STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondent-Respondent.

ROBERT F. KENNEDY, JR.'S AMENDED REPLY BRIEF

On Appeal from the Dane County Circuit Court,
the Honorable Stephen E. Ehlke Presiding,
Case No. 2024CV2653

ROBERT F. KENNEDY, JR,
Petitioner-Appellant

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I. Kennedy can't be treated worse than the major-party candidates or have his First Amendment Rights infringed.

Kennedy has an absolute right to endorse Donald Trump for President. He's done that in myriad ways: he's appeared at rallies, spoken on talk shows, and provided public endorsements whenever and wherever he could. In Wisconsin, he wants everyone who will listen to him to vote for Trump. That is core political speech and it's protected under the First Amendment. In an effort to ensure that message is conveyed clearly and without confusion, he asked that his name not appear on the Wisconsin ballot. He did so *well before* the Commission voted to put him on the ballot and *before* the major parties even had to submit a candidate. The reason he asked to withdraw his name from the race was to make sure there was no confusion in his message: in Wisconsin, I want everyone to vote for Trump! The Commission refused to honor that request and instead placed him on the ballot. In doing so, the Commission has created confusion and compelled a message that Kennedy wants no part of—namely, I still want your votes, I'm still running. I may attend rallies, I may stump for Trump, but really, where it counts, in the seclusion and secrecy of the voting booth, choose me.

The question is: in the realm of constitutional rights what does everything in that paragraph implicate? Intuitively, it feels amiss. Democrats and Republicans have an additional month to get off (and on) the ballot that Kennedy and the other independent candidates don't have. That just can't be right. And on top of that, the Commission won't allow him to withdraw even though it was before the Commission formally acted and even though it creates voter confusion—conveying a message that Kennedy himself does not endorse. The reason it feels amiss is that it's wrong. The Equal Protection Clause ensures equal treatment between the major parties and the independent candidates. And the First Amendment prevents the Commission from diminishing Kennedy's message or putting forth a message he doesn't agree with.

II. The Commission's attempts to escape that logic are unavailing and should be rejected.

Everything about this case can be summed up in those two paragraphs. Judges know that third-party candidates can't be treated differently, and no one can be compelled to give a message that he or she doesn't endorse. The particulars for all those points are spelled out in the previous briefing. What follows is why the Commission's counterarguments are unavailing. To escape those basic points, the Commission lodges several arguments. It makes technical arguments about the different deadlines and how they are reasonably related to important interests. And it makes arguments that Kennedy's rights are not at issue here—all that matters is the voters' rights. But in doing so it ignores that the distinction between the rights of candidates and voters is not easily separated. Indeed, here, it is Kennedy's message that matters, and the voters have a right not be confused by anything that muddles that message—in particular, the message his name being on the ballot conveys. And in making that argument, the Commission misreads the *Lewin* case—there, the candidate did not sue to get off the ballot, but his opponents sued to get him off. Finally, The Commission argues that *Hawkins* controls, but properly understood, *Hawkins* was a much different situation from what we have here.

A. The Commission's arguments about the statute ignore that Kennedy wants off the ballot not *on* it and that precedent supports flexibility for independent candidates.

First, the Commission makes technical arguments: the differing deadlines stem from different needs with verifying signatures and making sure everything complies with state law; and, it argues, there is no right to get off the ballot—once you declare, you're stuck there. But both arguments miss the point. The different deadlines and all the work that they can entail make sense for candidates getting *on* the ballot, but here Kennedy wants *off* the ballot. He wants to save the Commission the time and effort of checking those forms. So the needs that prompt a two-tiered deadline just don't

apply. The second point also fails. Here, Kennedy had to declare by August 6 and (under the Commission's logic) withdraw that same day if he didn't want to be on the ballot. But Trump and Harris could declare on August 6 and for the next month contemplate the situation and change their minds. They could drop out or swap out another candidate. That clearly benefits the major parties over the independents (indeed, the DNC did not even hold its convention until well after August 6).

The only other time the issue of disparate treatment between parties has come up (and there only partially) was in the infamous 1980 National Unity Campaign. There, when scandal rocked the Vice Presidential candidate, the powers-that-be didn't want to allow the National Unity Campaign the ability to switch out the Vice Presidential candidate—despite the Republicans and Democrats having that exact same ability on an extended timeline.[1] This was challenged on various grounds, and 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*."[2] The opinion added in a note that resonates here: "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."[3] Put differently, the voters don't benefit from different rules for different parties, and for that matter, the Equal Protection Clause doesn't allow it.[4]

Here, Wisconsin's deadlines hamstring independent candidates, while giving Democrats and Republicans a greater opportunity to disassociate from a candidate or for a candidate to dissociate from the

[1] No. OAG 55-80, 1980 WL 119496 (Wis. A.G. Sept. 17, 1980); *see also Brown Cnty. v. Brown Cnty. Taxpayers Ass'n,* 2022 WI 13, ¶ 32, 400 Wis. 2d 781, 971 N.W.2d 491.
[2] No. OAG 55-80, ¶ 5, 1980 WL 119496 (Wis. A.G. Sept. 17, 1980).
[3] *Id.*
[4] *Id*.

campaign.[5] It's worth adding 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 earlier. 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*.

Here, upon reflection, Kennedy has (like President Biden) decided that for associational and expressive reasons, he does not want to run for President anymore. And Kennedy (like President Biden) decided he wanted to not just be off the ballot, he also wanted to give his endorsement to someone else. Kennedy for Trump; Biden for Harris. And Kennedy (like President Biden) wanted to make sure that there was no voter confusion in Wisconsin—no one thinking that he was soliciting votes. Yet, Wisconsin's arbitrary, two-tiered deadlines prevent Kennedy (unlike President Biden or any other major-party candidate) from withdrawing and making sure that his message is clear.

B. Kennedy (like every citizen) has the right to convey a clear message without the Commission compromising it.

The Commission argues that Kennedy has no right to use the ballot as a means to convey his message. It's worth reiterating that Kennedy is not trying to use the ballot to convey a message, but to make sure that his name being on the ballot doesn't convey a message—there's a world of difference. Kennedy is trying (as best he can) to avoid voter confusion and prevent his actual message—I'm supporting Trump for the Presidency—from being drowned out by the confusion created by his name being on the ballot. After all, the Supreme Court has been clear: "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect

[5] *Compare* Wis. Stat. § 8.16(7), *with* Wis. Stat. § 8.20(8)(am).

candidates always have at least some theoretical, correlative effect on voters."[6] Among the principal duties of election officials is to make sure that the citizens can "make informed choices in the political marketplace."[7] And that demands transparency, not confusion. Indeed, the Commission cannot argue that the same confusion would attend a major party candidate withdrawing on August 23 (the day Kennedy did); after all, the Democrats and Republicans had until September 3 to even declare a candidate.

To escape that logic, the Commission cites and quotes *Timmons* in one breath and then disavows all that the case actually says in the next.[8] In *Timmons*, the Supreme Court looked at fusion ballots—the candidate's name appearing for two parties. This used to happen a lot, but Minnesota banned it. The Supreme Court noted (as Kennedy did in the petition) that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."[9]

The Supreme Court then continued with the key provisos that the Commission's brief has left out, namely, while it's clear that we're talking about core First Amendment activity, "States may, and inevitably must, enact *reasonable* regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."[10] No question there. The Supreme Court continued: "When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule 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."[11] That is, there's a balancing test that courts must strike. We

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[6] *Bullock v. Carter*, 405 U.S. 134, 143 (1972).
[7] *Citizen United v. FEC,* 558 U.S. 310, 366 (2010).
[8] *See* Br. at 29–30.
[9] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (quoting *Colorado Republican Federal Campaign Comm. v. Federal Election Comm.*, 518 U.S. 604, 616 (1996)).
[10] *Id.* (emphasis added).
[11] *Id.* at 358.

have a fundamental right at issue—Kennedy's First Amendment rights are on one side of the ledger and the State's ability to cure confusion on the other.

The Supreme Court broke it down this way, in a point that echoes here: "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate."[12] That makes sense, it reasoned, because "[a] particular candidate might be ineligible for office, *unwilling to serve*, or, as here, another party's candidate. *That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's association rights*."[13] That is, while there is not an absolute right to be on the ballot, there is an important right at issue, and that right has to be weighed against the State's compelling interests—namely "avoiding voter confusion and overcrowded ballots."[14]

But that's not what's going on here. Kennedy is not trying to get *on* the ballot and create confusion, he's trying to stay *off* the ballot to avoid confusion. The Commission—not Kennedy—is the one that has fabricated an overcrowded and confusing ballot. Properly understood, *Timmons* simply does not support that Kennedy's rights are non-existent or trivial; it says the opposite: "We conclude that the burdens Minnesota imposes on the Party's First and Fourteenth Amendment associational rights—*though not trivial—are not severe*."[15] And it certainly doesn't support the idea that the Commission has a compelling reason for keeping him on the ballot. Again, and to be perfectly clear about this: the very points for which the Commission is trying to use *Timmons*, those points actually support *why* Kennedy's rights are not outweighed by the Commission's needs. The Commission—not Kennedy—created these issues when, without any stated need, it refused to accede to his request to get off the ballot, a request that would have been granted if he were aligned with the two major parties.

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 363 (emphasis added).

The issue then becomes where (directly) lies the harm? The harm comes to Kennedy's message that he's publicly proclaiming in Wisconsin: I am not running for President, I do not want your vote. And the contrary message that appears on the ballot: I *actually* do want your vote. As the Supreme Court has noted: the "instant before the vote is cast" is "the most crucial stage in the election process."[16] While Kennedy does not have the right to communicate a specific message on the ballot, he does have a right not be compelled to put forth a specific message—that is, I want your vote. Forcing him to remain on the ballot unmistakably compels that message.[17]

Consider it this way: the First Amendment provides "both the right to speak freely and the right to refrain from speaking at all."[18] No one can question that—after all, the "right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind."[19] Put another way, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[20] In just the same manner as Kennedy has a right to access the ballot; he has a concomitant right to get off the ballot.

Now that right is not absolute, but that right must be accorded just as much respect as what is afforded the major party candidates. The Equal Protection Clause provides that such unequal treatment will not be tolerated: "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."[21] The major parties had the right to remove themselves from the ballot and place a different candidate on the ballot for far longer than what Kennedy was afforded. That is, if he

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[16] *Cook v. Gralike,* 531 U.S. 510, 525 (2001) (quotation omitted).
[17] *See Wooley v. Maynard,* 430 U.S. 705, 713 (1977).
[18] *Id.*; *see also Bd. of Education v. Barnette,* 319 U.S. 624, 633–34 (1943).
[19] *Id.* (quotation omitted).
[20] *Hurley v. Irish-American Gay*, 515 U.S. 557, 573 (1995); *see also Pacific Gas & Electric Co. v. Pub. Util. Comm'n of Cal,* 475 U.S. 1, 11 (1986).
[21] *Anderson v. Celebrezze,* 460 U.S. 780, 793–94 (1983).

were a major party candidate, he would not be on the ballot. And since that's true, it's clear that his rights have been violated.

C. The Commission's contrary cases—especially *Lewin*—do not provide the authority it needs to undermine those principles.

As the Circuit Court and everyone involved in this litigation accepts: there is not much law on this issue. That is for various reasons, including that these cases move quickly and once the election is over the harm cannot be remedied. But the Commission does cite and quote from a Maryland case, *Lamone v. Lewin,* for the proposition that Kennedy has no constitutional right to remove his name from the ballot.[22] But it's important to read the case, not just pluck a quote from it. In *Lewin,* it was the Plaintiffs who sued to have the candidate removed from the ballot and their names placed on the ballot—the incumbent candidate had been convicted of a federal offense and was going to soon be ineligible for office.[23] And those candidates wanted his spot.[24] Here's the quote: "Appellees Nancy Lewin, Elinor Mitchell, and Christopher Ervin—two of whom were rival candidates for the central committee—filed this suit against Appellant Linda Lamone in her official capacity as State Administrator of Elections to have Mr. Oaks' name removed from the ballot."[25]

Here's the *actual* argument made in *Lewin* about the First Amendment rights in play when removing a person from the ballot—again, in opposition to *what* the candidate wanted*:* "The [Appellees] reason that, because Mr. Oaks was at least temporarily disqualified from serving in elective office by giving up his voter registration prior to the primary election (and was likely to be disqualified in any event by virtue of serving a future prison sentence after the primary election), any vote cast for him would be 'wasted,' disenfranchising the voter who cast the vote. In Appellees' view, because [the Commission] retained Mr. Oaks' name on the ballot, those provisions were responsible for any such disenfranchisement."[26]

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[22] *See* Comm'n Br. at 20, quoting *Lamone v. Lewin,* 190 A.3d 376, 391 (Md. App. 2018).
[23] *Id.* at 377.
[24] *Id.*
[25] *Id.* at 378.
[26] *Id.* at 390.

There is just no way to read *Lewin* as the lodestar for this issue. It's not only distinguishable, but it also doesn't deal with the same core constitutional arguments that are raised here. Instead, this Court should follow the first principles of Constitutional law set out above and throughout this case and find that compelling Kennedy to stay on the ballot violates his rights—rights protected by the Equal Protection Clause and the First Amendment.

D. *Hawkins* does not control here; instead, in equity a remedy can be fashioned.

As a final point, the Commission over-reads *Hawkins*, and its impact on this case. For one, *Hawkins* is not settled precedent—it's the order of a denial of review setting out pragmatic considerations that are not present here.[27] Indeed, Hawkins wanted *on* the ballot, Kennedy wants *off* the ballot. For Hawkins, new ballots had to be created, for Kennedy stickers only need to be applied. And while the Commission argues that this is a bridge-too-far in terms of logistics, it has to be remembered that this is a State law. The legislature has provided this very same mechanism to be used. The Commission and the clerks do not have free reign to ignore the legislature's commands or brand them as difficult and thus to be ignored. And in all this, it has to be remembered that Kennedy asked to be removed far before the ballots were approved and printed. The Commission cannot create this problem and then cite it as a reason for the Court not to honor Kennedy's rights and cure the very problem that it created.

There is no question that there is some cost to placing stickers on the ballots. But that's not the standard that *Hawkins* set, it dealt with voter confusion. The risk of voter confusion is too great to risk putting him on the ballot.[28] But there is no voter confusion when Kennedy's name is covered up. *Hawkins* does not counsel that administrative burdens trump constitutional rights; it simply provides that voter confusion will. And here,

[27] *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877.
[28] *Id.*

ordering that Kennedy's name be removed or covered up cures any risk of confusion.

What's more, the reasoning behind the stickers in case of death also align with what Kennedy seeks here. We have those stickers in place so that voters aren't disenfranchised—votes wasted on someone who cannot take office. Here, we want the stickers placed on so votes aren't wasted on someone who does not want to take office. In both cases, it is voter confusion that the stickers cure and in both cases it can and should be the proper course of action.

III. Conclusion

Kennedy is not asking for much. He's seeking equal treatment under the law—that's it. That equal treatment cannot be washed away by simply ignoring his rights or adopting a "once you declare, you're forever there" reading of the statute. Indeed, had Trump or Harris sought to withdraw on August 23, there would have been no problem. That sort of two-tiered treatment is anathema to our system of government. And it cannot be tolerated, especially when it undermines Kennedy's First Amendment rights. Again, he has the right to stump for Trump—that's his undeniable right—and yet that message is compromised when voters step into the voting booth and (at that critical moment, which the Supreme Court has termed the most important) they see Kennedy's name there. And for that reason, we ask that this Court reverse the Circuit Court and order his name taken off the ballot.

Dated at Madison, Wisconsin, September 21, 2024.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms with the rules contained in Wis. Stat. § 809.50(1) and (4) for a petition produced with a proportional serif font. The length of this petition is 2,198 words.

Electronically signed by Joseph A. Bugni
Joseph A. Bugni