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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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