STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Respondent.

APPEAL OF A NON-FINAL ORDER DENYING A PRELIMINARY INJUNCTION, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

RESPONDENT BRIEF OF THE WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

The circuit court appropriately exercised its discretion in denying Robert F. Kennedy, Jr.'s quest for relief: a temporary injunction requiring clerks to create and place stickers on four million Wisconsin ballots to remove his name.

Kennedy filed nomination papers and a declaration of candidacy to run for U.S. President. Today, he prefers (at least in Wisconsin) to support a major party candidate. Kennedy's request to remove his name from the ballot was barred by Wis. Stat. § 8.35(1), and so the Commission correctly denied it.

Kennedy brought suit and sought a temporary injunction. The circuit court appropriately weighed the relevant factors and denied Kennedy relief. In concluding that Kennedy failed to justify a temporary injunction, the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. This Court should affirm that discretionary decision.

ISSUE PRESENTED

Whether the circuit court appropriately exercised its discretion in denying a temporary injunction that would have required election clerks to reprint or hand-affix stickers to four million Wisconsin ballots.

STATEMENT OF THE CASE

I. The Commission receives candidate papers for the November general election.

Kennedy and Nicole Shanahan submitted nomination papers and declarations of candidacy to the Commission on August 6, 2024, as independent candidates for President and Vice President in the November 2024 general election. (R. 44 ¶¶ 3–6, Ex. A, Ex. C; 45 ¶ 7, Ex. E.)

On August 19, the Commission received a Certification of Nomination from the Democratic Party nominating Kamala Harris and Tim Walz as its candidates for President and Vice President. The Commission also received declarations of candidacy from Harris and Walz. (R. 44 ¶ 8, Ex. D.) The Commission received no declaration of candidacy from current President Joe Biden or a certification of nomination from the Democratic Party nominating Biden. (R. 44 ¶¶ 9–10.)

On August 23, Kennedy sent a statement to the Commission that he was "withdraw[ing] his candidacy from the 2024 United States Presidential Election" and requesting that his name not be printed on the ballot in Wisconsin. (R. 44 ¶ 7, Ex. B.)

II. The Commission meets on August 27 and considers Kennedy's request to withdraw.

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 the 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 general election ballot. (R. 45 ¶¶ 5–6, Ex. C–D.)

Based on Wis. Stat. § 8.35(1), which 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," the commissioners voted 5-1 to deny Kennedy's request to withdraw from the ballot. (R. 45 ¶ 6, Ex. D.)

III. Clerks begin creating the ballots.

Wisconsin law requires that, "immediately upon receipt" of the Commission's notices, county clerks prepare the ballot forms. Wis. Stat. § 7.10(2). County clerks must integrate ballot information for local races and referenda onto ballot styles for each municipality. (R. 42 (Declaration of Robert Kehoe) ¶¶ 5, 12.) They then must finalize and proof their ballots, place the print order, and ensure that they have sufficient ballots. (R. 42 ¶ 5; 46 ¶ 8; 43 ¶¶ 8–9; 40 ¶ 9; 45 ¶ 4, Ex. B.) The vast majority of county clerks must utilize a third-party vendor because of the technical requirements for ballots to be accurately scannable and fed through electronic tabulation machines. (R. 42 ¶¶ 13–17; 43 ¶¶ 9, 11.)

This work must be completed by September 18, the last date by which county clerks must deliver printed ballots to municipal clerks—48 days before the general election. Wis. Stat. § 7.10(3). (R. 42 ¶¶ 7–10.)

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). (R. 42 ¶ 7; 46 ¶¶ 5–6, 9.) 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. (R. 42 ¶¶ 8–10.)

Following the Commission's 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. (R. 42 ¶ 22; 46 ¶¶ 7–8; 43 ¶¶ 8–9; 40 ¶¶ 8–9.) There will be approximately four million ballots printed in the state. (R. 42 ¶ 24.)

Print orders for ballots were scheduled to be completed by the September 18 deadline to provide ballots to municipal clerks. (R. 42 ¶ 22; 46 ¶¶ 7–10; 43 ¶ 9.) If counties are required to reprint ballots, clerks would be unable to meet statutory deadlines to get ballots into the hands of absentee voters. (R. 42 ¶ 18; 46 ¶¶ 11–12; 43 ¶ 10; 40 ¶ 10.)

IV. Kennedy files suit against the Commission and continues his campaign efforts elsewhere.

On September 3, Kennedy filed a petition for judicial review against the Commission and a motion for a temporary injunction. (R. 2–4.) On September 4, Kennedy filed an ex parte motion for an emergency temporary restraining order. (R. 11.) On September 6, the circuit court denied that motion and set a scheduling conference for September 11. (R. 29.)

On September 9, Kennedy filed a petition for leave for appeal the denial of his motion. (R. 33.) On September 12, the court of appeals ordered the petition held in abeyance while the circuit court decided Kennedy's motion for a temporary injunction. (R. 36.)

Meanwhile, Kennedy'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 may be close, but hopes voters will choose him in other states where he has successfully been placed on the ballot. (R. 45 ¶ 3, Ex. A).[1] Some of Kennedy's Wisconsin electors have indicated that they want him to remain on the ballot. (R. 42 ¶ 26.)

[1] Caitlin Yilek & 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-the-ballot-states/.

V. Clerks express concern that Kennedy's sticker plan would lead to the inaccurate tabulation of ballots.

Kennedy wants blank stickers to be created and placed over his name on every ballot. (R. 34.) The Commission is unaware of a situation where stickers have been used this way. (R. 42 ¶ 24.) Clerks are statutorily prohibited from affixing stickers to ballots, except if a candidate dies and is replaced by his party.

County clerks have expressed serious concerns about Kennedy's request. (R. 43 ¶ 17; 40 ¶ 15; 41 ¶ 12; 46 ¶ 14.) Incorrectly placed stickers would produce errors in how the voter's choices are registered. (R. 41 ¶ 13.) Stickers could peel off, getting stuck in the voting tabulator, or stick to and rip other ballots, making a jammed scanner unavailable on Election Day. (R. 42 ¶ 25; 43 ¶ 17; 40 ¶ 15; 41 ¶ 14.)

Miscounting can result even if a clerk correctly cuts out and places the sticker. Tabulators are programmed to register the ballot's weight to avoid feeding more than one ballot into the machine at once. Added weight may produce a double ballot error, resulting in the return of the ballot. (R. 43 ¶ 17; 41 ¶ 12.) Further, tabulators are designed to discern light marks in the area of a ballot where voters mark the ovals or arrows. A shadow or wrinkle caused by a sticker can cause the machine to register an overvote. On the presidential-only ballot, Kennedy's name appears immediately next to the oval for his ticket. (Second Declaration of Kehoe (filed with petition to bypass September 19) ¶¶ 4–6 & Ex. A.)

These risks mean that tabulators may fail the required pre-election testing that municipal clerks must conduct, meaning those machines will be out of service on election day. Wis. Stat. § 5.84.

And simply as matter of resources, placing stickers on four million ballots would be a herculean task for clerks, including those who are part-time and have other, fulltime jobs. (R. 40 ¶ 13; 43 ¶ 18; 42 ¶ 25; 41 ¶ 13).)

VI. The circuit court denies a temporary injunction; Kennedy files a new petition for leave to appeal.

The circuit court set a briefing schedule on the temporary injunction motion. On September 16, at Kennedy's request, the circuit court held an evidentiary hearing for Kennedy to present evidence. (R. 70:2–3.) Kennedy did not present any affidavits or witnesses. (R. 70:3, 12, 16.)

Later that day, after reviewing the parties' briefs and declarations from Commission staff and county clerks, the circuit court issued an oral ruling denying the temporary injunction. (R. 59; 60.)

On the likelihood of success, the court concluded that Kennedy's constitutional challenges were unpersuasive: Kennedy offered no support for a constitutional right to be *removed* from the ballot. (R. 60:11–20.) The court also reasoned that Wis. Stat. § 8.35(1) does not permit withdrawal from the ballot once a candidate submits his nomination papers and declaration of candidacy.

In addition to finding that Kennedy would suffer no irreparable harm absent an injunction, on the balancing of equities, the court held that the equities of harms to clerks, voters, and the public outweighed Kennedy's asserted interests. The court pointed to the unbudgeted costs for clerks, missed deadlines for sending ballots, and the "logistical nightmare" posed by Kennedy's proposal. The court cited his charge to avoid confusion and incentives not to vote in the time leading up to the election. (R. 60:7–10.)

Taking all the factors together, the court concluded Kennedy had not demonstrated that relief was appropriate.

Kennedy petitioned for leave to appeal. (R. 61.) This Court granted the petition and ordered briefing, including questions relating to stickering ballots.

VII. During these proceedings, the election process has moved forward.

Meanwhile, the election process has moved forward. The Commission collects daily data from all 72 counties. (Second Kehoe Decl. ¶ 7.) As of the morning of September 19, 343,742 ballots had been sent statewide. (Second Kehoe Decl. ¶¶ 10–11 & Ex. B.)

ARGUMENT

The court reasonably applied the relevant factors in denying the motion for a temporary injunction, and its decision reflected an appropriate exercise of discretion.

I. The circuit court's order will be upheld unless the court erroneously exercised its discretion.

A decision to grant or deny an injunction "is within the sound discretion of the circuit court," *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, ¶ 10, 262 Wis. 2d 264, 664 N.W.2d 55, "and will only be reversed for an erroneous exercise of discretion." *Sch. Dist. of Slinger v. WIAA***,** 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). "The test is not whether [this] court would grant the injunction." *Id.* Rather, the test is deferential and primarily serves to ensure that the decision was arrived at by the application of the proper legal standards and based upon the facts in the record. *See LeMere v. LeMere*, 2003 WI 67, ¶¶ 13–14, 262 Wis. 2d 426, 663 N.W.2d 789.

A circuit court's discretionary decision is upheld as long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Long v. Long,* 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995).

II. The circuit court's order here was a reasonable exercise of discretion.

The circuit court looked at the facts in the record, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. Its decision should be affirmed.

Wisconsin Stat. § 813.02(1)(a) authorizes courts to issue temporary restraining orders and injunctions when certain factors are met. Wis. Stat. § 813.02(1)(a). Circuit courts must balance four criteria: "(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*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted). "The purpose of 'a temporary injunction is to maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought.'" *Sch. Dist. of Slinger*, 210 Wis. 2d at 364 (citation omitted).

A. The circuit court correctly concluded that Kennedy did not make a showing of likely success on the merits.

The circuit court recognized that Kennedy offered no support for his assertion that a candidate has a constitutional right to be removed from the ballot. (R. 60:11–20.) And his statutory claim under section 8.35(1) ignores the statute's plain language.

1. Kennedy misunderstands the standard of review for his constitutional challenge.

Kennedy raises a constitutional challenge to the statutes governing nomination papers, but he misunderstands the standard of review, assuming it is strict scrutiny. (R. 61:17.) Instead, such challenges are reviewed under a balancing test that weighs the state's interests 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: "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) (citation omitted).

Instead, "a more flexible standard" applies: courts weigh the "character and magnitude" of the burden the law imposes 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)).

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.* (citation omitted). 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. Reasonable ballot access deadlines for independent candidates are constitutional.

Kennedy complains that differing ballot access deadlines for independent and major party candidates give major parties an advantage. (R. 61:19.) Even if this were a case about ballot *access*, that difference is not constitutionally significant. Wisconsin's deadlines reasonably reflect the difference in time needed to process nominations.

The U.S. Supreme Court has held 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.

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 law, but it noted that, based on the facts about reviewing papers and ballot preparation 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 procedures in Wis. Stat. §§ 8.20(8)(am) and 8.16(7) reflect two different procedures: independent candidates submit nomination papers, while major party candidates are nominated and certified by their party. They provide a reasonable, nondiscriminatory process—and reasonable deadlines—by which candidates must demonstrate sufficient support.

Independent candidates demonstrate sufficient elector support to qualify for the ballot by submitting nomination papers with 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. § 8.20(8)(am). Major party candidates—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). They select their nominees for president and vice president at their respective conventions and 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 paper signatures for sufficiency and process 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. Kennedy makes no claim here that the August 6 deadline was a burden at all, much less of such magnitude such that it ran afoul of the constitution.

3. Equal protection principles provide no right for a candidate to be removed from a ballot.

Kennedy offers no case law supporting his view that equal protection affords a right for a candidate to be *removed* from the ballot.

To the extent Wisconsin law addresses the ability of a candidate to "disassociate" with a party, Wis. Stat. § 8.35(1) makes no reference to political party. It 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."

Kennedy suggests 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 Kennedy was not. That is wrong. The Commission received no declaration of candidacy from Biden or a certification from his party nominating him.

Kennedy's theory is based on differing nomination deadlines for independent and major party candidates, but courts recognize those are constitutional. Kennedy offers no support for his premise that those deadlines become unconstitutional because they require independent candidates to commit sooner not to withdraw.

4. Kennedy has no First Amendment right to be removed from the ballot.

Kennedy also has no First Amendment right to remove himself from the ballot, either under a compelled speech or associational rights theory.

First, a candidate's name on a ballot is not compelled speech. Kennedy asserts that he wants voters (at least Wisconsin voters) to know that he supports a different

candidate for the Presidency. (R. 3:10–11.) 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 a Minnesota law 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. Similarly, in *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005), the Ninth Circuit court of appeals rejected a compelled speech claim regarding words in a ballot initiative title, and noted that plaintiff remained free to publicly disassociate himself from the message.

The same is true here. It is the government, not Kennedy, that is "stating" he is a candidate. If Kennedy wants to express his support for Donald Trump, the ballot is not the place to advance those views; he can communicate that message through a myriad of speech platforms.

Second, Kennedy's free association argument is a non-starter. Voters may have associational rights to have a candidate's name *included* on the ballot because a voter wishes to associate with the candidate by casting his vote in the candidate's favor. *Bullock v. Carter,* 405 U.S. 134 (1972);

see also Berg v. Egan, 979 F. Supp. 330, 336 (E.D. Pa. 1997) (citation omitted). Such interests favor keeping Kennedy on the ballot so that voters, including those who have objected to his removal from the ballot, can select him.

In contrast, voters and candidates have no constitutional right 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, 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).

Kennedy has no constitutional right to have clerks remove his name from the ballot.

5. Kennedy's reading of Wis. Stat. § 8.35(1) is incorrect.

Kennedy's view that Wis. Stat. § 8.35(1) does not apply is also wrong, as the circuit court concluded.

On August 6, Kennedy filed nomination papers and a declaration of candidacy. A declaration of candidacy 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).

Kennedy thus met the two requirements under Wis. Stat. § 8.35(1) to have his name placed on the ballot: he filed nomination papers and a declaration that he met the qualifications for the office he sought. Under the statute's plain language, he "may not decline nomination," and his name "shall appear upon the ballot." Wis. Stat. § 8.35(1).

A prior version of the law allowed candidates to withdraw, up to a week after submitting nomination papers. "'A review of statutory history is part of a plain meaning analysis' because it is part of the context in which we interpret statutory terms." *County of Dane v. LIRC*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (citation omitted). That statute permitted a candidate to "decline the nomination" if he did so "in one week after the last day on which nomination papers can be filed." Wis. Stat. § 5.18 (1965). While Kennedy would not even have met that deadline, that option no longer exists.

Kennedy argues that "qualifies" means official Commission approval (R. 61:12), which he says cannot happen if the candidate withdraws. But Wis. Stat. § 8.35(1) references no such process. 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. As the circuit court concluded, Kennedy's reading would add language not in the statute.

Kennedy's reading also conflicts with another election statute. Wisconsin Stat. § 5.64(1)(ar)1m. requires 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." Shanahan submitted no withdrawal statement, and ticket voting would be impossible if Kennedy's name were absent.

B. The circuit court found no irreparable harm and the competing equities weighed against granting the relief sought.

The circuit court reasonably determined that Kennedy would suffer no irreparable harm absent an injunction and the balancing of equities weighed against an injunction. The injury to clerks, voters, and the public from the proposed relief—illegal under Wisconsin law—far outweighs Kennedy's interest in being off the Wisconsin ballot.

Most basically, Kennedy's suggestion is prohibited: Wis. Stat. § 5.51(4) bars election officials from attaching a sticker to a ballot. There is one exception—for the death of a candidate, when a replacement nominee is selected, Wis. Stat. § 7.38(3)—but Kennedy is alive and well.

Courts cannot grant injunctions that violate state law. Courts acting in equity have discretion unless a statute clearly provides otherwise. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001). That is because "clearly-worded statutes have the power to divest courts of their equity powers." *Findlay Truck Line, Inc. v. Central States, Se. & Sw. Areas Pension Fund*, 726 F.3d 783, 753 (6th Cir. 2013). In *Findlay Truck Line,* the Sixth Circuit court of appeals held the trial court lacked authority to issue a preliminary injunction that violated plain statutory language. *Id.* Kennedy's cited case, *In Interest of E.C.*, 130 Wis. 2d 376, 388, 387 N.W.2d 72 (Wis. 1986), says that injunctive relief can include a measure not explicitly permitted in a statute, but that supports relief only when the statutes have not spoken. Here, the statute expressly prohibits the relief sought.

Even if Kennedy had died and Wis. Stat. § 7.38 were available, it would not work the way he assumes. That statute is about a political party's ability to *replace* its deceased candidate with a different nominee, allowing voters to select that candidate. It requires the political party to provide properly-sized stickers featuring the new candidate's name. That is a wholly different process than Kennedy's demand.

Kennedy also points to a reference in the Elections Manual discussing stickers for write-in candidates. (App. Br. 7.) Although the manual has not been updated, that option was eliminated by the legislature: 2015 Wis. Act 37 eliminated the option for voters to indicate their choice with a sticker at polling places with electronic voting systems.

It is for good reason that Kennedy's idea is not the law. Here, hand cutting and affixing stickers for four million ballots would be a herculean task, requiring tens of thousands of man hours—work for clerks whose hands are already full.

And it could jeopardize the proper administration of the election. Stickers may peel off, getting stuck in the tabulator or ripping other ballots. Loose stickers could jam a machine, taking it out of service. If 3.5 million ballots are cast, even an error rate of 0.010% would amount to 350 affected machines and, in turn, polling places.

Aside from machine breakdown, stickers threaten accurate reading of ballots. Tabulators are calibrated to recognize a difference in the weight of a ballot. The extra weight of a sticker could cause the machine to read the ballot as a double ballot and not count it. Tabulators are also calibrated to read light marks so that no vote goes uncounted, and a sticker in the "target area" of an oval or error—where a sticker over Kennedy's name would need to be—could register a double vote.

In enacting Wis. Stat. § 7.38(3), the legislature determined that those consequences may be justified in the case of a candidate's death so that voters may choose a party's

replacement candidate. The legislature has otherwise prohibited the practice, and for good reason. The circuit court was well within its discretion in concluding that the competing equities weighed against Kennedy's request—a remedy contrary to state law.

C. The circuit court reasonably determined that Kennedy's request would upend, not preserve, the status quo.

The circuit court held that Kennedy failed the requirement that a temporary injunction only preserve the status quo, not grant the ultimate relief he sought. (R. 60:7, 10–11.) This, too, was reasonable.

III. *Hawkins* supports the outcome below.

While the circuit court did not decide the motion under *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877, that decision also supports the result here.

In *Hawkins*, the supreme court recognized that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." *Id.* ¶ 5. The court considered a petition for leave to commence an original action filed by candidates who were excluded from the ballot due to insufficient signatures on their nomination papers. *Id.* ¶¶ 1–2. The petitioners 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 court concluded that under the circumstances, including the fact that the general election had "essentially 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.

Here, the undisputed evidence shows that the clash between Kennedy's request and the realities of election administration is just as acute as in *Hawkins*.

IV. Responses to Court's questions.

1. "[D]oes it matter if ballots with stickers on them have not been tested with voting equipment?"

Yes. Testing matters for two reasons. First, it would measure the risks posed by stickered ballots, but the Commission's precertification of tabulator models under Wis. Stat. § 5.91 and Wis. Admin. Code EL 7 did not test stickered ballots. Second, municipal clerks must test their tabulators with the ballots at least 10 days before the election under Wis. Stat. § 5.84; if stickered ballots are ordered and those results are not error free, the tabulators cannot be used in the election.

2. If a vacancy in a statewide office occurs because of the death of a candidate and the party supplies stickers with the name of the replacement candidate, "would the stickers have to be placed on the ballots statewide?"

Yes. The Commission has not previously needed to interpret the statute, but it would presumably be subject to situations where it could be feasibly achieved.

3. Under Wis. Stat. §§ 7.37(6), 7.38(3) & 8.35(2)(d), "[d]o clerks, as WEC has suggested, have discretion to not have the stickers applied to the ballots?"

No. Commission counsel inadvertently misread Wis. Stat. § 7.37(6) late at night while working on a prior brief. (R. 39:11.)

* * * * *

The circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. Its decision should be affirmed.

CONCLUSION

The Commission asks this Court to affirm the circuit court's order.

Dated this 20th 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 5368 words.

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 20th day of September 2024.

Electronically signed by Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General