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IN THE SUPREME COURT OF
Case No.: 2024AP1643-OA

DAVID STRANGE, INDIVIDUALLY AND AS DEPUTY OPERATIONS DIRECTOR - WISCONSIN FOR THE DEMOCRATIC NATIONAL COMMITTEE,

Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION (WEC); MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF WEC; DON MILLIS, ROBERT SPINDELL, JR., MARGE BOSTELMANN, ANN JACOBS, MARK THOMSEN, AND CARRIE RIEPL, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF WEC, AND WISCONSIN GREEN PARTY,

Respondents.

RESPONSE OF WISCONSIN GREEN PARTY TO PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION

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INTRODUCTION

The Democrat party ("DNC"), presumably based on a belief that they will benefit if the Green Party's presidential candidate does not appear on the ballot, here seeks to keep voters from being able to exercise their right to vote for a candidate of their choice. For years, key Democrat voices have derided opponents as undemocratic and "threats to democracy,"[1] yet it is they who repeatedly petition courts across the nation to remove political rivals from the ballot. *See Ortiz v. North Carolina*, 2024 WL 3764561 *3 (Aug. 12, 2024, E.D. N.C.) (Democrat-aligned super PAC challenged the certification of a new political party); *Holliday v. Benson*, Case No. 24-122-MZ, Mich. Ct. Claims (filed on 8/12/2024) (Former Democrat Party Chair seeks to keep candidate off ballot). [2]

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[1] Gregory Krieg & Dan Merica, "Obama: Democrats 'thumped' election deniers in key midterm races," CNN, Nov. 17, 2022, https://www.cnn.com/2022/11/17/politics/obama-democracy-culture-wars/index.html (President Obama: "What we are seeing, what's being challenged, are the foundational principles of democracy itself . . . . The notion that all citizens have a right to freely participate in selecting who governs them; the notion that votes will be counted and the party that gets more votes wins; that losers concede, power is transferred peacefully, that the winners don't abuse the machinery of government to punish the losers."); President Joseph R. Biden, Remarks by President Biden on the Continued Battle for the Soul of the Nation (Sept. 1, 2022), *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/01/remarks-by-president-bidenon-the-continued-battle-for-the-soul-of-the-nation/ (President Biden: "MAGA Republicans" are "working right now . . . in state after state to give power to decide elections in America to partisans and cronies, empowering election deniers to undermine democracy itself."); Press Release, Senator Baldwin Joins Effort to Protect Elections from Partisan Interference (July 28, 2023), *available at* https://www.baldwin.senate.gov/news/press-releases/senator-baldwin-joins-effort-to-protect-elections-from-partisan-interference (Senator Tammy Baldwin: "Free and fair elections are the bedrock of our democracy. Unfortunately, in Wisconsin, we have seen efforts to disrupt the democratic process, undermine the will of the people, and harass local election officials just for doing their jobs."); Josh Mann, "RFK suspends campaign, supports Trump for president, says Dems 'abandoned democracy,'" The Lion, Aug. 23, 2024, https://readlion.com/rfk-suspends-campaign-endorses-trump-for-president-says-dems-abandoned-democracy/ (Robert F. Kennedy Jr.: "In the name of saving democracy, the Democratic Party set itself to dismantling it.").

[2]*Craig Mauger, "Democratic-linked group challenges Cornel West's petitions to get on Michigan ballot," Detroit News, July 26, 2024,* https://www.detroitnews.com/story/news/politics/2024/07/26/democratic-linked-group-contests-cornel-west-petitions-for-michigan-presidential-ballot/74557506007/; *Marc Levy, "Democrats*

The DNC filed this original petition requesting that the Court declare that the Wisconsin Green Party is "ineligible to nominate presidential electors and to have its candidates for president and vice president appear on Wisconsin's 2024 general election ballot" based on a flawed and wishful desire to be free of its political competition. (Petition p. 21). A careful review of Wisconsin election law makes clear that the judicial relief sought by the DNC is not available. Thus, this Court must deny the DNC's petition to remove its political opponents from the ballot.

STATEMENT OF ISSUES PRESENTED

Issue 1: Whether the Democratic National Committee can petition this court to throw off the Wisconsin Green Party candidate from the Wisconsin general election ballot without alleging or providing any evidence that the Green Party failed to comply with section 5.64(em) and section 8.16(7) of the Wisconsin Election Code.

Issue 2: Whether the Democratic National Committee can petition this court to throw off the Wisconsin Green Party candidate from the Wisconsin general election ballot when doing so would create a severe restriction on the rights of voters while having minimal impact upon the state's interest in regulating the presidential elections.

Issue 3: Whether the requirement that each political party have a convention in the state capitol on October 1st is directory or mandatory such that failure to have such a convention could result in a political party having their candidate struck from the general election ballot.

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get a third-party hopeful kicked off Pennsylvania ballot, as Cornel West tries to get on," AP, Aug. 21, 2024, https://apnews.com/article/pennsylvania-ballot-2024-west-kennedy-cc5507101bcd198028b04945d2d03aa3.

STATEMENT REGARDING ORAL ARGUMENTS

Because Petitioner failed to prove any evidence that Respondent Wisconsin Green Party did not properly comply with Wisconsin Election Code § 8.16 (7) as is required by § 5.64(em), this Petition for Original Action should be dismissed and Oral Arguments are not be necessary.

STATEMENT OF THE CASE

Petitioner David Strange has filed this Petition for Original Action before this Court and this Court has required Respondents to file their responses by 5:00 p.m. on August 23, 2024.

Petitioner is requesting that this Court throw Green Party presidential candidate Jill Stein off the ballot in Wisconsin because Petitioner argues that the Green Party has no individuals who qualify for the political party convention that is specified to occur on October 1, 2024 in the state capitol.

In 2016, the Green Party also did not have any individuals who qualified to attend a Green Party convention at the state capitol. Regardless, in 2016, the WEC accepted the Green Party's slate of presidential electors.

ARGUMENT

I. The Green Party properly nominated its presidential candidate.

The Wisconsin election code outlines the steps that a candidate must go through to get their name on the General election ballot. WI ST §5.64(em) provides that "[t]he names of the candidates for the offices of president and vice president certified under s. 8.16(7) … shall appear on the ballot in the form prescribed in s. 7.08(2)(a)." This Court has repeatedly held that "we presume that the word 'shall' is mandatory." *Heritage Farms*, *Inc. v. Markel Ins.,* 339 Wis.2d 125, 144, 810 N.W.2d 465 (Wisc. 2012) quoting *Eby v. Kozarek*, 153 Wis.2d 75, 79, 450 N.W.2d 249 (1990); *Karrow v. Milwaukee Cnty. Civil Ser. Comm'n*, 82 Wis.2d 565, 570, 263 N.W.2d 214 (1978); *State v. Rosen*, 72 Wis.2d 200, 205, 240 N.W.2d 168 (1976).

The very next sentence of § 5.64(em) undermines any assertion that the naming of presidential electors has any material effect on the composition of the general election ballot. This section provides that the "names of presidential electors for the candidates supplied under ss. 8.18(2) … are not listed on the ballot." Nowhere in §5.64(em) does it suggest that if a party fails to provide electors the name of their candidate is not allowed to be on the ballot. Instead, if the campaign has properly followed the statute for president and vice president certification under § 8.16(7), it is mandatory for the WEC to place that candidate on the ballot.

Wisconsin election code §8.16(7) provides that "Nominees chosen at a national convention under s. 8.18(2) by each party entitled to a party primary ballot shall be the party's candidates for president, vice president and presidential electors." The statute also provides that the "state or national chairperson of each such party shall certify the names of the party's nominees

for president and vice president to the commission … .” Nowhere in the petition for original action does the DNC allege or provide evidence that the §8.16(7) has been violated such that the Green Party should be kept off the ballot. The Green Party has complied with §8.16(7), and there is no legal basis to prevent them from appearing on the ballot.

II. The DNC’s request fails the *Anderson-Burdick* framework.

The Supreme Court has made it abundantly clear when looking at ballot access cases for candidates of new or small political parties that courts are supposed to be careful not to infringe on the associational choices protected by the First Amendment. Although the Constitution grants the States power to legislate to regulation elections and ballot access, such power is always limited by other specific provisions of the Constitution. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

Statutes restricting ballot access potentially burden two different rights: “the right of individuals to associate for the advance of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (quoting *Williams*, 393 U.S. at 23); *see also Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (“[U]nduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.”). Both rights rank among our most precious freedoms. *Anderson*, 460 U.S. at 787. “No right is more precious in a free country than that of having a voice in the election of those who makes the laws under which, as good citizens, we must live. Other rights, even the most basic are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 29, (1964). When protecting those rights, “[it] is well-settled that a court has equitable authority to order that a candidate's

name be placed on an election ballot." *Buscemi v. Bell*, 964 F.3d 252, (4th Cir. 2020).

The constitutionality of a ballot-access law is assessed under analytical framework set forth in *Anderson* and refined in *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the *Anderson-Burdick* framework, courts must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate against the precise interest put forward by the State as justification for the burden taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. *Id.* at 434. The *Anderson-Burdick* test is a "two-track approach." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring).

The first step is to decide if the challenged law imposes a severe burden on First Amendment rights. "When election laws 'impose a severe burden on ballot access,' those laws 'are subject to strict scrutiny,' and will be upheld only if the laws are 'narrowly drawn' to support a compelling state interest." *Buscemi*, 964 F.3d at 263 (quoting *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014)); *see also S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 756 (4th Cir. 2010) ("Regulations that impose a severe burden on association rights are subject to strict scrutiny, and a court applying this level of review may uphold the regulation only if it narrowly tailored and advances a compelling state interest.") (cleaned up). In the second step, the court must weigh the severe burden on the Plaintiffs right against the government interest of protecting the political process from frivolous and fraudulent candidacies. *Id*.

Here, the DNC is attempting to remove Jill Stein's name from the ballot based on an irrelevant technicality that was not in any way meant to impede the

voting rights of Wisconsin voters. The Supreme Court has said that the "inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'" *Anderson*, 460 U.S. at 793 (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982)). The *Anderson* Court recognized that "the President and the Vice President of the United States are the only elected officials who represent all the votes in the nation." *Id.* at 795. Thus, the removal of the Green Party candidate in Wisconsin would have "an impact beyond the State's boundaries." *Id.* The *Anderson* Court determined that, in that case, Wisconsin "has a less important interest in regulating Presidential elections than statewide or local elections". *Id.* In short, the Supreme Court has made clear that state courts are not to interfere with the choices made at a national party's Presidential nominating convention. *See Cousins v. Wigoda*, 419 U.S. 477, 490 (1975) (stating the "Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is great than any interest of an individual State.").

Here, the DNC is attempting to misuse the Wisconsin Election code to deprive Wisconsin voters of the right to vote for the Green Party candidate. This is not some small evil. "The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Parrish*, 415 U.S. 709, 716 (1974) (quoting *Williams*, 393 U.S. at 30). The DNC's willful misinterpretation of Wisconsin Election code would "place a significant state-imposed restriction on a nationwide electoral process." *Anderson*, 460 U.S. at 795. The DNC expects this Court to use the Election code to deny a minor party access on the ballot because they have no candidates running for state legislature. This fails the *Anderson* balancing test because it imposes a severe restriction on the rights of the individual voters while only

marginally furthering the State's interest in regulating the presidential elections. The DNC should not be permitted to come into this Court and misuse the legal process at the last minute to deprive Wisconsin voters of the right to choose the presidential candidate of their choice.

III. The DNC misconstrues a directory provision in the Wisconsin Election code as mandatory

Finally, a careful review of Wisconsin Election Code section 8.18 shows it is being misapplied by the DNC. Section 8.18 is the process used by political parties to select the presidential electors who will be appointed if their candidate wins the majority of votes in the state. *See Generally* U.S. Const. Art. II, Sec. 1, cl. 2-3 and WI ST §7.75. However, it is clear that the only mandate contained in § 8.18 is that the "names of the nominees shall be certified immediately by the chairperson of the state committee of each party to the chairperson of the commission."

This Court in *in re Chairman in Town of Worcester*, 29 Wis.2d 674, 681, 139 N.W.2d 557 (Wis. 1966) laid out the rule of construction of election statutes when dealing with mandatory or directory provisions:

> The difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance: An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed 'irregularities,' and, as has been shown in the preceding subdivision, such irregularities do not vitiate an election. Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election.

Looking at § 8.18, the mandatory provisions of this statute require that the "names of the nominees shall be certified immediately by the chairperson." While § 8.18 provides that "each political party shall meet" it also specifies that the "purpose of the convention (of elected officials and nominated state legislators within the same political party) is to nominate" presidential electors, the section does not say that they "shall" nominate them. Thus the "purpose" portion of the statute is directory.

Nowhere in § 8.18 does the legislature say that failure of the political leaders to hold a convention would be fatal to a party's presidential candidate's candidacy. In fact, this same situation occurred in 2016 when the Green Party did not have any individuals who were capable of attending a political party meeting in the capitol. In 2016, the Green Party simply certified a list of presidential electors as is required by the mandatory provisions of § 8.18 and the nominees were appropriately processed. If the DNC was so concerned that there was a violation of the Wisconsin Election code, they had 8 years to bring this lawsuit. They should not be rewarded by bringing this lawsuit at the final hour.

The Green Party not having individuals who can participate in a convention in the state capitol on October 1st should be deemed by this Court to be an irregularity. It should not invalidate Wisconsin voters' rights to select the presidential candidate of their own choosing.

If a political party like the DNC or the RNC were to show up at the state capitol at 10 a.m. on October 1, 2024, and they could not reach agreement as to who the presidential electors were, the WEC would not be required to take Kamala Harris or Donald Trump off the ballot. Instead, the mandatory provision of § 8.18 would then require Ben Wikler (chair for the Wisconsin Democrat

Party) or Brian Schimming (chair for the Wisconsin Republican party) to certify the names of the presidential electors. The failure of the political parties to appear would not be fatal.

Yet even if this Court were to give any consideration to the DNC argument, which they should not, the legislature has already determined that a vacancy in presidential electors is not fatal. In § 7.75, the Wisconsin Election code states that if "there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy." This statute makes clear that there can be a vacancy for "other cause." The Wisconsin legislature did not say that if a vacancy in presidential electors occurs, you must throw the baby out with the bath water. Nowhere in the Wisconsin Election Code does it give the WEC authority to deprive Wisconsin voters the right to vote for the candidate of their own choosing just because there is a vacancy in presidential electors.

Construing § 8.18 and § 5.01 "to give effect to the will of the electors" necessitates that the failure of the Green Party to hold a convention on October 1, 2024, is not fatal to the Green Party candidate's name being placed on the ballot. No one would argue that Wisconsin voters should be denied the right to vote for Kamala Harris just because the Democrat politicians in the state could not agree on who should be the presidential electors. If the politicians cannot agree, the statutes anticipate that the chairperson for each party will provide the names of the delegates.

CONCLUSION

The petition for original action of the DNC must be denied as the Green Party properly nominated their candidate as required by § 5.64(em) and §

8.16(7). Furthermore, the DNC's petition must be denied under the balancing test laid out by the Supreme Court in *Anderson* since the severe burden on Wisconsin voters far exceeds any State's interest in regulating the presidential elections. Finally, the petition must be denied because granting the DNC petition would require this Court to misconstrue a directory provision in the Wisconsin Election code as mandatory.

Dated: August 23, 2024 Respectfully Submitted

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 11 pages and 3,098 words.

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