidates to Michigan's county clerks. Per the Court of Appeals' decision and subsequent order, Defendant's communication did not have Plaintiff's name listed as the candidate for the Natural Law Party, nor did it order that the ballots be printed. Three days later, after the Michigan Supreme Court's decision was released, Defendant updated the names of candidates and included Plaintiff's name as the presidential candidate for the Natural Law Party.

After Plaintiff lost his case in state court, he filed suit in the U.S. District Court for the Eastern District of Michigan. Plaintiff's district court complaint alleged three counts of constitutional violations: (1) a violation of Article II, Section 1, of the Constitution arguing "that states may not impose their stringent ballot access requirements on the national election for President" and that Defendant's placement of Plaintiff's name on the ballot serves "no other possible reason than to confuse unwitting Michigan voters to vote for a candidate no longer running for office," Compl., R. 1, Page ID #6–11; (2) a Fourteenth Amendment equal protection violation, arguing that the deadline by which a candidate withdraws gives an "advantage [to] the Democrats and Republicans" by unfairly preventing third-party candidates from withdrawing after receiving a party's nomination, *id.* at Page ID #11–15; and (3) a First Amendment compelled speech violation, arguing that by placing Plaintiff's name on the ballot, Defendant compels Plaintiff "to convey a false message to every citizen of Michigan that he is vying for their vote in this state," *id*. at Page ID #15–19. Plaintiff subsequently filed a motion for a preliminary injunction, requesting that Defendant be ordered to remove his name from the ballot. The district court denied Plaintiff's motion, finding, *inter alia*, that his claims were barred by res judicata and failed on the merits.

II. DISCUSSION

The crux of Plaintiff's argument, and of Judge Readler's and Judge Thapar's dissents, is that Plaintiff's First Amendment protections have been violated by the Secretary of State. Plaintiff argues that he will be subject to reputational injury if he is left on the ballot, as voters will incorrectly believe that he is still a candidate for president. He states that "once the ballots are printed" with his name on them, his supporters will "be left confused and angry for casting an invalid vote" for him. Appellant's Br., ECF No. 6, 34. Yet neither Plaintiff, nor the dissents, reconcile this argument with the fact that Plaintiff has fought to *keep* his name on the ballot in other states. For example, Plaintiff recently filed suit in New York in which he demanded that the state add his name to the ballot. *See Team Kennedy v. Berger*, No. 24A285, 2024 WL 4312515 (U.S. Sept. 27, 2024).

Plaintiff's attempts to put his name on the ballot in other states demonstrates that his First Amendment argument is completely fraudulent. Plaintiff certainly does not believe that placing

his name on the New York ballot would leave his New York supporters "confused and angry for casting an invalid vote" for him. And yet, for reasons not elucidated, Plaintiff believes that Michigan is different—that somehow his supporters in Michigan will be angrier for casting a wasted vote than his New York supporters. Nowhere does Plaintiff reconcile these conflicting and contradictory positions, which undermine the very basis of his First Amendment claim.

Plaintiff's suit is also barred by res judicata. Under that principle, if a litigant's claims reach final judgment in one court, he cannot pursue the same causes of action in another; in other words, he cannot "get two bites at the apple." *Talismanic Props., LLC v. City of Tipp City*, 742 F. App'x 129, 131 (6th Cir. 2018). Michigan applies a broad interpretation of res judicata, such that a litigant cannot bring any "claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair v. State*, 680 N.W.2d 386, 396 (Mich. 2004). Michigan's res judicata law "bars a second action on the same claim if (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Mecosta Cnty. Med. Ctr. v. Metro. Grp. Prop. & Cas. Ins. Co.*, 983 N.W.2d 401, 405 (Mich. 2022) (internal quotation marks and citation omitted).

Res judicata applies to each of Plaintiff's claims. Regarding the first element of Michigan's res judicata standard, the prior action was decided on the merits. The Court of Claims issued an opinion dismissing the state complaint on the merits, and the Michigan Supreme Court affirmed that dismissal. The second element is also met, as both Plaintiff and Defendant were parties to the state action. The primary issue, therefore, centers on the third res judicata element: whether the claims in the federal complaint were, or could have been, resolved in the state court case.

Plaintiff alleges three constitutional violations: (1) First Amendment compelled speech, (2) a violation of Article II, Section 1's prescriptions regarding the conduct of presidential elections, and (3) a Fourteenth Amendment equal protection claim regarding Michigan's purported disparate treatment of major and minor party candidates. Each of those claims could have been brought in state court. With respect to the First Amendment claim, Plaintiff's state court complaint listed a compelled speech claim under the Michigan Constitution, stating that

Defendant's actions compel "Plaintiff to convey a false message to every citizen of Michigan that he is vying for their vote in this state, when he is not." State Compl., R. 8-9, Page ID #188. Thus, Plaintiff evidently believed that Defendant's conduct implicated his speech interests prior to filing suit in state court, and he was therefore fully capable of raising a federal speech claim in the Court of Claims.

With respect to the Article II and equal protection claims, Plaintiff did not raise those causes of action in state court. But he could have. *See Adair*, 680 N.W.2d at 396. The claims in this case arise from the same transaction as the Court of Claims case: in both cases, Plaintiff alleged that Michigan unfairly placed his name on the ballot and he sought to have his name removed. The Article II count argues that the presence of Plaintiff's name on the ballot confuses Michigan voters and "waste[s] their votes," while the withdrawal deadlines are unreasonable and undermine the electoral process. Compl., R. 1, Page ID #6–11. Those precise arguments could have easily been made in state court; in fact, Plaintiff employs similar language in parts of his state court complaint, such as when he argues that votes for him are "wasted and in vain." State Compl., R. 8-9, Page ID #188. Regarding the equal protection count, Plaintiff argues that the state withdrawal deadlines unfairly benefit the major political parties, as minor party candidates are only permitted to withdraw prior to accepting a party's nomination. Yet before he filed in state court, Plaintiff knew Defendant rejected his request to withdraw from the ballot, implicating the exact same harms he raises here.

Judge Readler's dissent argues that res judicata does not apply because prior to September 9, 2024—the date on which Michigan listed Plaintiff as a candidate on the ballot—there was no Article II, equal protection, or First Amendment violation for Plaintiff to assert. Thus, the dissent argues, because Plaintiff filed his state complaint before September 9, 2024, he was unable to bring those constitutional claims in state court. But under this logic, constitutional causes of action are only ripe when ballots are finalized. That argument stands in contradiction of our precedent. *See Rosen v. Brown*, 970 F.2d 169, 173–74 (6th Cir. 1992) (addressing a challenge to the Ohio Secretary of State's decision, prior to ballots being finalized or printed, not to place a political party indicator next to a candidate's name on the ballot). Instead, Plaintiff was able to assert his claims in August of 2024, when Defendant declined to accept Plaintiff's

withdrawal notice. It was at that point that Plaintiff became "threatened with 'imminent' injury in fact," as it was then that he became aware of Defendant's decision that his name should remain on the Michigan ballot. *Carman v. Yellen*, 112 F.4th 386, 400 (6th Cir. 2024) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)). Plaintiff, who filed his state complaint after Defendant's denial of his request to be removed from the ballot, thus had ample opportunity to make his constitutional claims in state court.

At bottom, Plaintiff's current lawsuit is a re-run of his first. When Plaintiff filed his state court lawsuit in August of 2024, he sought to challenge the Defendant's decision—based on Defendant's interpretation of Michigan election law—that he should remain listed as a candidate on Michigan's ballot. In this lawsuit, Plaintiff continues to seek to have his name removed from the ballot. The fact that Plaintiff has now identified new legal theories does not somehow allow Plaintiff a second bite at the apple.

Plaintiff's complaint also suffers from flaws on the merits. Plaintiff's theory of injury, for example, argues that that "once the ballots are printed" with his name on them, he will inevitably suffer an "injury to reputation," and his supporters will "be left confused and angry for casting an invalid vote" for him. Appellant's Br., ECF No. 6, 34. But Plaintiff has not shown that removing his name would prevent a loss of face; in fact, Plaintiff requested in another case that New York courts *keep* him on the ballot. *See Team Kennedy v. Berger*, No. 24A285, 2024 WL 4312515 (U.S. Sept. 27, 2024). Plaintiff has never explained or reconciled these conflicting and contradictory positions. Additionally, removing Plaintiff from the ballot at this late stage would have important consequences for the Natural Law Party. The Chair of the Natural Law Party has explained that removing Plaintiff from the ballot would leave the party in a "bad position," as it could impact the party's ability to put candidates forward in the future. *See* R. 8-5, Page ID #13. Plaintiff seems completely oblivious to the fact, and selfishly unconcerned, that his actions in seeking to remove his name from the ballot at this late stage is likely to injure the fortunes of the Natural Law Party—which made him its presidential nominee and devoted the party's political capital and resources to promoting Plaintiff's political ambitions.

Both Judge Readler's and Judge Thapar's dissents argue that Plaintiff's First Amendment claim is both cognizable and implicates highly important election law issues. Plaintiff is correct

that First Amendment protections generally apply to ballot access laws. *See, e.g.*, *Norman v. Reed*, 502 U.S. 279, 290 (1992). However, the unprecedented nature of this case, and the subsequent lack of guiding case law, requires a balancing of interests. Plaintiff's First Amendment rights must be balanced against the First Amendment rights of the electorate, as voters have a fundamental First Amendment right to cast their ballots in an orderly election. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476–78 (6th Cir. 2008). Thus, Plaintiff's First Amendment claims must be weighed against the risk that confusion of the electoral process may impede the electorate's capacity to exercise its own First Amendment rights. Additionally, the Supreme Court has long recognized that states have an inherent power to regulate elections so that "they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). It is for that reason that this Court has found that a state's regulation of ballot access is an inherently compelling state interest. *See Thompson v. Dewine*, 959 F.3d 804, 811 (6th Cir. 2020). Michigan's basic interest in maintaining an orderly election—especially when the election is only weeks away—must therefore be balanced against Plaintiff's First Amendment rights. Finally, the First Amendment protections afforded to the Natural Law Party must be taken into account, inasmuch as the party would effectively be deprived of a candidate if Plaintiff was removed from the ballot. The Chair of the Natural Law Party has explained that removing Plaintiff from the ballot would leave the party in a "bad position," as it could impact the party's ability to put candidates forward in the future. *See* R. 8-5, Page ID #13.

Perhaps the most important reason for denying Plaintiff relief is that removing him from the ballot this late in the election cycle would have serious consequences for the public interest. Under Michigan law, absentee voting commences 40 days before the election—which, in this case, began on September 26, 2024. *See* Mich. Const. of 1963 art. 2, § 4(1)(h). That was nearly three weeks ago. Since that time, more than 2.5 million absentee ballots have been sent and nearly 800,000 Michiganders have returned their ballots. *See 2024 General Election Early Vote – Michigan*, University of Florida Election Lab, https://election.lab.ufl.edu/early-vote/2024-early-voting/2024-general-election-early-vote-michigan/. To remove Plaintiff from the ballot this late in the election cycle would require last-minute reprinting of millions of ballots, impose an unacceptably high burden on the Secretary of State, and cast the status of already-returned

ballots into question. Granting the relief demanded by Plaintiff would require the Secretary of State to rapidly develop an administrative process to cope with the ensuing confusion in the electoral process, which would impose an impossible burden on the state's resources. That level of chaos, this close to election day, is unacceptable and would completely disrupt the orderly administration of the upcoming election. *See Benisek v. Lamone*, 585 U.S. 155, 160 (2018); *Estill v. Cool*, 295 F. App'x 25, 27 (6th Cir. 2008).

Finally, under the Supreme Court's *Purcell* doctrine, courts are limited in the actions they can take this late in the electoral process, as court orders "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). The Supreme Court has therefore found that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam). The time frame that constitutes "on the eve of the election" has not yet been defined by the Supreme Court; however, this Court has noted that injunctions issued a month before an election—as is the case here—violate *Purcell*. *See Tennessee Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Lee*, 105 F.4th 888, 897 (6th Cir. 2024). Thus, requiring Michigan to upend its electoral plans, print new ballots, and reconfigure the election this late in the process would directly contravene the Supreme Court's holding in *Purcell*.

III. CONCLUSION

At bottom, my colleagues raise no arguments that justify relitigating this case in federal court or upsetting a presidential election this late in the process. Accordingly, I respectfully concur in the denial of rehearing en banc.

CONCURRENCE

GRIFFIN, Circuit Judge, concurring in the denial of the petition for rehearing en banc.

The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam). This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam).

The November general election is well underway in Michigan. More than 670,000 Michiganders have already voted.[1] Irrespective of the correctness of the Michigan Secretary of State's decision to place Natural Law Party presidential nominee Robert F. Kennedy, Jr. on the ballot, the genie is out of the bottle. At this juncture, without an effective remedy, court intervention would only further undue chaos in the ongoing election.

For this reason, I concur in the denial of the petition for rehearing en banc. I would follow "the *Purcell* principle, which seeks to avoid this kind of judicially created confusion." *Republican Nat'l Comm.*, 589 U.S. at 425.

[1] *More Than 670k Michigan Voters Have Cast Absentee Ballots Three Weeks Before General Election,* Mich. Dep't of State (Oct. 15, 2024), https://www.michigan.gov/sos/resources/news/2024/10/15/more-than-670k-michigan-voters-have-cast-absentee-ballots-three-weeks-before-general-election [https://perma.cc/5KAH-K53W].

DISSENT

THAPAR, Circuit Judge, dissenting from the denial of rehearing en banc.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). When voters head to the polls, they need to have confidence in the accuracy of their ballots.

Robert F. Kennedy, Jr., suspended his presidential campaign and asked Michigan not to include his name on the ballot. He made the request before the ballots were printed. Even so, Michigan included his name over his objection (and apparently in violation of Michigan law). By doing so, Michigan forced Kennedy to be on the ballot for an office he no longer intended to seek.

This case presents a question of exceptional importance: Does forcing a person onto the ballot compel his speech in violation of the First Amendment? The repercussions of that question are enormous. If a candidate can't stop his name from appearing on the ballot, could battleground states put President Joe Biden back on their ballots? Could states put anyone they wanted on their ballots (in violation of their own election laws)?

Because these important questions implicate the integrity of our democracy and its elections, this case merited en banc review. *See* Fed. R. App. P. 35(a)(2).

I.

Kennedy ran for president as the Natural Law Party's candidate in Michigan. But in August, he withdrew from the presidential race. So he sought to have his name removed from Michigan's ballots. He made his request on August 23, 2024, before the September 6 deadline for the Secretary of State to deliver the list of presidential candidates to the county clerks. *See* Mich. Comp. Laws § 168.648 (1954) (requiring the Secretary to send this list at least 60 days before the election). However, the Secretary denied his request.

So Kennedy sued in state court, seeking declaratory, mandamus, and injunctive relief. On September 6, the Michigan Court of Appeals concluded that Kennedy had "a clear legal right to have his name removed from the ballot." *Kennedy v. Sec'y of State*, No. 372349, 2024 WL 4111159, at *4 (Mich. Ct. App. Sept. 6, 2024), *rev'd*, 10 N.W.3d 632 (Mich. 2024). The court thus issued a writ of mandamus ordering the Secretary of State to remove Kennedy's name from the ballot. The court appeared to choose mandamus over injunctive relief "given the impending deadline for the [Secretary] to send notice to local election officials." *Id.* It is unclear why injunctive relief would not have worked.

The Secretary complied by removing Kennedy's name from the ballot. She also appealed to the Michigan Supreme Court. On September 9, that court found that mandamus relief wasn't available to order Kennedy's removal from the ballot. *Kennedy v. Sec'y of State*, 10 N.W.3d 632 (Mich. 2024). The Michigan Supreme Court did *not* order Kennedy's placement on the ballot or opine on the merits. But the Secretary put Kennedy back on September 9 anyway—three days after the statutory deadline had expired on September 6.

II.

To determine whether the Secretary violated Kennedy's First Amendment rights, we need to know who is speaking. Is Michigan saying, "Kennedy has satisfied our requirements to be on the ballot"? That would be pure government speech. Or does the ballot involve Kennedy's private speech as well? This distinction is critical: The "Free Speech Clause restricts government regulation of private speech," but "it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). But "government speech in the literal sense" can still run afoul of the First Amendment if it "uses a means that restricts private expression . . . as is the case with compelled speech." *Shurtleff v. City of Boston*, 596 U.S. 243, 269 (2022) (Alito, J., concurring in the judgment). In other words, traditional government speech isn't protected if it restricts or compels a private citizen's expression.

Government speech is "the purposeful communication of a governmentally determined message by a person exercising a power to speak for a government." *Id.* at 268; *see also Summum*, 555 U.S. at 472 (explaining that government speech is "meant to convey and have the

effect of conveying a government message"). But the government-speech doctrine is "susceptible to dangerous misuse" when the government tries to pass off private speech as its own. *Matal v. Tam*, 582 U.S. 218, 235 (2017). So courts must carefully identify the speaker to avoid this abuse. *See Shurtleff*, 596 U.S. at 263 (Alito, J., concurring in the judgment).

Three factors help distinguish private speech from government speech: (1) the extent to which the government actively shaped or controlled the expression, (2) the history of the expression, (3) and the likely public perception as to the speaker's identity. *See id.* at 252 (majority opinion). So who shapes the speech here? The government exercises control over ballots and has done so since the late 19th century. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 356 (1997) (discussing the history of state government-controlled ballots). For example, Michigan certifies candidates, releases the ballots, and then counts them. And parts of the ballot are government speech—like instructions on how to vote. But the government doesn't alter the names of the listed candidates or their parties. The only "control" that the government exercises is ensuring that the proposed candidate has complied with the relevant election laws. And these regulations are neutral with respect to the actual content on the ballot—they apply to all candidates and parties. So the government does *not* control the precise speech here. Rather, the ballot is the government conduit that facilitates the private speech.

The third factor—public perception of the speech—strongly favors classifying Kennedy's ballot entry as private speech. After all, the public likely will perceive Kennedy as the speaker when the ballot lists him as the Natural Law Party's candidate for president. His message is: (1) I'm running for president, (2) I'm willing and able to hold office if elected, (3) I'm a member of the Natural Law Party, and (4) I'd like you to vote for me. Kennedy conveyed this message on the campaign trail for over a year. But months before the election, Kennedy suspended his campaign. He notified the Michigan Secretary of State that he no longer wanted to convey his message—and he did so well before her deadline to certify candidates. By refusing to remove Kennedy's name and then placing his message back on the ballot against his will, the Secretary compelled Kennedy to speak. And she did so in apparent violation of Michigan's own laws.

A.

Given the unprecedented nature of this dispute, there's no directly controlling precedent. But the Supreme Court's approach to distinguishing government and private speech reinforces the conclusion that the Michigan Secretary has likely compelled Kennedy's speech.

Start with the Supreme Court's decision in *Matal*. 582 U.S. at 223. There, the Court rejected the government's argument that the Patent and Trademark Office's role in registering trademarks meant that the trademarks were government speech. *Id.* at 239. The PTO neither edited nor generated the trademarks. *Id.* at 235.

Compare these two scenarios: A company tries to get its trademark registered. A candidate tries to get his name on the ballot. In both cases, the government evaluates the application for compliance with the relevant legal standards. In both cases, the government doesn't alter the trademark, the candidate's name, or party affiliation. In both cases, the government's approval doesn't transform the underlying private speech into government speech. "[S]imply affixing a government seal of approval" by registering a trademark or listing a candidate on the ballot can't extinguish an individual's First Amendment rights. *Id.* at 235. That principle applies whether the government prevents a person from speaking or compels them to speak. The First Amendment protects both rights. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

Or look at *Wooley v. Maynard*. 430 U.S. 705 (1977). There, the Court found that New Hampshire's requirement that license plates carry the state motto, "Live Free or Die," was impermissibly compelled speech. *Id.* at 713. The Court could've concluded that license plates are government speech—after all, they're usually a string of numbers and letters that identify a car as registered in the state. But the Court didn't do that. Instead, it recognized that New Hampshire was forcing drivers to "participate in the dissemination of an ideological message" through their own private speech. *Id.* To be sure, the Court has held that specialty license plate designs are government speech. *Walker v. Tex. Div., Sons of Confederate Veterans*, *Inc.*, 576 U.S. 200, 212–13 (2015). The driving concern in *Walker* was the worry that the specialty design would "convey to the public that the State has endorsed that message." *Id.* at 212. Even so, the

Court acknowledged that the designs "also implicate the free speech rights of private persons." *Id.* at 219.

Just as government-issued license plates may include private speech, so too with ballots. The government can't force individuals to carry a message that they don't agree with, even if that message is as benign as a well-known state motto. *See Wooley*, 430 U.S. at 713. Here, the Secretary isn't just mandating that a state motto appear on candidates' electioneering materials; she is forcing Kennedy to convey the (false) message that Kennedy is running for president. In so doing, the Secretary is requiring Kennedy to continue endorsing a message he has disavowed. And for no innocuous end: She seemingly wants Michigan voters to read and rely on that false message. She can't do that. The "involuntary affirmation" of speech is an even greater affront to the First Amendment than silence. *Barnette*, 319 U.S. at 633.

Analogy to another area of First Amendment doctrine—forum analysis—sheds additional light. Ballots aren't public forums. *See Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as forums for political expression."). But ballots do resemble nonpublic forums (also called limited public forums). Nonpublic forums are "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 555 U.S. at 470. So are ballots. Ballots can only be "used" by eligible voters. And ballots are dedicated solely to discussion of the current election. Moreover, ballot and nonpublic forum regulations must follow the same First Amendment rules: The regulations must be reasonable and politically neutral. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008) (ballots); *Summum*, 555 U.S. at 470 (nonpublic forums). Finally, the Court has explicitly recognized polling places as nonpublic forums. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 12 (2018). That all favors viewing ballots like nonpublic forums, and not as government speech.

The same principles control Kennedy's compelled-association claim. The "[f]reedom of association" includes a "freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Forcing Kennedy to appear on the ballot violates his right not to associate with a particular political party. Kennedy currently appears on the ballot under the Michigan Natural Law Party's banner. That means his name stands for a set of ideas, namely whatever the Natural Law Party's platform says. By not acting, this court allows the Secretary to force Kennedy to

continue associating with the Natural Law Party. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) ("The right to eschew association for expressive purposes is likewise protected."). All told, an unbroken string of authorities teaches a simple lesson: The government can't force free individuals to endorse particular ideas or actions. Doing so is "always demeaning." *Id.* at 893.

B.

Ballots don't enjoy government-speech immunity from the First Amendment. After all, the Court has repeatedly applied First Amendment scrutiny to state ballot access laws. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 792–94 (1983); *Norman v. Reed*, 502 U.S. 279, 290 (1992). These cases addressed candidates or parties trying to get *on* the ballot, not off. Kennedy's suit is the flipside. But the First Amendment still applies. So under *Anderson-Burdick* balancing, the test we use for ballot-access cases, this dispute boils down to weighing Kennedy's First Amendment interest against the state's asserted interest in its election process. We weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 789).

What are the asserted interests here? As discussed, Kennedy has a strong claim to be free from compelled speech. Michigan, for its part, has two categories of potential interests: legal and practical.

Start with the legal. Of course, Michigan has an interest in following its own laws. But the Secretary's reinstatement of Kennedy on the ballot didn't advance that interest. Michigan law seems to operate as follows: First, the Secretary sends county clerks a list of candidates "at least 60 and not more than 90 days" before the election. Mich. Comp. Laws § 168.648. Then, at least 58 days before the election, the proposed ballot is put on file for public inspection and mailed to the candidates. *Id.* § 168.710. Each candidate then has five business days to object. *Id.* § 168.711(4). If there are no objections, "the county clerk is authorized to begin printing the ballots." *Id.*

Here, Kennedy requested that his name be removed from the ballot on August 23, 2024. That was well before the 60-day deadline and before any ballots were printed or sent out. Then, on September 6 (the 60-day deadline), the Secretary sent notice to Michigan's county clerks without Kennedy's name listed. But on September 9—three days *after* the statutory deadline had passed—the Secretary sent a new notice including Kennedy's name on the ballot. She did this even though Michigan's own Director of Elections has explained that "[i]t is *critical* for the successful administration of the November 5, 2024 general election" that the "names of candidates" be finalized by "September 6, 2024." Brater Aff., R. 8-5, Pg. ID 156 (emphasis added). True, she put Kennedy back on the ballot in the wake of the Michigan Supreme Court's decision. But that narrow decision simply ruled that mandamus relief was unavailable. Crucially, the Michigan Supreme Court didn't require the Secretary to put Kennedy back on the ballot against his will. Thus, the Secretary's reinstatement of Kennedy didn't advance the state's interest in honoring its own laws. In fact, by violating Michigan's statutory deadlines, the reinstatement flouted those laws.

Nor are Michigan's practical interests in minimizing administrative burdens and ensuring the stability and integrity of its electoral process enough to trump Kennedy's First Amendment rights. This would be a different case if Kennedy had demanded his removal from the ballot *after* Michigan's 60-day deadline for notice to the county clerks had passed. And to be sure, a candidate couldn't demand his name taken off the ballot a day before the election. That would disrupt the state's practical interests in electoral stability and integrity. So, under the *Anderson-Burdick* framework, the state would have an overriding interest. But months before? The scales are weighted differently. Of course, because of the Secretary's decision to put Kennedy back on the ballot, we are now several weeks past Michigan's statutory deadline. But while this timing might have affected the remedies available to our en banc court, it can't outweigh Kennedy's asserted interest in being free from compelled speech.

III.

Two final points. First, I agree with Judges McKeague and Readler that there are serious questions about the panel's res judicata analysis that warranted our reconsideration. *See Dart v. Dart*, 597 N.W.2d 82, 88 (Mich. 1999) ("Res judicata bars a subsequent action between the same

parties when the evidence or essential facts are identical."). That's especially true given the important First Amendment and election integrity interests at stake.

Second, I recognize that *Purcell* "ordinarily" counsels against federal court intervention as an election approaches. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). Why? To prevent "voter confusion" and "election administrator confusion." *Purcell*, 549 U.S. at 4–5; *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays). If the goal of *Purcell* is to protect voters from confusion, it's hard to see how *Purcell* cuts against an order preventing a state from affirmatively misleading its voters regarding who's running for president. Perhaps that's why *Purcell* isn't an "absolute" rule. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays). Sometimes, judicial intervention may be warranted to ward off the very voter confusion that *Purcell* normally worries it could create. And in this unique case, it wouldn't be confusing for election administrators to simply remove Kennedy's name from the election-day ballots. At the very least, we could have assessed the feasibility of doing so by hearing this case en banc.

* * *

To sum up, the Secretary's reinstatement of Kennedy on the ballot unconstitutionally compels Kennedy's speech and violates Michigan's own deadlines. It also forces Kennedy to be on the ballot for an office he no longer intends to hold if he were to win. And it has the unfortunate result of potentially misleading Michigan voters. *See Wash. State Grange*, 552 U.S. at 460 (Roberts, C.J., concurring) ("[W]hat makes the ballot 'special' is precisely the effect it has on voter impressions."). Finally, this all happens at a time when it is crucial for state governments to assure voters of the integrity of their elections.

Presidential elections "implicate a uniquely important national interest." *Anderson*, 460 U.S. at 794–95. If this case didn't raise "question[s] of exceptional importance" appropriate for en banc review, it's hard to imagine what case would. Fed. R. App. P. 35(a)(2). I respectfully dissent from the denial of rehearing en banc.

DISSENT

READLER, Circuit Judge, dissenting from the denial of rehearing en banc. Without explanation, and in violation of state law, the Michigan Secretary of State belatedly added Robert F. Kennedy Jr.'s name to the 2024 general election ballot for the office of president after previously granting Kennedy's lawful request not to be included on the ballot. In turn, Kennedy sought emergency relief in the district court to enjoin the Secretary's action. The district court denied Kennedy's request, and a divided panel of this Court affirmed on procedural grounds. Because Kennedy has demonstrated a likely violation of his constitutional rights, because he has otherwise satisfied the remaining factors warranting preliminary relief, and because this case presents exceptionally important questions of election law tied to the presidential election, I respectfully dissent from the denial of rehearing en banc.

I.

Michigan's Natural Law Party nominated Robert F. Kennedy Jr. as its candidate for president in April 2023. Kennedy was nominated in most other states as well, sometimes via a different political party. For over a year, Kennedy gained notoriety as a potentially viable third-party candidate, in a race against the two most recent presidents. But in late July 2024, the sitting president unexpectedly dropped his bid for reelection. He was replaced as a candidate by his vice-president in mid-August, dramatically shifting the nature of the race.

Noting those changes, and believing that his role in the race had been reduced to merely a "spoiler" in the so-called "battleground states," Kennedy suspended his campaign on August 23. Robert F. Kennedy, Jr., Address to the Nation (Aug. 23, 2024), *available at* https://perma.cc/LBJ6-GF64 ("I'm going to remove my name, and I've already started that process and urge voters not to vote for me."). Around the same time, he requested that his name not be included on the ballot in the aforementioned battleground states—Arizona, Florida, Georgia, Michigan, Nevada, North Carolina, Ohio, Pennsylvania, Texas, and Wisconsin. Virtually every state acceded to Kennedy's request, and in reasonably short order. *See* Ariz.

Sec'y of State, *Candidate Statement of Voluntary Withdrawal Receipt* (Aug. 22, 2024, 6:02 PM) ("[Kennedy's name] will not be printed on the November 5, 2024 General Election Ballot in Arizona."); Order, *In re Nomination Petition of Robert F. Kennedy*, No. 386 M.D. 2024 (Pa. Commw. Ct. Aug. 23, 2024) ("The Secretary of [Pennsylvania] shall not include Robert F. Kennedy, Jr. and Nicole Shanahan as candidates for President and Vice President of the United States on the November 5, 2024 General Election Ballot."); Juan Salinas II, *Robert F. Kennedy Jr. Ends Campaign, Endorses Trump, Withdraws from Texas Ballot*, Tex. Trib. (Aug. 23, 2024, 4:00 PM), https://perma.cc/TWJ8-KEPP ("Kennedy has withdrawn from being on the Texas ballot."); Frank LaRose (@FrankLaRose), X (Aug. 23, 2024, 5:34 PM), https://perma.cc/L4P4-GRMS ("[Kennedy] will not appear on the Ohio ballot."); *Wittenstein v. Kennedy*, No. 2502869 (Ga. Off. Admin. Hearings Aug. 26, 2024) ("Accordingly, [Kennedy] is NOT QUALIFIED to be appear on the ballot in Georgia for the office of President of the United States."); Stipulation & Order of Dismissal, *Rockenfeller v. Kennedy*, No. 24 OC 00111 1B (Nev. 1st Jud. Dist. Aug. 27, 2024) ("[Kennedy's] name[] shall not appear on the November 2024 general election ballot in Nevada."); Email from Mark Ard, Dir. of External Affs., Fla. Dep't of State, *quoted in* C. A. Bridges, *Will Robert F. Kennedy Be on the Florida Ballot After Dropping Out, Endorsing Trump?*, Tallahassee Democrat (Aug. 29, 2024, 2:53 PM), https://perma.cc/73ND-AM5Y ("[Kennedy's name] will not appear on Florida's ballot."); *Kennedy v. N.C. State Bd. of Elections*, 905 S.E.2d 55, 58 (N.C. 2024) (order) ("[T]he [North Carolina] Court of Appeals properly issued its writ of supersedeas to prevent the dissemination of inaccurate ballots [containing Kennedy's name].").

But not Michigan. There, the Secretary of State denied Kennedy's request not to be included on the ballot. Accordingly, he sought mandamus relief in state court to effectuate his withdrawal from the race. Kennedy was initially rebuffed in the court of claims. But on September 6, the Michigan Court of Appeals unanimously reversed and remanded, instructing the lower court to issue the requested relief.

September 6 was important for another reason. As the date coincided with the start of the 60-day window before the election, the Secretary was required on that day to "send to the county clerk of each county a notice . . . specifying . . . the federal . . . offices for which candidates are to

be nominated." Mich. Comp. Laws § 168.648 (1979). The Secretary did so, delivering the list of presidential candidates to Michigan's 83 county clerks. Kennedy's name was not on that list. When the Supreme Court later vacated the intermediate court's ruling on process grounds, the Secretary had an apparent change of heart. Three days later, she updated the candidate list to add Kennedy's name, and then circulated the revised list, notwithstanding § 168.648's deadline for doing so having expired.

Kennedy turned to federal court, seeking emergency relief to have his name removed from the ballot. When the district court and a panel of this Court denied Kennedy's request, he asked the full Court to resolve his case.

II.

Four factors govern whether a district court should grant a preliminary injunction: (1) the likelihood that the movant will succeed on the merits, (2) whether the party moving for the injunction is facing immediate, irreparable harm, (3) the balance of the equities, and (4) the public interest. *Mich. State AFL-CIO v. Schuette*, 847 F.3d 800, 803 (6th Cir. 2017). We review a district court's decision denying injunctive relief for an abuse of discretion, while considering any embedded legal determinations de novo. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 554 (6th Cir. 2021).

A.1. Kennedy has shown a strong likelihood of success on the merits. Consider again the factual backdrop. A state official mandated a former candidate's appearance on the presidential ballot over the candidate's objection. That fact alone would likely strike any reasonable observer as odd. Then consider that the official did so in the face of the former candidate's assertion of his First Amendment right not to be compelled to appear as a candidate. And consider further that the state official did so after she had previously honored the former candidate's request not to have his name included on the ballot, and after the state's statutory deadline for placing candidates on the ballot had passed.

a. Adding all of this together, the Secretary's decision is deeply suspect, legally and otherwise. Political candidates enjoy certain First Amendment rights in seeking access to the ballot. *See Am. Party of Tex. v. White*, 415 U.S. 767, 788–89 (1974); *see also Storer v. Brown*,

415 U.S. 724 (1974). A logical corollary of this "unexceptionable" principle is that the First Amendment similarly forbids states from unduly burdening a political candidate's ability to take his name off the ballot. *Cf. Am. Party of Tex.*, 415 U.S. at 788. And for good reason. Forcing a political candidate to remain on the ballot without reasonable justification burdens his "right to eschew association." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463–64 (2018). Why? Because it requires him to convey the message that he is still seeking votes for office. *Id.*

In the end, the Secretary did not respect those freedoms. Initially, to be sure, the Secretary did act on Kennedy's timely request. As mentioned, the Michigan legislature required the Secretary to place political candidates on the presidential ballot no later than September 6. In advance of this deadline, Kennedy requested that his name not be included on Michigan's ballot. The Secretary honored this command. Consistent with the statutory deadline, the Secretary circulated the list of candidates for president on September 6. It did not include Kennedy. Yet three days later, after the deadline for certifying the list of candidates had passed, the Secretary revised the list, adding Kennedy's name to the ballot. As the district court suggested, no statute authorized the Secretary essentially to reinstate Kennedy's campaign for presidential votes in Michigan. *Kennedy v. Benson*, --- F. Supp. 3d ---, No. 24-12375, 2024 WL 4231578, at *4 (E.D. Mich. Sept. 18, 2024) (stating that the Secretary's decision to "change the names of candidates after the deadline . . . may have exceeded the bounds of her office").

The Secretary's actions thus run headlong into different, but related, First Amendment principles. First, the Secretary has likely unduly burdened Kennedy's right not to be included on the presidential ballot, as forcing him to appear compels a message that he is in fact a candidate. *Cf. Am. Party of Tex.*, 415 U.S. at 788–89; *Storer*, 415 U.S. at 738. Second, by those same acts, the Secretary has likely burdened Kennedy's "right to eschew association" with his presidential election campaign. *See Janus*, 138 S. Ct. at 2463–64; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As Judge Thapar likewise agrees, when a state official arbitrarily places a former political candidate's name on a presidential ballot against his wishes, after she had previously excluded him from the ballot, and after the state's legislatively imposed deadline for certifying candidates has passed, that official seemingly compels the candidate to convey a message to

voters, in violation of the First Amendment. *Wooley*, 430 U.S. at 714; *see also* Thapar Dissenting Op.

Admittedly, case law in this context is sparse. That is likely because individuals are not routinely forced onto a ballot. *See* Appendix A, *infra* (listing representative examples reflecting that state officials, for over a century, have removed candidates from the ballot at the candidate's request). As just one example, an incumbent United States Senator was allowed to drop his candidacy at the same time Kennedy sought to do so. *See* Kristie Cattafi, *Sen. Bob Menendez Ends Independent Candidacy for Senate, Will Come Off NJ Ballots*, NorthJersey.com (Aug. 18, 2024, 1:31 PM), https://perma.cc/8U4V-4K64. And as already mentioned, virtually every other state where Kennedy sought not to be listed as a candidate honored his request.

Consider the asymmetries in Michigan's 2024 presidential ballot alone. One major party candidate dropped out of the race just weeks before his party's late-August convention, and after winning every state party primary, including Michigan. The week after that convention, Kennedy sought to do the same, in large part due to his rival's departure from the race. The Secretary voiced no concern over the former. *See* John Wisely, *New Democratic Nominee Can Be Placed on Michigan Ballots, Benson and Nessel Say*, Detroit Free Press (July 22, 2024, 6:42 PM), https://perma.cc/2YPF-J3SA. Yet she fights tooth and nail to oppose the latter. With all of this in mind, it becomes evident that, even under the First Amendment's most forgiving level of scrutiny—rational basis review—the Secretary's unusual actions do not pass muster. In the end, the Secretary never explains why she tainted the state's presidential ballot with the name of an individual who is not seeking office, after previously excluding him. *See Tiwari v. Friedlander*, 26 F.4th 355, 361 (6th Cir. 2022) (stating that government actions "premised on utterly illogical grounds . . . will not be upheld" on rational basis review). Nor has the Secretary identified a historical practice justifying her approach. *See Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (Readler, J., concurring in judgment). Rather, history says just the opposite as to candidates who seek exclusion in a timely manner. *See* Appendix A, *infra*.

Further animating Kennedy's First Amendment claims are concerns about the process by which his name was forced onto Michigan's presidential ballot. The Constitution vests the "Legislatures" of each state with power to carry out the rules governing federal elections.

See U.S. Const. art. I, § 4, cl. 1 (congressional elections); *id.* art. II, § 1, cl. 2 (presidential electors); *Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring) ("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."). This language was a "deliberate choice that [we] must respect," and we have an "obligation" to ensure that a state does not take action to "evade" the Constitution's commands. *Moore v. Harper*, 143 S. Ct. 2065, 2088 (2023).

Here, there is no doubting the legislative command as to who can appear on the ballot for the federal office of the presidency: those specified by the Secretary in her notice sent "at least 60 days" before the election. § 168.648. This instruction is express and unambiguous. And the practice is decades old. Yet the Secretary disobeyed that order, amending the list of candidates after the statutory deadline again, to, of all things, include a formerly withdrawn candidate, over his objection. In so doing, the Secretary seemingly "arrogate[d]" to herself the "power vested in state legislatures to regulate federal elections." *Moore*, 143 S. Ct. at 2089. In the process, she put Michigan voters at risk of casting their weighty presidential vote for a non-candidate. *See* Geoffrey Skelley, *The 2024 Election Could Come Down to a Single Tipping-Point State*, ABC News (Sept. 30, 2024, 5:59 PM), https://perma.cc/W687-Z6H9 ("Pennsylvania and Michigan [are] most likely to decide a one-state race.").

b. Against all of this, the Secretary now responds in her briefing to the en banc court that § 168.648 merely sets the earliest and latest dates for identifying and transmitting the positions up for election. *See* Resp. to Pl.'s Pet. for Reh'g En Banc at 7–9. In her view, because no statute affirmatively prohibits her from certifying the names of the candidates for these positions after a certain date, her conduct was entirely lawful. *Id.* at 10. The Secretary forfeited this argument, however, by failing to raise it before the district court. *See Kennedy*, 2024 WL 4231578, at *4 (district court noting "[t]he parties do not dispute that [the Secretary] was required by statute to certify the names of the candidates by September 6" and that she "has not provided any statutory authority for [recertifying the names]"); *see also Kennedy v. Benson*, No. 24-1799, 2024 WL 4327046, at *6 (6th Cir. Sept. 27, 2024) (McKeague, J., dissenting) ("To date, Secretary Benson

has not identified any statute, rule, or court order that required her—or even permitted her—to add a candidate to the ballot after the statutory deadline.").

In any event, her reading of § 168.648 has numerous flaws. For one, it ignores how the phrase "for which candidates are to be nominated or elected" contextualizes the meaning of "offices." The Secretary views the statute as requiring her merely to announce by September 6 a fact obvious to all—that a presidential election will take place in November. But that understanding ignores the textual requirement that "candidates" be paired with each "office[]." *See People v. Lee*, 526 N.W.2d 882, 885 (Mich. 1994) ("Where the language used is clear and the meaning of the words chosen is unambiguous, a common-sense reading of the provision will suffice, and no interpretation is necessary." (quotation omitted)). For another, her view of her authority—that she can act until a statute affirmatively prohibits her conduct—belies basic separation of powers considerations undergirding the Michigan constitution. *See UAW v. Green*, 870 N.W.2d 867, 874 (Mich. 2015) ("Where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effective or convenient." (citation omitted)); *Soap & Detergent Ass'n v. Nat. Res. Comm'n*, 330 N.W.2d 346, 350 (Mich. 1982) ("It is beyond debate that the sole source of an agency's power is the statute creating it."). Equally problematic, her view eliminates any semblance of a timeliness requirement in § 168.648. If the law affords the Secretary complete discretion in deciding not only which candidates to place on the ballot, but also when to do so, she ostensibly could modify the ballot on an election's eve.

There is even more peculiarity to the Secretary's position. And this one may be the most glaring. If she is correct in her reading of § 168.648, then she is fully authorized to remove from the ballot a candidate not seeking office, as Kennedy requests. Yet wielding this authority, the Secretary fails to explain why she nonetheless forced Kennedy onto the ballot over his objection, and to the voters' collective detriment. Instead, she seemingly takes the view that candidates for office are akin to the ill-fated guests of the Hotel California: "You can check out [of the race] anytime you like, but," as for the ballot, "you can never leave." Eagles, *Hotel California*, at 4:15, *on* Hotel California (Asylum Records 1977).

Nor can I agree with the Secretary that the Michigan Supreme Court required her to place Kennedy's name on the ballot. Michigan's high court ordered no such thing. *See generally Kennedy v. Sec'y of State*, 10 N.W.3d 632 (Mich. 2024) (order). Recall the case's history. Kennedy filed suit seeking a writ of mandamus to prevent his name from being included on the ballot. When the Michigan Court of Appeals ordered the Secretary to honor Kennedy's request, the Secretary complied, without even asking that court to stay its decision, nor even seeking a simple administrative stay of the order. While the Michigan Supreme Court ultimately disagreed with Kennedy's request, it did not order the Secretary to do the opposite, mandating that Kennedy's name be placed on the ballot after the deadline for doing so. *See id.* Which makes sense. After all, no one asked the Michigan Supreme Court to order that Kennedy's name be included on the ballot. In the end, it was the Secretary's decision to include Kennedy as a candidate, one that ran afoul of a host of constitutional and pragmatic concerns.

Query who would even have a cognizable basis for objecting to Kennedy's pre-deadline decision not to run? The Secretary does not identify anyone to that effect. Judge Clay, for his part, believes Kennedy's First Amendment interests must bend to the Natural Law Party's desire to have a candidate on the Michigan ballot. *See* Clay Concurring Op. at 8. As a legal matter, however, it is difficult to believe a political party's interest in fielding a candidate would ever trump an individual's desire not to appear on the ballot. Tellingly, Judge Clay cites no case to that effect. Equally true, as a practical matter, were there concerns about the Natural Law Party's future prospects, the Secretary could have replaced Kennedy on the ballot with another candidate selected by the Party before the September 6 deadline, and certainly before voting began in late September, assuming the Secretary holds the power she purports to wield.

One last point. Judge Clay suggests that the inescapable legal harms caused by the Secretary's actions are undermined by Kennedy's pursuit of presidential votes in other states, including New York. From a political science perspective, one might well question Kennedy's approach to waging a presidential election. But as a legal matter, his motives are irrelevant. Whether Kennedy is acting in a "selfish[]," "contradictory," or even self-defeating way, Clay Concurring Op. at 8, he enjoys First Amendment freedoms nonetheless. Those "protections," it bears reminding, do not "belong only to speakers whose motives the

government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2317 (2023) (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J.) (observing that "a speaker's motivation is entirely irrelevant" (citation omitted))). In the end, "we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988).

* * *

It should go without saying that not every state law violation has federal constitutional reverberations. State rules governing access to the ballot are longstanding, and their enforcement rarely justifies federal court intervention. But here we encounter a candidate being forced onto the presidential ballot, in the face of his timely request to not be so included, and after the Secretary initially honored that request, only to change her mind beyond the point the statutory deadline allowed her to do so. Along the way, numerous constitutional protections were disregarded. Such blatant illegality in a presidential race justifies a federal remedy.

2. The timing of the Secretary's conduct bears further emphasis. Just two months before the election, she materially altered Michigan's presidential ballot. A familiar principle requires federal courts to favor the status quo in state election procedures rather than allowing their disruption in the lead up to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam). The rationale for the *Purcell* principle is straightforward: election rules should be clear, and last-minute changes to those rules muddy the waters at significant cost to voters, the administration of law, and public confidence in the election. *See Republican Nat'l Comm. v. Democratic Nat'l Comm*., 140 S. Ct. 1205, 1207 (2020); *Democratic Nat'l Comm*., 141 S. Ct. at 30–31 (Kavanaugh, J., concurring). So when faced with a last second challenge to a state election law, *Purcell* counsels against disturbing the existing state of affairs. But the "same rationale" requires federal court action to "prevent election interference" by state executive agencies. *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) (per curiam); *Wise v. Circosta*, 978 F.3d 93, 111 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting) ("*Purcell* . . . operates to bar [a state agency] from changing the rules at the last minute . . . .").

Here, the Michigan legislature set the rules for the election well in advance. As established by Michigan law, the status quo included a September 6 deadline as to who will appear on the presidential ballot. In an orderly process, and in advance of that deadline, Kennedy ensured that he was not so included. But the Secretary then upset the status quo by unilaterally changing the rules of the game. Settled election law precedent weighs against that effort. "[I]t is our duty, consistent with *Purcell*," to preserve what remains of the established state of play as of September 6. *Carson*, 978 F.3d at 1062. Especially so, it bears repeating, when the Secretary has never explained why she would upset the status quo for the peculiar purpose of adding a non-candidate's name to the presidential ballot.

3. The panel majority opinion faulted Kennedy for the timing of his suit, not its merits. Both the Secretary and the panel majority opinion believe that Kennedy's claims are substantively identical to those raised in state court, *see Kennedy*, 2024 WL 4327046, at *2–4, rendering them precluded under Michigan res judicata principles, *see* 28 U.S.C. § 1738; *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) ("[Section 1738] directs a federal court to refer to the preclusion law of the State in which judgment was rendered."). As a starting point, it is not clear what preclusive value the denial of mandamus relief in state court has for future litigation, given the narrow context in which mandamus cases are decided. *See Salisbury v. City of Detroit*, 249 N.W. 841, 841 (Mich. 1933) (holding that a mandamus denial did not have preclusive effect in a future, related case as a mandamus court addresses only whether "to enforce a plain positive duty" owed by the respondent). In any event, before deeming a claim to be precluded, Michigan law requires that a court confirm "the matter contested in the second action was or could have been resolved in the first." *Dart v. Dart*, 597 N.W.2d 82, 88 (Mich. 1999).

Recall two things about the challenged conduct here. One, Kennedy seeks to have his name removed from the ballot based upon the Secretary's conduct on September 9, three days after the September 6 deadline, whereas his earlier case, pursued in advance of September 6, sought to have his name not included on the list of candidates to be circulated by the Secretary. Two, the challenged conduct here occurred only after the Michigan Supreme Court issued its opinion and order in the earlier case. Taking these points together, this appeal concerns the

Secretary's unlawful action on September 9, a dispute that could not possibly have been resolved in the original state-court litigation. So res judicata principles tied to the earlier litigation do not stand in the way of resolving this case's merits. *See Kennedy*, 2024 WL 4327046, at *5 (McKeague, J., dissenting).

It may be true, as the Secretary and panel emphasize, that Michigan "employs a broad view of res judicata." *Kennedy*, 2024 WL 4327046, at *2 (quotation omitted) (majority opinion). Yet resting matters there overlooks a key caveat: res judicata applies only to claims that "the parties, exercising reasonable diligence, might have brought forward at the time." *In re MCI Telecomms. Complaint*, 596 N.W.2d 164, 183 n.7 (Mich. 1999) (quoting *Hackley v. Hackley*, 395 N.W.2d 906, 907 (Mich. 1986)). That understanding is part and parcel with the related point that parties must pursue actual controversies, not future ones that may never arise. *See League of Women Voters of Mich. v. Sec'y of State*, 957 N.W.2d 731, 743–44 (Mich. 2020) (explaining that Michigan standing doctrine requires "a present legal controversy, not one that is merely hypothetical or anticipated in the future" (quotation omitted)). Understandably, even the most diligent party cannot anticipate, let alone litigate, a Secretary of State's future violation of state law, one that reversed an earlier, lawful decision.

No more availing is the panel majority opinion's characterization of this case as merely a "re-run" of Kennedy's prior lawsuit. *Kennedy*, 2024 WL 4327046, at *4. To be sure, the state court litigation and this appeal share the broader context of Kennedy's attempt to not be included on Michigan's presidential ballot. But they depart on a fact pivotal to Kennedy's argument today: the Secretary has since added Kennedy's name to the list of candidates, after previously excluding it, in violation of Michigan law. That illegal conduct invites the host of constitutional questions outlined above, which materially vary from, and could not have been feasibly raised in, Kennedy's state court litigation. Take, for example, both the state separation-of-powers and *Purcell* arguments here. Each centers on the Secretary illegally usurping the Michigan legislature's role in setting election rules, and thereby upsetting the status quo. That conduct occurred only after the Michigan Supreme Court issued its decision, and thus was not sufficiently foreseeable during the state court litigation. Consider next Kennedy's compelled speech claim. True, his state complaint also raised a compelled speech claim. But Kennedy's

argument in state court involved only the alleged compulsion of speech triggered by the Secretary desiring to add his name to the ballot pre-deadline, over his objection. This appeal, on the other hand, involves the Secretary's illegal, post-deadline addition of Kennedy's name to the ballot after previously doing otherwise. That affirmative misconduct raises distinct concerns of unconstitutionally compelled speech, and likewise disrupts the status quo established by the September 6 deadline. *See Janus*, 138 S. Ct. at 2464. It also usurps the authority of the Michigan legislature, casting doubt over the integrity of the state's electoral process. As "the evidence or essential facts" between the two lawsuits are not "identical," indeed, far from it, Michigan res judicata principles do not bar today's action. *Dart*, 597 N.W.2d at 88.

I agree with the panel dissent that the Secretary's remaining procedural grounds for dismissing Kennedy's suit are likewise meritless. *See Kennedy*, 2024 WL 4327046, at *7–8 (McKeague, J., dissenting) (rejecting laches and *Rooker-Feldman* defenses). Because Kennedy has a high likelihood of success on the merits of his claims, I turn to the remaining considerations in weighing a request for injunctive relief.

B. Those factors also counsel in favor of issuing the preliminary injunction. To demonstrate irreparable harm, Kennedy must face the prospect of ongoing and immediate injury to his constitutional rights. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (recognizing that loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). With an election pending—one for which his name has been forced on the ballot over his objection—his injury is quintessentially irreparable.

As to the equities and the public interest, both factors, as Judge McKeague aptly observed, likewise point in Kennedy's direction. Start with the equities. The Secretary's decision to belatedly add a withdrawn candidate to the ballot, over the candidate's objection no less, was head scratching, unnecessary, and, in the end, lawless. Nor is the public interest served by adding a frivolous presidential candidate to the field, stoking voter confusion and undermining the election's integrity. *See* 2024 WL 4327046, at *6 (McKeague, J., dissenting).

C. That leaves a more challenging question: how to remedy Kennedy's injury? Ideally, the Secretary should satisfy Kennedy's request to withdraw from the Michigan ballot as a

candidate for president. This would comport with the other jurisdiction that has addressed the matter. *See Kennedy*, 905 S.E.2d at 58 ("We acknowledge that expediting the process of printing new ballots will require considerable time and effort by our election officials and significant expense to the State. But that is a price the North Carolina Constitution expects us to incur to protect voters' fundamental right to vote their conscience and have that vote count."). The Secretary worries that this solution would spark disarray and cast doubt over the integrity of Michigan's electoral process. Regrettably, the Secretary's actions have already done just that. Remedial efforts would help stem the unfortunate tide unleashed by the Secretary. To uphold the Secretary's actions on the basis that the ensuing damage is not easily remedied would be to reward that conduct, a perverse outcome indeed. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) ("[A] litigant in the position of appellee must take the bitter with the sweet.").

At the same time, it is fair to recognize the burdens tied to granting the sought-after injunction as written. After all, early in-person and absentee voting has already commenced. Yet other remedies remain. They include: (1) reissuing ballots to be used on election day with Kennedy's name removed from the list of candidates for president; (2) notifying, in a writing delivered to the mailing address of every Michigan voter who has received or will receive an absentee ballot, that Kennedy is no longer a candidate for president; and (3) posting conspicuous notice in early in-person polling places that Kennedy is no longer a presidential candidate. *Cf. In re Nader*, 865 A.2d 8, 19 (Pa. Commw. Ct. 2004), *aff'd*, 860 A.2d 1 (Pa. 2004) (ordering removal of candidate's name from ballot 20 days before election); *Ramirez v. Chi. Bd. of Election Comm'rs*, 151 N.E.3d 206, 215 (Ill. App. Ct. 2020) (ordering removal of candidate's name and postage of notice "reasonably calculated to inform voters that votes cast for [candidate] will be suppressed" 25 days before election); *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) (ordering that proposed constitutional amendment be stricken from ballot 12 days before election); *Holloway v. Byrne*, 874 A.2d 504, 505 (N.J. 2005) (order) (ordering reprinted and remailed absentee ballots 20 days before election); *Wilson v. Hosemann*, 185 So. 3d 370, 380 (Miss. 2016) (ordering addition of candidate's name to ballot 11 days before election). These commonsense solutions could have been ordered well before now, and could still be implemented today. Regrettably, the panel failed to order any of them. Michigan's presidential election is worse off for it.

APPENDIX A

1. *Bordwell v. Williams*, 159 P. 869, 869–70 (Cal. 1916) ("The right to seek election to any office is open to all persons possessing the constitutional or statutory qualifications. A citizen is, however, under no obligation to seek election to an office. He may be a candidate, or refuse to be such, at his option, and, in the absence of statutory provision to the contrary, the mere fact that he has once announced his candidacy for an office does not prevent him from withdrawing as a candidate whenever he sees fit so to do.").

2. *State ex rel. La Follette v. Hinkle*, 229 P. 317, 319 (Wash. 1924) ("If at one time Mr. La Follette gave consent to the use of his name [as a candidate for president], it was nothing more than a bare license or permission which may be revoked by him at any time . . . .").

3. *State ex rel. Rogers v. Hunt*, 81 P.2d 883, 884 (Wyo. 1938) ("[I]n the absence of statutory regulation or prohibition a candidate has a natural right to withdraw, if his application be made in time to enable the officials to have the necessary alterations put in effect." (citation omitted)).

4. *Conroy v. Nulton*, 48 A.2d 831, 832 (N.J. 1946) ("It seems apparent that the right of a candidate to resign is an inherent right of the individual, subject to reasonable legislative restrictions.").

5. *Introcaso v. Burke*, 65 A.2d 786, 787 (N.J. Super. Ct. Law Div. 1949) ("The right of a candidate for public office to resign is an inherent right of the individual. The right, however, must give way to reasonable legislative restrictions . . . ." (citation omitted)).

6. *Black v. Bd. of Supervisors of Elections*, 191 A.2d 580, 582 (Md. 1963) ("It appears to be well settled that in the absence of a statutory prohibition against resignation a candidate has a natural or inherent right to resign at any time and to have his name deleted from the ballot.").

7. *Battaglia v. Adams*, 164 So. 2d 195, 198 (Fla. 1964) ("[I]t appears to be generally held that, in the absence of statutory inhibition, a candidate has a natural or inherent right to resign at any time and to have his name deleted from the ballot.").

8. *Clark v. Patterson*, 137 Cal. Rptr. 275, 279 n.4 (Cal. Ct. App. 1977) ("Absent a statutory provision to the contrary, the common law rule is that a person who declares himself a candidate has an implied power to withdraw his name.").

9. *New Jersey Democratic Party, Inc. v. Samson*, 814 A.2d 1025 (N.J. 2002) (order) (permitting Robert Torricelli to remove his name from the ballot as a candidate for the United States Senate in the general election).

10. *Taylor v. Kobach*, 334 P.3d 306 (Kan. 2014) (permitting Chad Taylor to remove his name from the ballot as a candidate for the United States Senate in the general election).

11. 29 C.J.S. *Elections* § 183 (2024) ("Under the common law and under statute, a candidate for public office has the right to withdraw his or her candidacy. However, to be valid and effective, it is essential that such withdrawal be made in the manner and filed within the time prescribed by statute." (citations omitted)).

12. 26 Am. Jur. 2d *Elections* § 206 (2024) ("A citizen may refuse to be a candidate and seek withdrawal of a nomination, at his or her option.").

STATEMENT

McKEAGUE, Circuit Judge,[1] a statement respecting the denial of rehearing and the denial of rehearing en banc. In defiance of the U.S. Constitution and state election law, Michigan Secretary of State Jocelyn Benson manipulated the presidential ballot in Michigan. Robert F. Kennedy, Jr. first attempted to withdraw from the election on August 23, weeks before any ballots were printed. Secretary Benson refused, relying on a dubious interpretation of state law. The parties went to state court, and the Michigan Court of Appeals ordered Secretary Benson to remove Kennedy's name from the ballot. On September 6, Secretary Benson complied with that order and issued the call of the election to the county clerks *without* Kennedy's name on the ballot. But then three days later—and three days after the statutory deadline—she *added* his name back on the ballot.

Why? Tellingly, her explanation has changed over time. Before the district court, Secretary Benson did not provide *any* justification for post-deadline ballot change. *See Kennedy v. Benson*, No. 24-12375, 2024 WL 4231578, at *4 (E.D. Mich. Sept. 18, 2024) (noting that Secretary Benson "has not provided any statutory authority" for "chang[ing] the names of candidates after the deadline"). But before the three-judge panel of this court, Secretary Benson stated that she was "acting on judicial authority" from the Michigan Supreme Court. And now, in response to the petition for rehearing en banc, Secretary Benson claims that (1) state law only requires her to notify the county clerks of the "offices" up for election, rather than the "specific candidates";[2] (2) state law does not prohibit her from changing the list of candidates after the

[1]I was a member of the panel that considered this case. I dissented. Because I am a judge of this court in senior status, I cannot vote to rehear a case en banc or join a dissent from a denial of rehearing en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). I construe this court's policies, however, to permit a statement regarding an order granting or denying en banc review.

[2]This claim contradicts an affidavit submitted by Secretary Benson in the district court, which stated that "[i]t is critical . . . that the Bureau of Elections inform counties of the *names of candidates* appearing on ballots by 60 days before the election (in this case September 6, 2024)." Brater Aff., R.8-5 at PageID 156 (emphasis added).

deadline; and (3) the Michigan Supreme Court "ordered" her to "revise her initial notice."[3] As Judge Readler correctly explains in his dissent from the denial of rehearing en banc, there are numerous flaws with Secretary Benson's reasoning. But perhaps more importantly, her inconsistent post hoc explanations leave us searching for the *real* reason why she put Kennedy's name back on the ballot.

No matter how many justifications Secretary Benson can conjure up, the outcome is the same: putting Kennedy's name on the ballot will mislead Michigan voters. It will trick them into thinking that Kennedy is still vying to be the President of the United States. Secretary Benson's actions violated Kennedy's First Amendment rights and defy basic common sense.

For the reasons articulated in my panel dissent and the thoughtful dissents from the denial of rehearing en banc by Judge Thapar and Judge Readler, I regret that our court declines to hear this case en banc. I am particularly disappointed by this court's refusal to consider even modest relief, such as placing notices at polling places which state that Kennedy is no longer running for President. This form of relief was deemed appropriate in other states, but apparently not in Michigan. *See Al-Bari v. Pigg*, No. S25A0177, 2024 WL 4284250, at *2 (Ga. Sept. 25, 2024) (noting that when two presidential candidates were disqualified after ballots were printed, the Georgia Secretary of State agreed to place "prominent notice[s]" at polling places "advising voters of the disqualification of the candidate[s]" (alterations in original)). Such relief would not "alter the election rules," but rather minimize the risk of voter confusion created by Secretary Benson's actions. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020).

Standing idly by in the face of this constitutional violation is a disservice not only to Kennedy, but to all Michigan voters. In an extremely close presidential election, the presence of a third-party candidate on the ballot can be decisive. *See* Rebecca Davis O'Brien & Taylor

[3]This claim differs from Secretary Benson's prior characterization of the Michigan Supreme Court order. In her initial brief on appeal, she correctly described the order as "holding that the Secretary of State had no duty to accept [Kennedy's] withdrawal." Appellee Br. 38. As I stated previously, the Michigan Supreme Court's holding was simple: Kennedy was not entitled to mandamus relief. The order did not compel Secretary Benson to do anything, and it certainly did not order her to change the ballot after the statutory deadline. *See Kennedy v. Benson*, No. 24-1799, 2024 WL 4327046, at *8, *10 (6th Cir. Sept. 27, 2024) (McKeague, J., dissenting).

Robinson, *In a Tight Race, Third-Party Candidates Are a Wild Card in Battleground States*, N.Y. Times, Oct. 15, 2024, at A15. And because this court chooses not to intervene, Secretary Benson is permitted to unilaterally change the rules—and potentially the outcome—of the election.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk