No. 24A399

In the Supreme Court of the United States

Robert F. Kennedy Jr., *Petitioner/Applicant*

v.

Wisconsin Elections Commission, *Respondent*

Reply Brief for an Emergency Injunction Pending Appeal Restoring Robert F. Kennedy, Jr. to Wisconsin's 2024 Ballot

To the Honorable Amy Coney Barrett,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Seventh Circuit

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INTRODUCTION

Judge Thapar put it well in addressing what should be the companion case to this one: "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."[1] There is no hiding from that. Yet, the Commission (like the Wisconsin Supreme Court) attempts to duck the issues and hope that since this has never arisen before, that it will be forgotten. Again, from Judge Thapar: "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."[2] Here, the Commission has violated Kennedy's Constitutional rights and the only Court that can protect them is this one. What follows is a *very short* reply brief, addressing the salient arguments raised in the Commission's brief, filed late yesterday.

[1] *Kennedy v. Benson*, 2024 U.S. App. LEXIS 26081, *18-19.
[2] *Id*. at 23.

ARGUMENT

I. Kennedy is Entitled to Relief of an Injunction Pending Appeal

A. Kennedy will Suffer Irreparable Constitutional Harm Absent an Injunction

Contrary to the Commission's position: This Court has been clear. Ballot access questions implicate the First and Fourteenth Amendments.[3] It is also clear that a candidate's name on a ballot is speech and covered under the First Amendment. Kennedy, like every citizen, has the right to convey a clear message without the government compromising it. The Commission is claiming that a name on a ballot is not compelled speech, and therefore does not violate his constitutional rights.[4] But it fails to explain how forcing Kennedy's name on a ballot could not be construed as a violation of his constitutional rights. Instead, the Commission adopts an untenable position; Kennedy wanted on at some point, so he can never get off. Judge Readler colorfully made the point: "The Commission 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.'"[5]

[3] See *Lubin v. Panish*, 415 U.S. 709, 716 (1974).
[4] (R. Br. at 20).
[5] *Kennedy*, 2024 U.S. *45 (Readler, dissenting) (quoting Eagles, Hotel California, at 4:15, on Hotel California (Asylum Records 1977).

Yet the government cannot force individuals to carry a message that it knows the person doesn't agree with.[6] The "[f]reedom of association" includes a "freedom not to associate."[7] Forcing Kennedy to appear on the ballot violates his right not to associate with a particular political party. And forcing Kennedy to appear on the ballot permits the government to force Kennedy to endorse a particular idea that he does not believe in.[8]

The Respondent states that the "[a]pplicant has never offered support" for a rule of law "that voters and candidates have a constitutional right to have a candidate's name *removed* from the ballot."[9] But just because a case of a candidate wishing to be removed from the ballot has not been presented to this Court does not mean that there is no inherent constitutional right. Again, from Judge Thapar: "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*."[10]

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[6] *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).
[7] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).
[8] *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878,893 (2018).
[9] (R. Br. at 21).
[10] *Kennedy*, 2024 U.S. *23 (Thapar, dissenting) (emphasis added).

Political candidates enjoy certain First Amendment rights in seeking access to the ballot.[11] No question on that one.[12] There is, then, a logical corollary that the First Amendment similarly forbids states from unduly burdening a political candidate's ability to take their name *off* the ballot.[13] Forcing a political candidate to remain on the ballot without reasonable justification burdens his right to avoid association and requires him to convey the message that he is still seeking votes for office.[14] By forcing Kennedy to remain on the ballot, the Commission is directly infringing his constitutional rights.

And just because Kennedy has requested to be placed *on* the ballot in other states does not invalidate his claim, as the Commission argues.[15] Judge Readler explicitly addresses this argument and points out its fallacy: "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 . . . 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

[11] *See Am. Party of Tex. v. White*, 415 U.S. 767, 788–89 (1974); see also *Storer v. Brown*, 415 U.S. 724 (1974).
[12] *Id.*
[13] *See Am. Party of Tex.*, 415. U.S. at 788 (1974); see also *Kennedy v. Benson*, No. 24-1799 at 22 (6th Cir. Oct. 16, 2024).
[14] *Janus*, 138 S. Ct. at 2463–64 (2018).
[15] (R. Br. at 7).

whose motives others may find misinformed or offensive."[16] In the end, "we presume that speakers, not the government, know best both what they want to say and how to say it."[17] That is, all to say: Regardless of his claims in other states, Kennedy has made it clear that is Wisconsin, he does not wish to run for President and does not wish to be on the ballot. By refusing to take his name off of the ballot, his constitutional rights are being violated.

B. The Public Interest Favors an Injunction, As Keeping Kennedy on the Ballot Will Cause Irreparable Harm to the Integrity of the 2024 Presidential Election

"Confidence in the integrity of our electoral processes is essential to the functions of our participatory democracy."[18] This Court does not need Kennedy to restate the importance of the upcoming election and the need to ensure that the public remains confident in its integrity. They are self-evident propositions. But that election's importance speaks to exactly why Kennedy's name should be *removed* from the ballot. By allowing Wisconsin to present inaccurate ballots to voters, the Commission is doing exactly what the *Purcell* doctrine was intended to prevent.

This is all happening at a time when it is of the utmost importance that voters are assured of the integrity of their elections. The Commission cites *Purcell* as a way to show that late day changes would cause more voter confusion.[19] It also, incorrectly, claims that Kennedy is asking that "Wisconsin

[16] *Kennedy*, No. 24-1799 at 27–28 (emphasis added).
[17] *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988).
[18] *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).
[19] (R. Br. at 9).

election clerks stop running the election."[20] But at no point has Kennedy asked Wisconsin to stop running the election. Doing so would create the voter confusion that he hopes to avoid by having his name *off* the ballot.

What Kennedy is requesting (that the ballots be amended, or that stickers be placed on his name) could be accomplished as early voting still occurs. It should be noted that this could have been accomplished over *two months* ago when Kennedy formally sought withdrawal from the ballot if the Commission had honored his request and removed him from the ballot. But because they refused, this matter needs to be decided a week before the election. And keeping Kennedy's name on the ballot would have the more likely outcome of misleading voters of who is and is not running. In an election like this, it is imperative that confusion of any kind be avoided.

For the next week, when voters head to the polls, they need to have confidence in the accuracy of their ballots. And while *Purcell* "ordinarily" counsels against court intervention as an election approach, there are extreme circumstances in which intervention may be warranted.[21] The goal of *Purcell* is to protect voters from confusion, and keeping Kennedy on the ballot affirmatively misleads its voters regarding who's running for president.[22] "Sometimes, judicial intervention may be warranted to ward off the very voter confusion that *Purcell* normally worries it could create."[23] Here, forcing

[20] (R. Br. 10).
[21] *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020).
[22] *See Kennedy*, No. 24-1799 at 19 (6th Cir. Oct. 16, 2024).
[23] *Id.*

Kennedy on the ballot for an office he no longer intends to hold if her were to win has the unfortunate result of misleading Wisconsin voters.[24]

There is no question that there is some cost to either placing stickers on the ballots or reprinting ballots for voters on election day. But the risk of voter confusion is too great to risk keeping Kennedy on the ballot.

II. This Court Has Authority to Grant Review

The Commission claims that that Kennedy hardly grapples with the standard of review, and that because of that, the Application should be dismissed.[25] While the test to reverse is based on an "erroneous exercise of discretion," that doesn't matter—the question is whether there was a legal error? And there was—the Wisconsin state courts refused to honor and enforce Kennedy's constitutional rights. The constitutional question present in this case, and the irreparable harm that the Kennedy may suffer absent this Court's intervention favor review and an injunction.[26]

The Commission also claims that, because this is an appeal on state law grounds, that this Court lacks the jurisdiction.[27] This Court lacks the judication to review a state court judgment if that decision rests on "adequate" and "independent" state grounds.[28] But the Wisconsin Supreme Court's decision didn't rest on adequate grounds. The Wisconsin Supreme Court

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[24] *Id*; *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts, C.J., concurring).
[25] (R. Br. at 14–15).
[26] *See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020).
[27] (R. Br. at 13).
[28] *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

ignored over 60 pages of merits briefing and decided that the appeal was underdeveloped.[29] The Wisconsin Supreme Court cannot dodge wrestling or even addressing—let alone vindicating—Kennedy's constitutional rights by citing 60 pages of briefing as somehow equivalent to raising an argument in a footnote. Indeed, the Wisconsin Supreme Court's decision was, instead, an arbitrary dereliction of duty. Put differently, its decision does not rest on "adequate" state grounds, and therefore this Court has a duty to review and decide on Kennedy's Constitutional questions.

CONCLUSION

In sum, for the reasons expressed in the Application the stay should issue and all the other relief pursued granted.

Respectfully submitted,

October 29, 2024.

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[29] *Kennedy v. Wisc. Elec. Comm'n*, 2024 WI 37.

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