No. 24A405

In the Supreme Court of the United States

ROBERT F. KENNEDY, JR., APPLICANT,

V.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS MICHIGAN SECRETARY OF STATE

RESPONSE IN OPPOSITION TO EMERGENCY INJUNCTION PENDING APPEAL REMOVING ROBERT F. KENNEDY, JR.'S NAME FROM MICHIGAN'S 2024 BALLOT

**To the Honorable Brett M. Kavanaugh,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit**

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Dated: OCTOBER 28, 2024

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INTRODUCTION

Over 1.5 million Michigan voters have already returned their absent voter ballot.[1] Another 263,634 voters have voted early.[2] Under Michigan's Constitution, early in-person voting continues in every jurisdiction until November 3, 2024. Mich. Const. art. II, § 4(1)(m). From now until November 5, thousands of Michigan voters will continue returning their absent voter ballots or appearing in person to cast their ballots early.

Further, tens of thousands of these ballots have already been tabulated, although no results may be generated.[3] Once ballots are tabulated, they become anonymized, meaning no ballot can be traced back to its voter. Mich. Const. art. II, § 4(1)(a) (preserving right to a secret ballot). And while it cannot be known for certain yet, of the thousands of Michigan voters who have already voted, they surely include citizens who cast their ballot for Applicant Robert F. Kennedy, Jr., as the presidential

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[1] See Michigan Voting Dashboard, available at https://www.michigan.gov/sos/elections/election-results-and-data/voter-participation-dashboard (accessed October 28, 2024.) Over 2.3 million voters have requested absent voter ballots, so over half the requested ballots have already been voted and returned. (*Id.*)

[2] *Id.*

[3] Voters at early-voting sites place their voted ballots into the tabulator just like Election Day voters. Mich. Comp. Laws § 168.720j. Regarding absent voter ballots, dozens of jurisdictions in 46 of Michigan's 83 counties will be pre-processing absent voter ballots, which includes tabulating the ballots, prior to Election Day. Mich. Comp. Laws § 168.765a(11). These include Michigan's most populous counties—Wayne, Oakland, Macomb and Kent. See https://www.michigan.gov/sos/-/media/Project/Websites/sos/Elections/How-to-Vote-in-Michigan/Documents/AV-Early-Processing--November-5-2024.pdf?rev=e1eee6814340418dabd4aeac71babe1b&hash=FAAAF974F58A85C833CCE4284EE93A3A (accessed October 28, 2024.)

nominee of Michigan's Natural Law Party. And surely there are many more voters who intend to do the same in the 8 days remaining before the November 5 election. These voters likely do not consider their votes for Kennedy to be frivolous or deserving of less protection than votes cast for a major party candidate.

Despite the late hour, Kennedy asks this Court to enjoin Michigan's Secretary of State and order that his name be *removed* from the general election ballot. But that is simply no longer possible. As the Sixth Circuit twice recognized, Michigan's election is well underway. Indeed, ballots for the general election had already been printed by September 21—one day after Kennedy filed his appeal in the Sixth Circuit. It is no longer possible for Michigan's 83 counties to reprint and distribute new ballots—a process that can take up to two weeks to complete. Further, Michigan's tabulating equipment has already been programmed to count existing ballots; that equipment cannot now be reprogrammed to tabulate different ballots.

But first to warrant consideration of such exceptional relief, Kennedy must demonstrate to this Court that his substantive claims have merit—this he cannot do. To be sure, had Kennedy sought to withdraw his candidacy sometime before August 6, 2024, the final date by which the Natural Law Party could hold a convention, Mich. Comp. Laws § 168.686a(1), the parties might not be before this Court. But he did not. And despite his efforts to recast his claims to fit dissents from the Sixth Circuit's panel and en banc decisions, that court correctly held Kennedy failed to demonstrate he was likely to prevail. This is because Kennedy's constitutional claims are barred by res judicata because they could—and should—have been raised in Kennedy's state

court litigation. And even if his claims were not barred by res judicata they fail on the merits because no court has recognized that preserving a candidate's ballot access after nomination results in a First Amendment violation.

And second, because Kennedy's claim of irreparable harm is based on his perceived constitutional injury, he cannot satisfy this required element either where his constitutional claims fail. Further, his claims of compelled speech, reputational harm, and voter confusion as a result of appearing on Michigan's ballot are at odds with his attempts to be *on* the ballot in New York and numerous other states. Kennedy does not acknowledge or address his efforts in other states or explain how he can be irreparably injured by the very thing he asked to be granted him in New York.

Where Kennedy has not shown that his claims are likely to prevail, that he will suffer any "irreparable" harm absent an injunction, and where the harm to the public would be substantial and extraordinary, the requested injunction must be denied.

JURISDICTION

This Court has jurisdiction over this matter under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Michigan's filing requirements for minor party candidates.

The Michigan Election Law provides that minor parties whose candidates received a minimum percentage of votes in the previous election are entitled to ballot access in the next election. Mich. Comp. Laws § 168.685. The Natural Law Party is a

minor party entitled to ballot access in Michigan based on the number of votes its candidates have received in each election. Mich. Comp. Laws § 168.685. To field a candidate for President of the United States, the names, and addresses of the party's nominees for the offices of President and Vice-President must be certified by the chairperson and secretary of the party's state central committee to the Secretary of State within one business day after the conclusion of the party's state convention or national convention (whichever is later). Mich. Comp. Laws § 168.686. This convention must occur no later than the August primary, Mich. Comp. Laws § 168.686a(1), which was August 6 for this cycle. In addition, the party must timely send the names of its presidential electors to the Secretary. Mich. Comp. Laws § 168.686a(4). See also Mich. Comp. Laws § 168.42.

Kennedy is nominated by Michigan's Natural Law Party.

Kennedy sought out the nomination of the Natural Law Party as its candidate for President. (R. 8-5, PageID.164, Def's Ex. D, Brater Aff., Attachment A, Dern e-mail.) On April 17, 2024, that party held its state convention and nominated Kennedy as its candidate for President and Nicole Shanahan as Vice President. (R. 8-2, PageID.142–143, Def's Ex. A, Certificate of Nomination.) The party nominated its presidential electors the same day. (R. 8-3, PageID.144–145, Def's Ex. B, Certification of Presidential Electors.)

Kennedy seeks to withdraw as a candidate for the Natural Law Party.

On Friday, August 23, 2024, Kennedy sent a letter to Michigan's Director of Elections requesting that he be withdrawn as a candidate for the Natural Law Party.

(R. 8-4, PageID.148–151, Def's Ex. C, email chain.) Michigan's Bureau of Elections responded to the request on Monday, August 26, 2024, and based on Michigan Compiled Laws § 168.686a(4), rejected the withdrawal *Id*. On August 27, 2024, Kennedy emailed again, requesting that he be withdrawn and disagreeing with the Bureau's reliance on Mich. Comp. Laws § 168.686a(4). *Id*. On August 29, 2024, the Bureau responded and denied this second request to withdraw. *Id*.

STATE COURT PROCEEDINGS.

1. The Michigan Court of Claims rules against Kennedy keeping him on the ballot.

On Friday, August 30, 2024, after 5:00 p.m. and on the eve of the Labor Day holiday weekend, Kennedy filed suit in the Michigan Court of Claims seeking to have his name withdrawn from the ballot. *Kennedy* v. *Benson*, Court of Claims No. 24-000138. All state offices were closed the following Monday, September 2, 2024.

On Tuesday, September 3, 2024, the Director of Elections received an email from Doug Dern, Chair of the Natural Law Party, opposing Kennedy's withdrawal as its candidate for President. (R. 8-5, PageID.164, Def's Ex. D, Brater Aff., Attachment A, Dern e-mail.) As Mr. Dern explained, "As a minor party that has had ballot access in Michigan for decades [the Natural Law Party] would be greatly harmed if not destroyed if this were allowed. We are required to pull one percent to maintain ballot access and that would be in jeopardy if our presidential candidate was removed. Mr. Kennedy's staff sought our nomination and we agreed and nominated him. . . . " *Id*.

On September 3, 2024, the trial court issued its decision denying Kennedy's complaint for mandamus, injunctive, and declaratory relief, concluding that Michigan Compiled Laws § 168.686a(4) applied to bar his withdrawal and rejecting Kennedy's compelled speech claim. (R. 1-4. Compl., Page ID # 31, COC Decision.)

2. The Michigan Court of Appeals reverses and orders Kennedy removed from the ballot.

Kennedy filed an appeal in the Michigan Court of Appeals on September 4, 2024. On September 6, 2024, the Court of Appeals reversed the Court of Claims and ordered that Kennedy be removed from the ballot, concluding that Michigan Compiled Laws § 168.686a(4) did not apply to nomination of a presidential candidate and thus did not preclude Kennedy's withdrawal. (R. 8-6, Page ID # 169–173, Def's Ex. E, COA Decision.) The court remanded to the trial court for entry of an order granting mandamus relief. (*Id*.) The same day the Michigan Court of Claims entered an order granting Kennedy relief as directed by the Court of Appeals. (R. 1-5, Page ID # 36.)

3. The Secretary calls the election and lists Kennedy as a candidate.

Under Michigan Compiled Laws § 168.648, the Secretary of State must send notices to the county clerks no later than 60 days prior to the election date, specifying the offices for which candidates are to be elected. On Friday, September 6, 2024, shortly after the appellate court's order, the Secretary sent this notice—without

Kennedy's name as a candidate for President. (R. 8-5, PageID.157, Def's Ex. D, Brater Aff., ¶ 15.)

4. The Michigan Supreme Court reverses the removal of Kennedy from the ballot, restoring the trial court's order denying relief.

A few hours after the Michigan Court of Appeals' ruling, the Secretary filed an emergency appeal in the Michigan Supreme Court, requesting that the court reverse the Court of Appeals decision by 3:00 p.m. on Monday, September 9, 2024. Shortly after 2:30 p.m. on September 9, that court issued its opinion that reversed the Court of Appeals' order removing Kennedy from the ballot and restored the trial court's order dismissing Kennedy's complaint demanding to be removed from the ballot. (R. 1-6, Page ID # 37–57, MSC Decision.)

5. The Secretary sends the counties an updated notice of candidates that includes Kennedy's name

Almost immediately after the Michigan Supreme Court's decision on September 9, the Bureau of Elections advised the counties to proceed with Kennedy's name on the ballot on the authority of the court's order. (R. 8-5, Page ID # 157, Def's Ex. D, Brater Aff., ¶ *Id.*, ¶ 16.)

FEDERAL COURT PROCEEDINGS

1. Kennedy files suit in federal district court and the court rules in the Secretary's favor.

Minutes after the Michigan Supreme Court's ruling Kennedy's counsel advised that they intended to file in federal court seeking immediate relief. (R. 8-7, Page ID

175, Def's Ex. F, Brehm email.) Two days later, on September 11, Kennedy's counsel emailed Defendant's counsel, attaching copies of the filed complaint and motion for temporary restraining order (TRO). (*Id.*)

The district court denied the TRO and scheduled a hearing on Kennedy's request for a preliminary injunction for September 17, 2024. (R. 11, Page ID # 274, Notice of Hearing.) On September 18, 2024, the district court issued an opinion and order denying Kennedy's motion. (R. 14, Page ID # 299–316, Op. & Ord.) On the same day, the court issued judgment in the Secretary's favor. (R. 15, Page ID # 317.)

2. The Sixth Circuit Court of Appeals affirms the district court and denies en banc review.

On September 20, 2024, Kennedy filed a notice of appeal of the district court's denial of his motion for preliminary injunction and its entry of judgment. (R. 16, Page ID # 318.) On September 27, 2024, a panel of the Sixth Circuit Court of Appeals affirmed the district court's decision. *Kennedy* v. *Benson*, No. 24-1799, 2024 WL 4327046 (6th Cir. Sept. 27, 2024).

The panel agreed with the district court that res judicata barred all of Kennedy's constitutional claims, and thus Kennedy was unlikely to succeed on the merits. *Id.* at *4. In its consideration of irreparable harm, the panel upheld the district court's decision. *Id.* Noting the contradiction inherent in Kennedy's lawsuits against New York and Michigan officials, the panel observed that Kennedy never explained "how excluding [him] from the ballot could protect him from irreparable reputational damage in one state but cause the same damage in another." *Id.*

Last, in balancing the harms against the public interest, the panel held that the district court's findings of fact about the "orderly administration of the upcoming election" were proper and left them undisturbed. *Id*. at *5. (citations omitted). Citing those findings of fact, the panel explained that "[t]he ballots are now printed" and "[c]hanging the ballot at this late date would be even more disruptive." *Id*. at *4, *5.

On October 3, 2024, Kennedy filed a petition for a rehearing en banc. (R. or ECF? 11, Pet for Reh En Banc.) The Secretary filed a response to the petition at the request of the court on October 10, 2024. (R or ECF 15, Def Resp to Pet Reh En Banc). On October 16, the Court issued an order denying the petition for rehearing en banc. *Kennedy* v. *Benson*, No. 24-1799, 2024 WL 4501252 (6th Cir. Oct. 16, 2024).

ARGUMENT

I. Kennedy is not entitled to an injunction pending appellate review and the extraordinary relief of reprinting ballots on the eve of the November 5, 2024, presidential election.

In *Hobby Lobby Stores*, *Inc.* v. *Sebelius*, this Court succinctly summarized the high threshold required for injunctions pending appeal. 568 U.S. 1401, 1403 (2012). This Court reiterated that "[w]e have consistently stated, and our own Rules so require, that such power is to be used sparingly." *Hobby Lobby*, 568 U.S. at 1403. As this Court recognized, the only source of authority for this Court to enter an injunction is the All Writs Act, 28 U.S.C. § 1651(a). *Id*. Indeed, Rule 20.1 expressly states that "[i]ssuance by the Court of an extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised." As a result, a Circuit Justice may issue an injunction "only when it is '[n]ecessary or appropriate in

aid of our jurisdiction' and 'the legal rights at issue are indisputably clear.' " *Id*. This is a "demanding standard" for extraordinary relief. *Id*.

Kennedy has not satisfied this demanding standard. Just as in *Hobby Lobby*, "whatever the ultimate merits of the applicants' claims, their entitlement to relief is not 'indisputably clear.' " *Id*. See also *Brown* v. *Gilmore*, 533 U.S. 1301, 1303 (2004) ("Such an injunction is appropriate only if the legal rights at issue are indisputably clear." (Cleaned up).) Kennedy's application for an injunction has not offered any binding federal precedent either clearly rejecting the application of res judicata to his claims as presented in the district court or recognizing a "constitutional right" of candidates to withdraw from the ballot at any time. Kennedy's claims are not indisputable. They are, at best, arguable, and there are arguments opposing them. Kennedy's application fails to even argue that an injunction here is necessary or appropriate to aid this Court's jurisdiction.

Further, an injunction pending appellate review can issue only where the applicant demonstrates that he is "likely to prevail, that denying . . . relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (citing *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).) Just as he failed below, Kennedy cannot meet these requirements before this Court—indeed he does not even present any argument addressing the harm to the public interest. His Application must be denied.

A. Kennedy is not likely to prevail on his compelled-speech First Amendment claim, or any other constitutional claim, where his claims are barred by the doctrine of res judicata.

Kennedy pled three constitutional claims: (1) a violation of article II, § 1 based on an interpretation of *Anderson* v. *Celebrezze*; (2) an equal protection violation; and (3) a First Amendment compelled speech claim. (R. 1, Compl, Page ID # 6–19.) Kennedy referenced the Secretary's action on September 9 in sending an updated notice to the counties to include Kennedy's name on the ballot and suggested the act was unlawful but did not clearly ground any count on that action or otherwise separately plead it as a constitutional or statutory violation. (See, e.g, *id*., Page ID # 8, 10–11, 18.) Indeed, the Secretary declined to accept Kennedy's withdrawal based on Michigan Compiled Laws § 168.686a(4), a decision the Michigan Supreme Court reinstated. Defendant, reasonably, understood Kennedy's complaint to be challenging the application of § 686a to him, and not to Michigan Compiled Laws § 168.648, which simply provides a mechanism for notifying counties which offices and candidates are on the ballot. The Secretary thus defended accordingly.

But as it became more apparent in his Sixth Circuit briefing and now in his Application, it is plain that Kennedy's cause is premised on the Secretary's allegedly unlawful September 9 notification. This changes nothing, as Kennedy's claims are still barred.

1. Kennedy's reliance on the Secretary's administrative act in providing an updated candidate listing to avoid res judicata is misplaced.

Kennedy argues in this Application that his claims could not be barred by res judicata because they did not exist until September 9, when the Secretary "unlawfully" "recertified" the list of candidates to include his name. (Application, p. 10.) Kennedy's argument, however, flatly misstates the record and procedural history of this case in an attempt to capitalize on the dissenting opinions below.

On September 3, 2024, the state trial court denied Kennedy's request to be removed from the ballot: "IT IS SO ORDERED that . . . plaintiff's August 30, 2024 motions for immediate mandamus relief, and temporary restraining order/injunction, are denied, and plaintiff's verified complaint is dismissed with prejudice." (R. 1-4, Page ID # 31.)

On September 6, 2024, the Michigan Court of Appeals reversed that order and remanded "for entry of an order granting immediate mandamus relief to plaintiff." (R. 8-6, Page ID # 169–173.) That same day, the trial court, on remand, issued an order stating: "IT IS ORDERED that Plaintiff Robert F. Kennedy, Jr., is hereby awarded mandamus relief directing the secretary of state to remove plaintiff's name from the ballot. . . ." (R. 1-5, Page ID # 36.) Not wanting to violate her statutory duty under § 648, the Secretary complied with this order on September 6 by not including Kennedy's name on the notice to clerks. (R. 8-5, Page ID # 157, Def's Ex. D, Brater Aff., ¶ 15.) But the Secretary also filed an emergency appeal with the Michigan Supreme Court the same day.

On September 9, 2024, the Michigan Supreme Court issued its order, in which it stated: "On order of the Court, . . . we REVERSE the judgment of the Court of Appeals and VACATE the opinion and order of the Court of Claims except for that part of the Court of Claims order denying the motion for immediate mandamus relief and temporary restraining order/injunction and dismissing the complaint with prejudice, which we REINSTATE." (R. 1-6, Page ID # 38.)

This procedural history shows that the Michigan Supreme Court did two things on September 9, 2024: (1) it ordered reinstatement of the trial court's original order from September 3, denying Kennedy relief, and (2) it reversed the Court of Appeals' order from September 6, which had directed the Secretary to remove Kennedy from the ballot. The only reason Kennedy was not included in the Secretary's September 6 notice was because there were court orders prohibiting her from doing so. In reversing the Court of Appeals' order and reinstating the trial court's order, the Michigan Supreme Court's order had the effect of undoing the relief that had been granted and effectuated on September 6. Accordingly, the Secretary complied with the Michigan Supreme Court's final order and "sent an updated candidate listing to the County Clerks the same day at 3:45 p.m." (R. 8-5, Page ID # 157, Def's Ex. D, Brater Aff., ¶ 16.) To have done otherwise would have been to ignore the Michigan Supreme Court's order and render it a nullity.

It is certainly within the Michigan Supreme Court's authority to issue orders shortly after the initial notice deadline had passed, and it was within the Secretary's authority to communicate an update to her initial timely notice. Kennedy's tortured

construction of the procedural history reads an absurdity into the Michigan Supreme Court's order. Critically, if that court had intended its decision to have no effect, it would have held that the entire dispute was moot rather than reversing the lower court's order. But the Michigan Supreme Court did not hold that the dispute was moot.

Kennedy—and the dissents below—accuse the Secretary of acting unlawfully or even "lawlessly," but that that accusation does not match the clear and undisputed record. The Secretary complied with the Court of Appeals order (despite believing it to be in error) while immediately pursuing an emergency appeal in which she sought—and received—relief in less than three days. After prevailing before the Michigan Supreme Court, the Secretary took only those actions that were necessary to give effect to the Supreme Court's order and to negate the effect of the now-reversed Court of Appeals and trial court orders. While Kennedy takes issue with the Secretary's doing so, he has never explained exactly what effect or import the Michigan Supreme Court's order *should* have been given. Kennedy appears to maintain—without any legal authority or explanation—that his losing before the State's highest court means that he gets to keep the relief to which he was not legally entitled.

In short, the Secretary has consistently rejected Kennedy's attempts to withdraw, and in fact that was the basis for his complaint in the state trial court. The Secretary's action on September 9 (immediately after the Michigan Supreme Court order) did nothing but continue the position she had maintained throughout the state

court litigation. So, there was no reason that the claims Kennedy would later raise in the district court—Article II, § 1, Equal Protection, and "compelled speech" under the First Amendment—could not also have been raised in state court. Indeed, as the Sixth Circuit recognized below, Kennedy had raised a "compelled speech" claim under the Michigan constitution. *Kennedy* v. *Benson*, No. 24-1799, 2024 U.S. App. LEXIS 26081, at *9 (6th Cir. Oct. 16, 2024). If he could raise such a claim under the state constitution, he could also have raised the same claim under the First Amendment. Indeed, the free speech clause of Michigan's Constitution is coextensive with the First Amendment to the U.S. Constitution. *Woodland* v. *Michigan Citizens Lobby*, 378 N.W.2d 337, 343 (Mich. 1985).

Furthermore, Kennedy's Application continues to misapprehend the state law involved. Mich. Comp. Laws § 168.648 does not direct the Secretary to "certify" any list of candidates. Rather, the law creates a notice requirement for the Secretary that does not foreclose later changes based on updated information:

> The secretary of state, *at least 60 days and not more than 90 days* preceding any regular state or district primary or election, shall send to the county clerk of each county *a notice in writing of such primary or election*, *specifying in such notice the federal*, *state and district offices for which candidates are to be nominated or elected*, as well as any constitutional amendments and questions to be submitted thereat.

Mich. Comp. Laws § 168.648 (emphasis added). Indeed, the statute requires the notice to include only the "offices"—not the specific candidates. To be clear, the Secretary usually does transmit the names of candidates to the clerks. This is in keeping with other deadlines involved in ballot printing, such as the obligation that

absent voter ballots be delivered to the county clerks 47 days before the election, which this year fell on September 19. Mich. Comp. Laws § 168.713.

Nonetheless, § 648 creates a window for providing notice to county clerks of the election. As the Director of Elections explained in his affidavit in the district court, this notice signals the commencement of the ballot-printing process. (R. 8-5, Page ID # 156, Def's Ex. D, Brater Aff., ¶¶ 13–14.) It is important that the notice be as accurate and complete as possible, but there is no statutory bar to making corrections or necessary changes—especially those necessitated by judicial orders.

Moreover, a later statute contemplates that additional notices might be required. Michigan Compiled Laws § 168.650 provides that "[i]f, after such notices have been sent, a vacancy shall occur in any office which by law is required to be filled at such election, the secretary of state shall send to each county clerk an additional notice specifying the office in which such vacancy exists and that such vacancy will be filled at the next general election." And, in fact, changes to candidate lists after notice has been sent due to litigation occur fairly often, although generally not with respect to a statewide candidate. For example, on September 18, 2024, a Michigan state court ordered relief in the form of altering a ballot after the applicable statutory notice deadline had passed, and its order was affirmed by the Michigan Court of Appeals. *Open Stores in Howell Committee* v. *City of Howell*, No. 372499, 2024 WL 4270962, at *5 (Mich. Ct. App. Sept. 20, 2024). The same sequence of events happened in Kennedy's case, when the Michigan Supreme Court's order authorized the Secretary to revise her initial notice on September 9, 2024.

As a result, Kennedy's claims are barred by res judicata, as the Sixth Circuit properly concluded. *Kennedy* v. *Benson*, No. 24-1799, 2024 WL 4327046, at *2–4 (6th Cir. Sept. 27, 2024). Kennedy's Application does not identify any conflicting Michigan precedent concerning res judicata and fails to even argue that the three conditions necessary for res judicata under Michigan law were not met. In the absence of any contrary argument, there is no reason this Court should not likewise conclude that Kennedy's claims are barred.

2. Kennedy's reliance on the Secretary's September 9 notice, which she made as a direct result of the Michigan Supreme Court's order, raises *Rooker-Feldman* and other jurisprudential concerns.

Defendant flagged the potential application of the *Rooker-Feldman* doctrine in their response in opposition to Kennedy's motion for a preliminary injunction. (R. 8, Def Resp, Page ID # 119, n. 1.) And the district court noted its potential application where Kennedy's claims teetered on challenging the Michigan Supreme Court's decision. (R. 14, Op, Page ID # 309.) Defendant raised *Rooker-Feldman* again in their Sixth Circuit brief as it became clear that Kennedy's claims and alleged injury were grounded in the Michigan Supreme Court's order and the Secretary's enforcement of that order. (R. 8, Appellees Brf, pp. 44–50.)

The Secretary raises it again here because the grounds and authority for her September 9 notice stem directly from the Michigan Supreme Court's decision, and Kennedy's attack on her notice is simply a disguised and impermissible challenge to that court's decision.

The *Rooker-Feldman* doctrine embodies the notion that appellate review of state court decisions and the validity of state judicial proceedings is limited to this Court under 28 U.S.C. § 1257, and thus lower federal courts lack jurisdiction to review such matters. See *Exxon Mobil Corp*. v. *Saudi Basic Indus. Corp*., 544 U.S. 280, 291 (2005) ("[T]his Court's appellate jurisdiction over state-court judgments . . . precludes a United States district court from exercising subject-matter jurisdiction.").

The *Rooker-Feldman* doctrine applies in those circumstances where a party initiates an action in federal district court "complaining of an injury *caused by* the state-court judgment and seeking review and rejection of that judgment." *Exxon Mobil*, 544 U.S. at 291 (emphasis added). The pertinent question in determining whether a federal district court is precluded under the *Rooker-Feldman* doctrine from exercising subject-matter jurisdiction over a claim "is whether the 'source of the injury' upon which plaintiff bases his federal claim is the state court judgment." *Lawrence* v. *Welch*, 531 F.3d 364, 368 (6th Cir. 2008) (quoting *McCormick* v. *Braverman*, 451 F.3d 382, 394 (6th Cir. 2006)). This is true regardless of whether the party challenges the validity of the state court judgment on constitutional grounds. See *Lawrence*, 531 F.3d at 369.

Here, the true "source" of Kennedy's federal claims is the Michigan Supreme Court's decision affirming the Secretary's rejection of Kennedy's withdrawal under Michigan law. September 9 is not only the date of the Secretary's updated candidate list—it is also the date of the Michigan Supreme Court's order. Kennedy acknowledges in his Application that the Supreme Court held that he was not entitled

to mandamus. (Application, p. 6). But the conclusion that Kennedy was not entitled to mandamus is why the Michigan Supreme Court *reversed* the Court of Appeals, which had compelled the Secretary to remove Kennedy's name from the list of candidates. Kennedy's argument thus creates a "heads I win, tails you lose" scenario, where no matter which way the Michigan Supreme Court ruled, he gets what he wants. But that is not how court orders—let alone state supreme court orders—work. Courts enter orders so that they will have some legal effect. Again, if the Michigan Supreme Court did not expect its order to be given effect, it would have concluded that the matter was moot rather than reverse the Court of Appeals.

Kennedy's Application makes a rather weak point of noting that the Michigan Supreme Court's order did not expressly direct the Secretary of State to "recertify" the list of candidates. Again, this overlooks that the order reversed the order compelling the Secretary to remove Kennedy's name from the ballot, after which there was no longer any legal basis for Kennedy not to be on the ballot as the nominee of his party. But more pointedly, if Kennedy truly believed that the Michigan Supreme Court's order did not permit the Secretary's action, he had state court remedies. He could have filed a motion for rehearing or reconsideration. Mich. Ct. Rule 7.311(F)–(G). Alternatively, he might have filed a motion to clarify the scope of the order. See, e.g. Mich. Ct. Rule 7.311(A)(1). Kennedy did neither. Instead, he filed an entirely new lawsuit in federal court, raising a virtually identical compelled speech claim.

Kennedy's decision to abandon any effort to challenge the legality of the Secretary's actions before the court issuing the order makes his arguments in federal court accusing the Secretary of violating state law all the more confusing. As this Court well knows, claims of state statutory violations are barred by the Eleventh Amendment. *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *Seminole Tribe of Fla.* v. *Fla.*, 517 U.S. 44, 58 (1996); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 100 (1984).

Ultimately, insofar as Kennedy asserts that he was "injured" in some new way on September 9, any such injury was caused by the Michigan Supreme Court's order. And Kennedy is arguing that the Michigan Supreme Court got it wrong and that his rights have been violated as a result. This is precisely what this Court described in *Exxon-Mobil*: a state-court loser complaining of injuries caused by state court judgments rendered before the district court proceedings commenced. 544 U.S. at 284.

3. Kennedy's compelled speech claim fails on the merits.

Although Kennedy raised three constitutional violations below, he focuses on his compelled speech claim. But the merits of that claim were not reached by the Sixth Circuit. More pointedly, Kennedy fails to cite any precedent recognizing an unrestrained right of candidates to withdraw at any time regardless of consequence to their nominating party, and the claim simply does not work under existing precedent.

Kennedy argues that Michigan denies federal candidates a right to withdraw and that this imposes the kind of "state-imposed restriction on a nationwide electoral process" that was struck down in *Anderson* v. *Celebrezze*, 460 U.S. 780, 794–95 (1983). But Kennedy's argument misreads *Anderson*.

In *Anderson*, the candidate had been *denied* ballot access. The Court observed that "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Id*. at 794–95 (footnotes omitted). Further, "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus, in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders." *Id*. at 795 (footnotes omitted). As a result, "[t]he 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." *Id*.

In this case, Kennedy *obtained* ballot access and instead seeks to renege on the nomination he affirmatively sought and obtained. The Secretary, pursuant to statute, sought to preserve the presidential ballot, including a minor party's access to it. The decision in *Anderson*, standing alone, does not compel a conclusion that Michigan's statute is unconstitutional. Indeed, Kennedy reads *Anderson* too broadly by suggesting that Michigan's statute, Michigan Compiled Laws § 168.686a(4), fails

outright. *Anderson* was not a wholesale rejection of any and all presidential filing requirements under state law, and this Court recognized that " '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 processes.' " 460 U.S. at 788 (citations omitted).

Kennedy has alleged that placing his name on the ballot is tantamount to "compelling [him] to convey a false message to every citizen of Michigan that he is vying for their vote in this state." (R. 1, Compl., PageID.16.) In other words, Kennedy seeks to characterize election ballots as a medium of communication in which candidate names are speech, and he asserts that he is being forced to use this medium of communication. See, e.g., *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952) (holding that speech within a recognized "medium for the communication of ideas" like motion pictures is protected).

But for Kennedy to have an intelligible claim under the First Amendment, he must first establish that when his name appears on a ballot, the ballot is his speech. Here, Kennedy failed to demonstrate that he is producing "speech" on or through the ballot. No court has ever held that election ballots are a medium of communication. Therefore, placing Kennedy's name on the ballot cannot constitute candidate speech. There are two reasons this is true.

First, merely placing a candidate's name on the ballot is not speech at all. The Supreme Court has consistently held that ballots are not forums for candidate speech.

See, e.g., *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression.").

Political parties can use their speech rights to clarify in other available mediums of communication like television, newspapers, and their campaign websites. As the Court has explained, political parties "retain[ ] great latitude in [their] ability to communicate ideas to voters and candidates through [their] participation in the campaign[.]" *Timmons*, 520 U.S. at 363; see also *Rosen* v. *Brown*, 970 F.2d 169, 175 (6th Cir. 1992) (holding that states do not have to provide ballots with political designations of candidates). But the ballot is not the medium through which Kennedy or any other candidate sends messages to voters.

Second, Kennedy's compelled speech claim does not conform to any of the types of compelled speech previously recognized by the Court. There are many ways in which speech can be attributed to an individual. But Kennedy has failed to demonstrate that any of them apply. For example, Kennedy does not speak or write the ballot himself, which are the most common forms of speech. See, e.g., *W Virginia State Bd of Educ* v. *Barnette*, 319 U.S. 624, 642 (1943) (holding that a policy requiring students to recite the Pledge of Allegiance is compelled speech). Moreover, Kennedy does not publish the ballot himself. See *Miami Herald Pub Co* v. *Tornillo*, 418 U.S. 241 (1974) (holding that a statute requiring newspapers to publish the replies of political candidates whom they had criticized is compelled speech). Nor is Kennedy being asked to display the ballot on his private property. See *Wooley* v. *Maynard*, 430 U.S. 705–706 (1977) (holding that a state requirement to display the state motto on

every car's license plate is compelled speech). These types of communication—first-person speech, publication of speech in one's own newspaper, and displaying a message on one's own property—are the prototypical types of speech that cannot be compelled. But words or names appearing on a ballot are not among them.

Further, Kennedy's allegation that placing his name on the ballot constitutes compelled speech is utterly without precedent. The dissent below acknowledges this. *Kennedy* v. *Benson*, No. 24-1799, 2024 WL 4501252, at *8 (6th Cir. Oct. 16, 2024) (Thapar, J., Dissenting) ("Given the unprecedented nature of this dispute, there's no directly controlling precedent.") Indeed, to the Secretary's knowledge, there are only two Supreme Court opinions that consider compelled speech claims in connection with ballot regulations. In both decisions, the Court decided *not* to apply the compelled speech doctrine to ballot regulations. See *Cook* v. *Gralike*, 531 U.S. 510, 531 (2001) and *Washington State Grange* v. *Washington State Republican* Party, 552 U.S. 442, 444 (2008).

But breaking new ground is unnecessary because Kennedy is challenging a law that regulates state electoral processes, not speech. The district court agreed, as it held that "the regulation against withdrawal does not regulate speech but conduct." (R. 14, PageID.314.) Instead, the *Anderson-Burdick* framework—which governs review of statutes regulating electoral processes—should apply. See *Green Party of Tennessee* v. *Hargett*, 767 F.3d 533, 545 (6th Cir. 2014).

As to the first step of this analysis, there is no burden to Kennedy's First Amendment rights because his speech is not at issue. The *Anderson-Burdick* analysis should thus end there.

But if the *Anderson-Burdick* analysis were to continue, Michigan has two justifications for enforcing the election law: (1) protecting the integrity of election administration, which is particularly vulnerable here given that ballots have already been printed and voting has already begun, and (2) protecting the minor party rights of Kennedy's nominating party and its supporters. Given the strength of these interests, Michigan's law is constitutionally valid.

As to the first interest, the integrity of the electoral process is at stake. Michigan has enacted ballot printing deadlines for the purpose of complying with state and federal law and protecting the voting rights of military and overseas voters. See 52 U.S.C. § 20302(a)(8), Mich. Const. art. II, § 4, and Mich. Comp. Laws §§ 168.714 and 759a. Kennedy's last-minute maneuver would not merely halt and reverse the ballot-printing process—it would require that process to be started anew a week before Election Day. But the Michigan Election Law makes no exception for a candidate's political maneuvers, nor does this Court. See, e.g., *Burdick* v. *Takushi*, 504 U.S. 428, 440 (1992) ("The State has a legitimate interest in preventing these sorts of maneuvers [by candidates] . . . .").

Kennedy's change of heart does not outweigh the right of military and overseas voters to have their voted ballots counted. Kennedy may claim that placing his name on the ballot will "mislead voters" about his intention to run. (R. 1, PageID.19.) But

that claim is at odds with Kennedy's own public statements. In his official announcement of his campaign's suspension, he clearly states that he will intentionally remain on the ballot in most states and encourages voters in "blue states" to vote for him despite his decision to endorse another candidate.[4] He even holds out hope that he might still win the presidency by remaining on the ballot in those states and forcing a contingent election. *Id*. As of September 27, 2024, Kennedy is on the ballot in 32 states plus Washington, D.C., and not on the ballot in 18 states.[5] In at least two states, Kennedy even submitted petitions to qualify for ballot access after suspending his campaign on August 23: Kentucky and Oregon.[6]

Kennedy says one thing in Michigan and another thing in Kentucky and Oregon. Kennedy characterizes himself as a candidate who has "confirm[ed] that [he] is not willing to serve as President if elected." (ECF No. 6, Appellant's Brf., pp 27–28.) Yet in his own campaign announcement he holds out hope that he could still win

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[4] Robert F. Kennedy, Jr., *Why I Am Suspending My Campaign for President*, Substack (Aug. 23, 2024), https://robertfkennedyjr.substack.com/p/why-i-am-suspending-my-campaign-for ("I want everyone to know that I am only suspending my campaign, not terminating it. My name will still be on the ballot in most states. If you live in a blue state, you can vote for me without harming or helping President Trump or Vice President Harris.").

[5] Caitlin Yilek, Map shows where RFK Jr. is on the ballot in the 2024 election, CBS News (Sept. 27, 2024), https://www.cbsnews.com/news/rfk-jr-map-on-the-ballot-states/.

[6] McKenna Horsley, After suspending his campaign, Robert F. Kennedy Jr. filed to run for president in Kentucky, Kentucky Lantern, (Aug. 27, 2024), https://kentuckylantern.com/briefs/after-suspending-his-campaign-robert-f-kennedy-jr-filed-to-run-for-president-in-kentucky/; Dirk VanderHart, RFK Jr. supporters put him on Oregon ballot, despite suspended campaign, Oregon Public Broadcasting (Aug. 27, 2024), https://www.opb.org/article/2024/08/27/rfk-robert-f-kennedy-jr-supporters-oregon-ballot-despite-suspended-campaign/.

and serve as President. His attempt to have his cake and eat it too is what would "upend election and ballot integrity." (R. 1, Compl., PageID.19.) In fact, Kennedy filed a similar application in this Court seeking injunctions to have his name placed *on* the ballot in New York, which was denied. See *Team Kennedy* v. *Berger*, No. 24A285, 2024 U.S. LEXIS 3055, 2024 WL 4312515 (U.S. Sept. 27, 2024). Then, last week, Kennedy also filed an application for an injunction to be removed from the Wisconsin ballot. *Kennedy* v. *Wisconsin Elections Commission*, USSC Docket No. 24A399, (application for injunction pending appeal submitted to Justice Barrett on October 21, 2004). Kennedy's inconsistent position and contradictory demands make it impossible to consider any harms alleged to be "irreparable."

As to the State's second interest, any free speech analysis must also consider the associational rights of the supporters of Kennedy's nominating party, the Natural Law Party. In *Anderson*, the Supreme Court based its holding on the voting and associational rights of *supporters* of independent candidates. *Anderson*, 460 U.S. at 793–94. Kennedy sought out, and won, the nomination of Michigan's Natural Law Party.[7] To grant Kennedy's request would leave this party and its supporters without a nominee on the ballot at no fault of their own. (R. 8-5, PageID.162, Def's Ex. D, Brater Aff., Attachment A, Dern email.) Supporters of the Natural Law Party likely have already voted (and more will likely follow) for their party's nominee to meet the

[7] Robert F. Kennedy Jr. gets spot on Michigan's ballot as Natural Law Party nominee, https://www.detroitnews.com/story/news/politics/2024/04/18/robert-f-kennedy-jr-rfk-gets-spot-on-michigan-presidential-ballot-as-natural-law-party-nominee/73370615007/ (accessed September 12, 2024).

vote threshold to ensure the party's continued presence in future elections. See Mich. Comp. Laws § 168.685(6).

For these reasons, Kennedy's compelled speech claim simply fails outright, and he has not demonstrated any likelihood of prevailing on the merits of his claim.

B. Kennedy has not shown any irreparable injury, while an injunction would harm the Secretary and cause great harm to the public.

First, consistent with his failure below, Kennedy again fails to demonstrate any irreparable harm before this Court. His claims of injury are premised on his alleged constitutional violations, but for the reasons already discussed, those claims are either barred or fail on the merits.

Regardless, Kennedy's claims of injury are hard to countenance. The Sixth Circuit pointedly observed that Kennedy's "campaign committee [ ] asked to be kept on the ballot in New York, claiming irreparable injury if he's taken off." *Kennedy*, 2024 WL 4327046, at *4 (citing *Kennedy* v. *Berger*, No. 24-2385, 2024 WL 4274191 (2d Cir. Sept. 18, 2024)). As the panel observed, Kennedy never explained "how excluding [him] from the ballot could protect him from irreparable reputational damage in one state but cause the same damage in another." *Id.* Further, on September 27, 2024, this Court rejected Kennedy's application for an injunction requiring his name to be placed on the New York ballot. *Team Kennedy* v. *Berger*, No. 24A285, 2024 U.S. LEXIS 3055, 2024 WL 4312515 (U.S. Sept. 27, 2024). Despite the Sixth Circuit's pointed observation of this contradiction, Kennedy makes no attempt to reconcile his arguments in this Application.

Second, and crucially, as the Sixth Circuit also recognized, the harm to the State and public interest factors weigh in favor of denying injunctive relief. As the panel explained, "The public interest is perhaps the most paramount here." *Kennedy*, 2024 WL 4327046, at *5.

That remains true now, if not even more so, with only 8 days remaining until the November 5 presidential election. "This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle." *Democratic Nat'l Comm*. v. *Wisconsin State Legislature*, 141 S. Ct. 28, 30–31 (2020) (Kavanaugh, J., concurring) (citing *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (*per curiam*) and other USSC cases). Court precedents "recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor." *Democratic Nat'l Comm*., 141 S. Ct. at 31 (Kavanaugh, J., concurring.)

The harm posed by Kennedy's requested injunction is great. As explained above, over 1.7 million people have already voted in Michigan by casting an absent voter ballot or by voting early.[8] As explained by the Director of Elections below, printing ballots is a complicated and lengthy process. (R. 8-5, Page ID # 156, Def's Ex. D, Brater Aff., ¶¶ 13–21.) There simply is no ability for the State to direct the reprinting of ballots in all 83 counties, creating ballots which would somehow be

[8] See Michigan Voter Dashboard, available at https://www.michigan.gov/sos/elections/election-results-and-data/voter-participation-dashboard (accessed October 28, 2024).

offered or only available to a segment of voters, and which would require reprogramming voting equipment across the State.

This election is not merely "imminent," it is already underway, and voters are already voting. There is no way to "unring the bell at this juncture without great harm to voting rights and the public's interest in fair and efficient election administration," as the lower court aptly explained. *Kennedy*, 2024 WL 4327046, at *5. Had Kennedy not been dilatory, granting some form of relief may have been feasible. But instead of immediately appealing the Michigan Supreme Court decision to this Court, Kennedy made the baffling decisions to file a new action in federal court raising the same claims, to make an unsuccessful appeal to the Sixth Circuit, and then to seek an unnecessary rehearing en banc, causing further delay.

Tellingly, Kennedy's Application fails entirely to address the burdens of an injunction at this late stage, which leaves the harm to the public completely undisputed. Kennedy does not even attempt to suggest how his requested injunction could be implemented in time for the election.

Regardless, Kennedy fails to argue, let alone demonstrate, that the balance of harms and public interest factors weigh in his favor. He is not entitled to the injunctive relief he seeks.

CONCLUSION

For the foregoing reasons, Defendant Michigan Secretary of State requests that this Court deny the Application for an Emergency Injunction Pending Appeal Removing Robert F. Kennedy, Jr.'s Name from Michigan's 2024 Ballot.

Respectfully submitted,

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