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No. 2024AP1872-LV

In the Wisconsin Court of Appeals

District II

ROBERT F. KENNEDY, JR.,
PETITIONER-APPELLANT,

V.

WISCONSIN ELECTIONS COMMISSION,
RESPONDENT-RESPONDENT.

AMICUS CURIAE BRIEF OF DR. MICHAEL J. WHITE

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STATEMENT OF INTEREST

Dr. Michael J. White is co-chair of the Wisconsin Green Party, and, as such, he unfortunately is all too familiar with the disrespect third-party and independent candidates face in the administration of elections. Just one presidential cycle ago, it was Dr. White's Green Party that was on the wrong end of this dynamic when the Wisconsin Elections Commission refused to place the Green Party's presidential and vice-presidential candidates on the November 2020 ballot. See *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877. More recently, the Democratic National Committee filed a suit attempting to bully the Green Party off the 2024 presidential ballot—an effort the Wisconsin Supreme Court thankfully rebuffed. See *Strange v. Wis. Elections Comm'n*, No. 2024AP1643-OA, unpublished order (Wis. Aug. 26, 2024).

Wisconsin Stat. § 8.35(1)'s restriction on independent candidates' ability to withdraw from electoral consideration is just one more example of how the electoral system—and the major

parties that back it—stack the deck against third-party and independent candidates.

Dr. White respectfully submits this amicus brief in his individual capacity to provide the Court an additional perspective on the type of unequal treatment third-party and independent candidates face under laws like Wis. Stat. § 8.35(1). Although Dr. White does not support either Mr. Kennedy's candidacy or the candidate Mr. Kennedy endorsed, he feels strongly that Mr. Kennedy's civil rights should not be violated. He believes that protecting constitutional rights is always important, but it is especially important when done for those with whom you disagree. In that spirit, Dr. White urges the Court to closely examine the unequal treatment Mr. Kennedy faces under § 8.35(1).[1]

[1] Dr. White submits this brief based on his personal experience and in his individual capacity only. Although he is co-chair of the Wisconsin Green Party, he does not purport to speak on behalf of that party with this brief.

INTRODUCTION

This case centers on a simple issue of fairness. Because the Democrats and Republicans control the levers of power, they give themselves an extra month to decide who they want to run for President. Independent candidates do not have that luxury and must meet an expedited timeline. However, the Equal Protection Clause and the First Amendment protect third-party and independent candidates from inferior treatment compared to major-party candidates—a principle this Court must uphold. Dr. White's primary purpose in filing this brief is to highlight the fact that Mr. Kennedy's treatment as an independent candidate is not an isolated incident. It is part of a pattern by the major political parties to treat smaller political parties and independents as inferior and unworthy of equal treatment.

To be clear, Dr. White favors the fair and timely administration of this election. Mr. Kennedy should receive the relief he is entitled to under the Constitution, and the Court should also ensure that all voters receive their ballots on time. In Dr.

White's view, this can best be accomplished by directing election officials to place a sticker over Mr. Kennedy's name indicating that he is no longer a candidate for President.

ARGUMENT

I. WISCONSIN'S ELECTION STATUTES UNCONSTITUTIONALLY STACK THE DECK AGAINST THIRD-PARTY AND INDEPENDENT CANDIDATES.

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. While there have been some bumps along the way, for the most part, this country and its government have striven to fulfil that promise. But a gap in that effort is particularly evident if you are a third-party or independent candidate running for President on the Wisconsin ballot. If you happen to be such a candidate, you have to play by a different set of rules—rules that the "big-name" candidates (i.e., those running for under the Republican or Democratic banners) do not have to follow. This unequal treatment is not allowed. See *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (holding that election regulations must "not unfairly or

unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity").

The statute in this case is no exception—it sets different rules for different people, seemingly for no reason at all. Independent candidates must commit to have their name included on the ballot a whole month earlier than Democratic or Republican candidates.[2] Compare Wis. Stat. §§ 8.20(8)(am) & 8.16(7). That is, an independent candidate with less infrastructure, resources, and know-how must make decisions far sooner than the major political parties, even though the major political parties have far more substantial infrastructure and resources than the typically less-equipped third parties and independents.

[2] Unfortunately, this disparate treatment of small and independent parties is not unique to Wisconsin. Around the nation, small and independent parties fight for their survival. *See, e.g.*, *Const. Party of Penn. v. Cortes*, 116 F. Supp. 3d 486, 500 (E.D. Pa. 2015); *Supreme v. Kansas State Elections Bd.*, No. 18-CV-1182-EFM, 2018 WL 3329864, at *1 (D. Kan. July 6, 2018); *Working Fams. Party v. Commonwealth*, 169 A.3d 1247, 1249 (Pa. Commw. Ct. 2017), *aff'd*, 209 A.3d 270 (2019); *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1344 (N.D. Ga. 2016), *aff'd*, 674 F. App'x 974 (11th Cir. 2017).

The simple fact of that matter is that the reason for this disparate treatment is unstated but clear—it benefits the two major parties at the expense of third parties and independents. These rules were written by (and are enforced by) officials elected under either the Republican or Democratic banners—officials who have vested and concrete interest in keeping as many potential competitors out of the political process as possible. This is an issue Dr. White is deeply concerned about because it holds significant implications for the party he leads, a party which has been targeted in the last two presidential elections. See *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; *Strange v. Wis. Elections Comm'n*, No. 2024AP1643-OA, unpublished order (Wis. Aug. 26, 2024).

Election laws are often a Mirkwood-like maze that require sophisticated legal counsel to successfully navigate them. This obstacle poses a significant hurdle for parties and engaged citizens like Dr. White. In addition, most election- or ballot-related decisions are made quickly, and the losing party has mere days (sometimes

less) to: (1) retain counsel; (2) get counsel up to speed on the specific issues; and (3) direct counsel act on their behalf.

In this case, WEC made the decision to put Mr. Kennedy on the ballot on August 27, 2024. The very next day, August 28, 2024, WEC set the deadline for clerks to send proofs of the ballots for approval. While large political operations may have the resources to seek swift judicial relief, others do not. This puts smaller parties and independents at an inherent structural disadvantage because they are then forced to expend their limited resources on legal fees rather than spreading their political message—a message which, under the Constitution, they have the right to share or not share.

II. WISCONSIN STAT. § 8.35(1)'S UNEQUAL TREATMENT OF THIRD-PARTY AND INDEPENDENT CANDIDATES VIOLATES FIRST AMENDMENT AND EQUAL PROTECTION PRINCIPLES.

Wisconsin Stat. § 8.35(1) imposes an earlier deadline on independent candidates to decide whether to withdraw from a presidential election than the deadline that applies to major party candidates. This scheme of unequal treatment is unconstitutional

under the U.S. Supreme Court's precedent in *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

In Anderson, the Supreme Court laid out the framework for analyzing whether disparate treatment of major parties versus minor and independent parties violates the First and Fourteenth Amendments. The Court explained:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 789. Summing up, the Court directed, "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.*

Anderson also provided a few markers of when a state election regulation unconstitutionally disadvantages a minor party or independent candidate. It explained, "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the

availability of political opportunity." *Id.* at 793. "**A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates . . . .**" *Id.* at 793–94 (emphasis added).

Section 8.35(1) does not clear Anderson's test. The statute creates a more relaxed deadline for candidates from major parties to withdraw from an election and an earlier withdrawal deadline for independent candidates. In light of this clear disparate treatment, "the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 789. Here, there is no legitimate—much less compelling—state interest that would justify setting different withdrawal deadlines for major party candidates and independent candidates. Why did WEC need independent candidates like Mr. Kennedy to decide whether to withdraw by August 6? The ballots could not be finalized or printed until after the major party

candidates decided whether to withdraw on September 3. The only possible rationale for requiring independent candidates to make that decision almost a month earlier is to stack the deck in favor of the two major parties. That is not a sufficient state interest to satisfy the First and Fourteenth Amendments. Section 8.35(1) is unconstitutional.

A persuasive case from a federal circuit court of appeals offers additional insight that supports this analysis. In *Libertarian Party of Ohio v. Blackwell*, the Sixth Circuit considered whether a pair of Ohio regulations posed an unconstitutional burden on a minor party. 462 F.3d 579 (6th Cir. 2006). The issue in that case was whether a requirement that a political party register one year before an election to qualify for the ballot violated "First and Fourteenth Amendment rights of free association." *Id.* at 582. The court observed that when a regulation poses a severe restriction on a ballot access issue, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* at 586 (quoting another source). The court observed that the state's

election regulations fell unfairly on minor parties, violating their associational rights. The court explained: "Put simply, the restrictions at issue in this case serve to prevent a minor political party from engaging in the most fundamental of political activities . . . . As such, we find that the Ohio system for registering minor political parties imposes a severe burden on associational rights." *Id.* at 590. Despite this, Ohio "provided no evidence that its registration procedure for minor parties in any way protects [the state's] interests." *Id.* at 594. Thus, the restriction was unconstitutional. *Id.*

Such is the case here. Wisconsin has established a two-tier system of election administration—yet failed to articulate any rationale to support its double standard. This cycle, independent candidates' final opportunity to withdraw from the presidential race fell on August 6, 2024. Meanwhile, major parties had until September 3, 2024. WEC cannot identify a legitimate (much less compelling) interest advanced by Wis. Stat. § 8.35(1). The only possible rationale for the difference is that the statute protects two-

party control at the expense of third-party and independent candidates. This Court should hold that such a rational is insufficient to pass constitutional muster. As the Sixth Circuit held, "This system serves to protect the two major parties at the expense of political dialogue and free expression, which is not justified, much less compelling." *Id.* at 594.

CONCLUSION

For the foregoing reasons, Dr. White respectfully urges the Court to guard against the marginalization of third-party and independent candidates and strike down § 8.35(1) as depriving independent candidates their constitutional rights under the Equal Protection Clause and the First Amendment.

Dated: September 17, 2024

Respectfully submitted,

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Electronically signed by Alexander C. Lemke

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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. The length of this brief is 1554 words.

Dated: September 17, 2024.

Electronically Signed by Alexander C. Lemke
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