STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ROBERT F. KENNEDY, JR.,

Petitioner,

v. Case No. 2024CV____

WISCONSIN ELECTION COMMISSION, ET AL.,

Respondent.

BRIEF IN SUPPORT OF THE MOTION FOR A TEMPORARY INJUNCTION

TABLE OF CONTENTS

I. Introduction

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

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

CERTIFICATE OF WITHDRAWAL

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

/s/
Robert F. Kennedy, Jr.

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

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

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

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

II. Facts in support of this motion.

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

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

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

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

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

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

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

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

[1] Wis Stat. § 8.35(1).

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

A. Third parties are treated differently.

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

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

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

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

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

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

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

[10] Wis. Stat. § 8.20(8)(am).

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

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

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

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

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

[11] Wis. Const. art. I, § 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion.

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

Dated this 3rd day of September, 2024.

Respectfully submitted,

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