STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP____

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondents-Respondents.

ROBERT F. KENNEDY, JR.'S PETITION FOR LEAVE TO APPEAL

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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INTRODUCTION

The Supreme Court has been clear: third-party candidates can't be treated as second-rate candidates, burdened by laws and restrictions that don't apply to the two major-party candidates. Yet, that's what's happened here. Robert F. Kennedy, Jr., told the Wisconsin Elections Commission that he wanted to be off Wisconsin's ballot. They said no, he doesn't have the right. Even though the two major parties had until September 3 to do so—the day Kennedy filed suit to get off the ballot—he was supposed to let the Commission know a full month earlier. A deadline that was actually *before* the DNC had even met and nominated Vice President Harris.

This is a Presidential election and entrenched political parties play games.[1] We all know it. And so, it's not surprising that this isn't the first time that a third-party candidate has been treated differently. When that's happened the Supreme Court has given extremely clear guidance on what the Constitution tolerates.[2] And it's not unequal treatment: "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."[3] Giving that unimpeachable principle teeth, the Court went on to make clear exactly what it meant: "[I]n a Presidential election[,] a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries."[4] In other words, two-tiered treatment with different standards

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[1] *E.g.*, Sarah Lehr, *Democrats Ask Wisconsin Supreme Court to Boot Green Party from Ballot*, WPR (Aug. 20, 2024).

[2] *Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983).

[3] *Id.*

[4] *Id.* at 794–95.

for third-party candidates will not be tolerated, especially in a Presidential election.[5]

After all, unequal treatment violates the very core principles of Equal Protection, and it trounces on the very promises that the First Amendment is supposed to hold inviolate—namely, being free from compelled speech and association. Indeed, Kennedy's rights are no less precious (or protected) than Biden's or Harris's, yet he's being treated differently because he's an independent candidate and did not (as his relatives did) march under the Democrat's banner.

Demanding that his rights not be diminished on that basis, Kennedy filed suit in Dane County—as he must.[6] He filed for a preliminary injunction and a temporary restraining order, seeking immediate relief and for the Commission to strike his name from the ballot.[7] That motion was denied late Friday afternoon, and the Court set a status conference more than a full week after he filed suit.[8] At that conference, a briefing schedule will be set, and Kennedy's claim will likely be mooted.

Kennedy made such haste in filing suit and now seeking an interlocutory appeal because once the ballots are printed and sent out, the Wisconsin Supreme Court in *Hawkins* has indicated that the claims may be moot.[9] The risk of voter confusion is too great.[10] And so Kennedy is running against the clock: as soon as the ballots are approved and sent out, the Commission (who has already rejected his request) will simply assert that *Hawkins* controls—arguing purported voter confusion trumps Kennedy's

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[5] *Id.*

[6] Wis. Stat. § 227.53(1)(a)3.

[7] App. 8–9, 19–20.

[8] App. 19–20.

[9] *Hawkins v. WEC*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W. 877.

[10] *Id.*

constitutional rights. Put differently, where the Constitution and the law don't favor the Commission, time does. Its victory will not be one of principle and precedent but procrastination.

Kennedy needs the Court to act and to act quickly; he needs the Court to address his constitutional arguments and take him off the ballot. It's supposed to be that "when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed."[11] To call foul (as the law demands), this Court cannot wait for the Circuit Court to act and the parties to take their time with the briefing.[12] Rather, Kennedy needs this Court to exercise its discretion, take this interlocutory appeal, and take the rare—but appropriate—step of addressing this claim immediately on the merits and granting Kennedy the relief he seeks: order his name not added to the ballot.

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[11] *James v. Heinrich*, 2021 WI 58, n.18, 397 Wis. 2d 517, 960 N.W.2d 350 (lead opinion) (quoted source omitted).

[12] *See In re Fort Worth Chamber of Com.*, 100 F.4th 528, 534–35 (5th Cir. 2024) ("Given the Chamber's diligence in seeking to expedite briefing and consideration, and its repeated requests for a ruling by specific dates so as to avoid substantial compliance with the new rule, the district court effectively denied the [preliminary injunction] motion by failing to rule on it by those dates," even though the "district court found good cause to expedite the briefing schedule.").

STATEMENT OF ISSUES PRESENTED

In deciding this appeal there are three issues concerning the merits.

1. The Equal Protection clause prevents states from unfairly burdening third-party candidates. Here, Wisconsin law demands that third-party candidates move to withdraw from the ballot a full month before the major parties. Is that arbitrary distinction based on party designation consistent with the Equal Protection Clause's guarantees?

2. The First Amendment forbids coerced speech and association. Here, Kennedy does not want his name on the ballot, which makes a statement he's explicitly disavowed—namely, I am seeking votes in Wisconsin a bid for President of the United States. Does forcing that statement and his association with the candidacy violate his First Amendment rights?

3. Wisconsin law provides that any person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The term "qualifies" has been misread by the Commission. Before the ballot was approved, Kennedy withdrew his candidacy and since he cannot be drafted into being a candidate—against his will—he no longer "qualifies" as one. Did the Commission err in its reading of the statue's text?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues raised in this appeal can be fully addressed by briefing, but if the Court has questions, Kennedy would ask for immediate oral argument. The decision of the Court should be published if the matter is decided on the merits.

STATEMENT OF THE FACTS

Like President Biden, Kennedy thought it was a good idea to run for President. Both have been lifelong politicians and have great name recognition. 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 presidential campaigns raged on, both men had second thoughts about continuing 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, stating for the world to hear: they wanted to be President.

Yet, they both eventfully changed their minds. And Wisconsin (like almost every other state) 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 with a campaign for office—and having the ballot declare they want citizens to vote for them—if they don't want it. Ours is a free country, rooted in liberty and the promise that everyone (even politicians) aren't compelled to give a message they disavow.[13]

But while Biden had until the first Tuesday in September to withdraw, 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	Before September 3, 2024	Before September 3, 2024 (but after August 6, 2024)
Deadline to submit a declaration of candidacy	September 3, 2024	August 6, 2024
Allowed to withdraw?	Yes	No

[13] Wis. Const. art. I, §§ 1, 3; *see also McCutcheon v. FEC*, 572 U.S. 185, 191–92 (2014).

The issue in the circuit court and on appeal is why? Why the different playbook for Kennedy as opposed to Biden. It can't be because of some compelling state need to check the signatures and makes sure that every "i" is dotted and "t" is crossed. Kennedy simply wants off the ballot, there is no rigorous testing of a candidate's qualifications when they want off the ballot—you simply do not include his name. It can't be that this is some impossible administrative task. Again, Kennedy is simply asking to not be put on the ballot. And getting off the ballot isn't something that *never* happens that these ballots. State law provides a mechanism for removing someone in case of death—so it can be done.[14] Without any reason—let alone a compelling reason—the only difference in the treatment rests on the prohibited fact that third-party candidates are treated differently (read: worse) than the two mainstream party candidates. Put in the constitutional parlance of our claims, this unequal treatment subordinates Kennedy's First Amendment rights beneath those of Biden and other major party candidates.

Refusing to tolerate that treatment, Kennedy sued the Commission and every other interested party.[15] He asked for a preliminary injunction and (knowing the importance of timing) a temporary restraining order.[16] The initial complaint and motion were filed on Tuesday, September 3, a follow-up motion the next day, and service was perfected a day later.[17] In the motion for a temporary restraining order, Kennedy asked for an order by 5:00 on Friday. Grant it, great. Deny it, fine—we'll appeal. All the while,

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[14] Wis. Stat. § 8.35(1).

[15] App. 1–7.

[16] App. 8–9.

[17] App. 10–12.

every newspaper and political talk show and news station in Wisconsin covered the story.[18]

As the hours passed, the WEC's attorneys put in their notice and we waited for a brief to follow.[19] Something that would defend Kennedy's unequal treatment. None came. Instead, on Friday, the WEC sent in a letter, asking that the motion be dismissed because they weren't properly served.[20] Again, it wasn't that they didn't have notice or that this wasn't an important issue or that time wasn't of the essence. They quibbled about who got the complaint. Again, ducking the merits would mean Kennedy's claim could be denied through procrastination and not principle.

Late Friday afternoon, the Circuit Court weighed in.[21] No temporary restraining order would come. No denial on the merits. Instead, in five days the lawyers would leisurely convene and set a briefing schedule on the merits. The principle has always been: justice delayed is justice denied. And the greater the delay in reaching the merits, the more likely it is (closing in on certainty) that they will never be heard and Kennedy's claims denied. Hence, the need for this interlocutory appeal.

The following is a brief but comprehensive timeline of the case, the filings, and Kennedy's attempts to get off the ballot and not have his name associated with something he has disavowed. The statutory deadlines are on the left and Kennedy's or WEC's actions are on the right.

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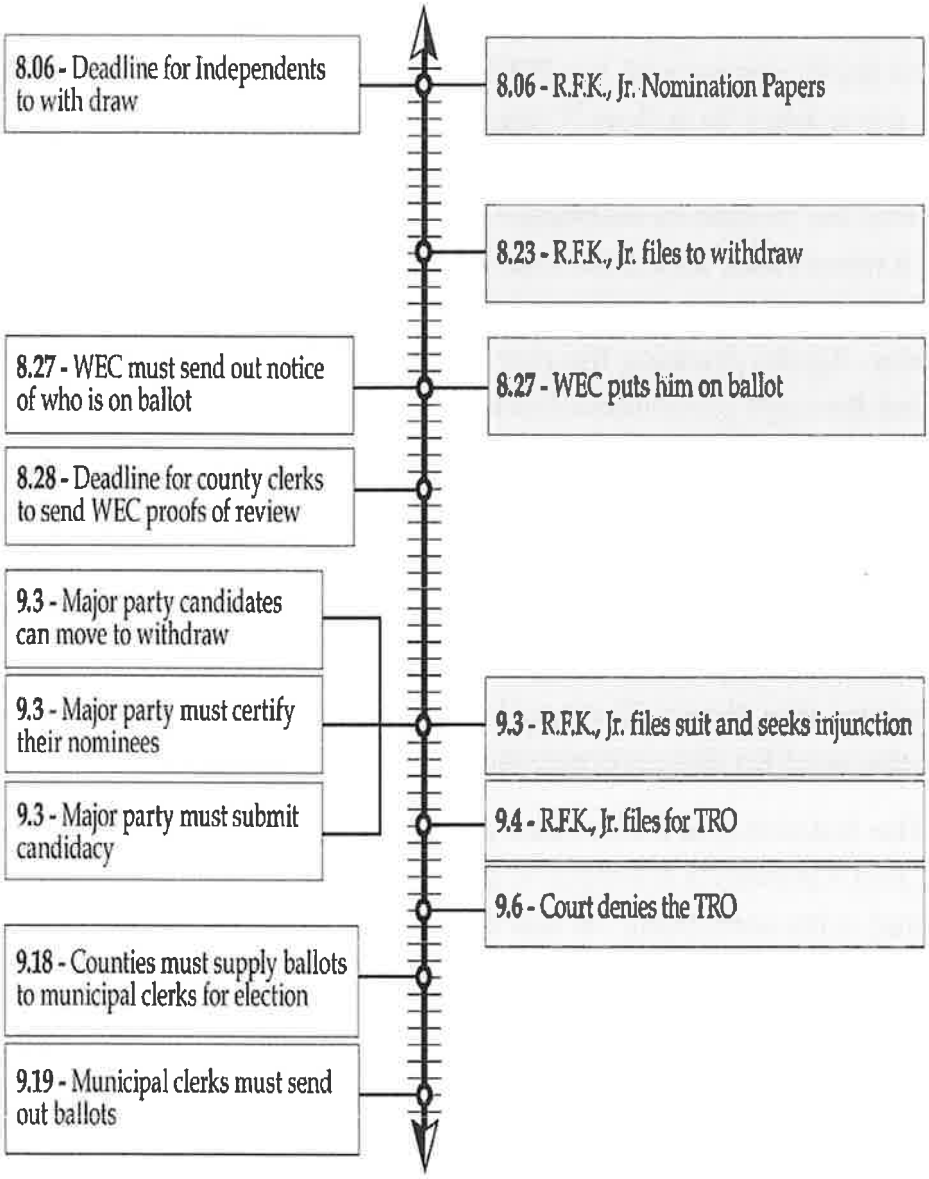
[18] Rich Kremer, *RFK Jr. Suing to Remove His Name from Wisconsin Presidential Ballot*, WPR (Sept. 4, 2024), https://tinyurl.com/yx3nzhyp.

[19] App. 13–18.

[20] App. 21.

[21] App. 19–20.


8.06 - Deadline for Independents to with draw
8.06 - R.F.K., Jr. Nomination Papers
8.23 - R.F.K., Jr. files to withdraw
8.27 - WEC must send out notice of who is on ballot
8.27 - WEC puts him on ballot
8.28 - Deadline for county clerks to send WEC proofs of review
9.3 - Major party candidates can move to withdraw
9.3 - Major party must certify their nominees
9.3 - Major party must submit candidacy
9.3 - R.F.K., Jr. files suit and seeks injunction
9.4 - R.F.K., Jr. files for TRO
9.6 - Court denies the TRO
9.18 - Counties must supply ballots to municipal clerks for election
9.19 - Municipal clerks must send out ballots

ARGUMENT

I. The trial court erred in refusing to enter the temporary restraining order and instead setting briefing

The facts outlined above and alleged in the complaint 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 violates the promise of equal protection for candidates. And it violates Kennedy's rights to free speech and association. What follows makes that plain. Indeed, little case law needs to be cited to know that Biden shouldn't be treated better than Kennedy. And everyone knows that putting someone on the ballot against their will—compelling their speech—is repugnant to the First Amendment. It's worth adding that suits like this have been filed in two other states and so far Kennedy has triumphed in both.[22] As much as political games and maneuvering are expected and tolerated every four years, once they trample on a person's constitutional rights, courts have to stop them: "when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed."[23]

But maybe this Court doesn't want to delve into those heady constitutional waters, and Kennedy is agnostic about how he gets off the ballot. If the Court wants an easy out from the constitutional issues, it simply has to read the statute. Wis. Stat. § 8.35, which falls under the heading "Vacancies after nomination," states in relevant part: "Any 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 text is "qualified to be on a ballot," which isn't simply a person who is over thirty-five and a citizen (the demands of

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[22] Paul Egan, *Appeals Court Reverses Earlier Rulings, Says RFK Jr.'s Name Should Be Removed from Ballot*, Detroit Free Press (Sept. 7, 2024, 5:37 AM), https://tinyurl.com/yeywa59y; App. 22–28.

[23] *Heinrich*, 2021 WI 58, n.18 (lead opinion) (quoted source omitted).

Article II); rather, a qualified candidate is one who has put himself out there and declared that he wants to be a candidate, **and one whom the Commission deems to be "qualified" to appear on the ballot**. Hence why the WEC requires all presidential candidates (including the major parties) to file a declaration of candidacy.[24] After all, a person isn't actually a viable (read: qualified) candidate until the Commission puts him on the ballot. And here, on August 23, 2024, Kennedy let the Commission know he wasn't interested far before the Commission made that decision on August 27, 2024. That is, he withdrew his declaration and with it any possibility that he could be considered a person who is "qualified to appear on the ballot."

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 ordered to not send out any ballot with Kennedy's name on it. To the extent that may have already happened—despite the haste that has attended Kennedy's every move and no indication any ballot has been printed yet—this Court should require the Commission to follow the procedures that govern what happens when a candidate dies.[25] In those instances, the Commission supplies the municipal clerks with stickers to put over the candidate's name. To be absolutely clear, Kennedy doesn't care *how* his name is excised from the ballot—he just doesn't want a single voter in Wisconsin to be confused and believe (for one second) that he's interested in their vote.

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[24] *Deadline to Certify Presidential & Vice Presidential Candidates*, WEC (last visited Sept. 7, 2024), https://tinyurl.com/mr2su3hv.

[25] Wis. Stat. § 8.35(2)(d).

A. Treating third-party candidates differently, with additional burdens and restrictions, violates the Equal Protection Clause's guarantees.

The Supreme Court has consistently held: statutes cannot "unfairly or unnecessarily" burden an independent candidate's interest in the "availability of political opportunity."[26] To do so, violates the First Amendment. The precedents surrounding ballot-access issues embody a deep-seated fear of two-party entrenchment and what it portends for those outside the two parties—a marginalized and compromised voice.[27] (It's worth noting that *all* of the members of the Commission are from the two major parties - party leaders in the legislature are in charge of appointing commissioners.)[28] Consistent with that principle, the Supreme Court has held that a statute restricting ballot access is unconstitutional when it practically prohibited a minor political party with a "very small number of members" from appearing on the ballot.[29] It reasoned, voters have a right to "associate for the advancement of political beliefs" and to "cast their votes effectively," regardless of their "political persuasion."[30] Axiomatically, the First and Fourteenth Amendments, viewed together, require that whatever opportunity the major political parties have to associate or disassociate from a particular candidate be provided on equal terms to independent, third-party candidates.[31] In a word, what's good for the goose is good for the gander.

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[26] *See Lubin v. Panish*, 415 U.S. 709, 716 (1974).

[27] *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

[28] *Members and Administrator*, WEC (last visited Sept. 7, 2024, 1:24 PM), https://tinyurl.com/43kdwxs4; Wis. Stat. § 15.61(1)(a).

[29] *Williams*, 393 U.S. at 24.

[30] *Id.* at 30.

[31] *See Janus v. AFSCME*, 585 U.S. 878, 891–92 (2018).

Yet, from time to time (as we have here), third-party candidates have been treated differently 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 Vice Presidential candidate—despite the Republicans and Democrats having that exact same ability on an extended timeline.[32] 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*.[33]

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.[34]

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.[35]

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[32] OAG 55-80 (Sept. 17, 1980) (Unpublished Opinion) (1980 WL 119496 (Wis.A.G.)); *see also Brown County v. Brown Cnty. Taxpayers Ass.*, 2022 WI 13, ¶ 32, 400 Wis. 2d 781, 971 N.W.2d 491.

[33] *Id.*

[34] *Id.*

[35] *Id.*

Here, Wisconsin's deadlines for ballot access violate this rule. They hamstring third-party candidates, while 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" to "certify the names of the party's nominees for president and vice president" to the 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."[36] It's worth adding (for a third time) that Kennedy had to withdraw *before* the DNC had even announced its candidate or his opponent.

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

[36] Wis. Stat. § 8.20(8)(am).

arbitrary, two-tiered deadlines prevent Kennedy (unlike President Biden) from withdrawing and making sure that his message is clear.

The First Amendment safeguards fundamental rights, and unequal treatment of such rights triggers strict scrutiny.[37] In First Amendment parlance: the major parties had an additional month to ensure that Biden was not coerced into speaking a message he didn't desire—I want votes for President—and he was not compelled to associate with a campaign he's not part of. And put in terms of the Equal Protection Clause, if the first Tuesday in September is "good enough" for the Democrats and Republicans to withdraw, then it's "good enough" for Kennedy and any other independent candidate who wants to remove himself or herself from the ballot. If nothing else, when it comes to fundamental rights, the promise of Equal Protection provides that "good enough" for the major parties applies with equal force to independents.

B. Printing Kennedy's name on the ballot against his will violates the First Amendment's guarantees against compelled speech and association.

The Equal Protection Clause assures Kennedy the same footing as the major parties, but his First Amendment's rights are even greater.[38] Here, forcing Kennedy to remain on the ballot constitutes compelled speech—he must state that he's a candidate for something in Wisconsin he has publicly avowed he's not. And it doubles as compelled association: the right to associate also entails the right not to associate.

Those principles are more than an academic matter to be debated in Constitutional law seminars. Compelling Kennedy's association with the campaign comes with real world health and safety risks. After all, President

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[37] *Monroe Cnty. Dep't of Health & Hum. Servs. v. Kelli B.*, 2004 WI 48, ¶ 17, 271 Wis. 2d 51, 678 N.W.2d 831.

[38] *McCutcheon*, 572 U.S. at 191.

Biden ordered the U.S. Secret Service to protect Kennedy in July, and *after* Kennedy suspended his campaign that protection was yanked.[39] Continued association as a candidate in the presidential race in Wisconsin thus brings obvious health and safety risks. After all, why give Kennedy Secret Service protection if it didn't, and why pull it once he quit the race. Yet including Kennedy's name on the ballot (as the Commission insists) forces his association in this political process against his will and with obvious threat to his person. The First Amendment does not allow for such involuntary action, especially as it relates to speech and association.

Defendants are free to write and share with the world their opinion about Mr. Kennedy. That message will be viewed as coming **from Defendants**. But when they place Mr. Kennedy's name on the ballot, voters believe that is because Mr. Kennedy wanted his name on the ballot, and that he is asking for their support and their vote. That message will be viewed as coming **from Mr. Kennedy**, not from Defendants. This is precisely the form of compelled speech that the Wisconsin Constitution and U.S. Constitution are intended to protect against. While Defendants are not harmed in any way by simply leaving Mr. Kennedy's name off of the ballot, compelling Mr. Kennedy to convey a false message to every citizen of Wisconsin that he is vying for their vote in this state, when he is not, and then subjecting him to the reputational and irreparable harm, and the loss of good will, that flows from this compelled speech.

Among the great promises of the U.S. and Wisconsin Constitutions is the right to free speech.[40] 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 political

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[39] Zeke Miller and Colleen Long, *Biden Orders Secret Service to Protect RFK Jr. After Attempt on Trump's Life,* Associated Press (July 15, 2024, 4:48 PM), https://tinyurl.com/zn3w2w6j; Kaia Hubbard and Allison Novelo, *RFK Jr.'s Scret Service Protection Ends After Campaign Suspended,* CBS News (Aug. 25, 2024, 2:49 PM), https://tinyurl.com/4tctyzkj.

[40] Wis. Const. art. I, § 3.

office.'"[41] 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."[42] That right "includes both the right to speak freely and the right to refrain from speaking at all."[43] "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[.]"[44] And that support extends even to candidate-eligibility requirements.[45]

Here, Kennedy is a national political figure and he does not want to tell, yell, or even hint to the great citizens of Wisconsin that he is vying for their votes. Placing his name on the ballot against his will subjects him to derision, anger, reputational harm, and loss of good will by those who would vote for him based on this speech only to later find out their vote was wasted. Imagine the serviceman or woman stationed overseas who doesn't get the bombardment of political advertisements most Wisconsinites receive, who's on the front lines and doesn't have the luxury to check-in and see that Kennedy has dropped out. That serviceman shouldn't have their vote wasted because Kennedy was compelled to give a message he didn't endorse. Free speech means a free flow of information within the economy of ideas. The Commission cannot, however, make Kennedy a conduit for a message that he does not want to promote and that isn't even accurate.

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

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[41] *McCutcheon*, 572 U.S. at 191–92.

[42] *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 47, 363 Wis. 2d 1, 866 N.W.2d 165.

[43] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[44] *Janus*, 585 U.S. at 892–93.

[45] *Anderson*, 460 U.S. at 786.

presidential election. By forcibly including Kennedy's name on the ballot, the Commission is falsely representing to the people of Wisconsin that Kennedy is running against President Trump in Wisconsin 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 unmistakably conveyed.[46] 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. "Freedom of association ... plainly presupposes a freedom not to associate."[47] "[F]orced associations that burden protected speech are impermissible."[48] 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. For that reason, the Commission's decision not only violates the Equal Protection Clause, it also violates the First Amendment.

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[46] *Soltysik v. Padilla*, 910 F.3d 438, 447–48 (9th Cir. 2018) (holding 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).

[47] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also Janus*, 585 U.S. at 892.

[48] *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986).

C. Beyond the Constitution's guarantees, even the plain reading of the text confirms Kennedy should not be 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.[49] 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."[50] A correct interpretation of this statute avoids (for today) all of the constitutional issues.

While Kennedy clearly filed nomination 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 (e.g., a declaration of candidacy) 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 want no part of this. So, his withdrawal doesn't come within the limits of § 8.35(1) because he hadn't yet qualified to appear on the ballot before he withdraw. Put differently, and in the statutory language of Wis. Stat. § 8.30(1)(b), he was, by his own "admission," "ineligible to be nominated or elected."[51] The Commission's decision to the contrary, runs roughshod over the plain text.

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[49] *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 31, 391 Wis. 2d 497, 942 N.W.2d 900.

[50] Wis. Stat. § 8.35(1).

[51] Wis. Stat. § 8.30(1)(b).

The Commission may argue that "qualified" means "qualified" to hold office, e.g., the qualifications set forth in the United States Constitution.[52] However, 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.[53] To do so, violates the plain-text canons and it goes contrary to the legislature's clear choice of language.

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In the end, as interesting as constitutional issues are in the midst of a Presidential election, this case is really very, *very* simple. If it's good enough for the Democrats to have until 5 p.m. on the first Tuesday in September to withdraw their candidate and replace him with someone else, then it's good enough for Kennedy and every other independent candidate. That basic principle of fundamental fairness is given force by the Equal Protection Clause and animated by the First Amendment. Neither provision of the Constitution tolerates third-party candidates being treated as second-class candidates. And 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 or, if it's the case that ballots have printed and been sent out (despite Kennedy's best efforts to ensure that didn't needlessly happen and no indication that it has happened) that the municipal clerks be directed to cover his name on every ballot with a sticker.

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[52] U.S. Const. art. II, §1.

[53] *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 653, 681 N.W.2d 110.

II. This Court should accept the interlocutory appeal and decide this case on its merits.

This Court is very familiar with the standards for interlocutory appeals and they won't be needlessly reiterated—though they are all present here.[54] The most important factor is likely success on the merits. As one scholar has noted:

> The most important criterion for determining whether an [interlocutory] appeal should be granted is not expressly included among the statutory criteria listed in section 808.03(2), although it is implicit in those criteria. This consideration is whether the petition for leave to appeal shows a substantial likelihood of success on the merits. . . .Likelihood of success on the merits is the first question the court will consider when responding to a petition for leave to appeal because the court will want to ensure that an appeal will not simply serve to delay and defeat the ends of justice, rather than expedite and clarify the proceedings.[55]

In seeking this interlocutory appeal, Kenedy isn't seeking delay, but speed; he's not seeking to defeat the ends of justice, but to make sure that justice delayed does not mean justice denied. After all, *Hawkins* counsels that there is a real fear that Kennedy's First and Fourteenth Amendment rights will be subordinated to concerns about voter confusion (even though it's the Commission that is causing the confusion by forcing his name to appear on the ballot). The only way to ensure that doesn't happen is to move with speed. And that isn't happening in the Circuit Court, where briefing

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[54] Wis. Stat. § 808.03(2); *See Cascade Mt. v. Capitol Indem. Corp.*, 212 Wis. 2d, 265, 267, 569 N.W.2d 45 (Ct. App. 1997).

[55] Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 9.4 (6th ed. 2014); *see also State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991).

will be set on Wednesday. Instead, it has to happen here, where this Court can quickly enter the appropriate order. Indeed, this is not the case where any deference would be given to the trial court because there is no factual issue in dispute.

To that end, this request for an interlocutory appeal is appropriate. Denying the temporary restraining order was an error of law. As his petition, motion, and brief all set out, Kennedy had met the statutory criteria for granting the order. It is per se an erroneous exercise of discretion when the Circuit does (as it did here) refuse to consider the most important factor at play: the irreparable harm that flows from inaction.

Looking at the four factors that a court considers when ordering injunctive relief—whether it's a preliminary injunction or a temporary restraining order—the two most important considerations are success on the merits and the harm that results from denial.[56] Here, the success has been covered for twenty pages, so too has the harm. If the ballots get released, the Commission will have created the very problem it will cite as the reason for denying relief: voter confusion because ballots have already issued. Granting the injunction is the only way to stop that. Considering the other two factors, there is no other means to stop this and preserved the status quo—Kennedy tried withdrawing his name, now judicial intervention is all that he has left to ensure that ballots are not printed with his name on them.

CONCLUSION

In the no-holds barred world of presidential elections, few things should come as a surprise. Yet, the Commission (again, made up of appointees from the two major parties) has accomplished that. It's used Kennedy, a third-party candidate as a means of creating voter confusion. And it has done so by creating a tiered system for a politician's ability to withdraw from the ballot; it has done so by compromising Kennedy's First

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[56] *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, 370 Wis. 2d 644, 883 N.W.2d 154.

Amendment rights; and it has done so by misreading the very statutes it's supposed to be governed by. It is up to this Court to dispel that confusion and the violation of Kennedy's rights by accepting this interlocutory appeal and entering the preliminary injunction against the ballots going out.

Dated at Madison, Wisconsin, September 9, 2024.

Respectfully submitted,

Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff *Pro Hac Vice* Motion forthcoming	ROBERT F. KENNEDY, JR., *Petitioner* *Electronically signed by Joseph A. Bugni* Joseph A. Bugni *Wisconsin Bar No.* 1062514 HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com (608) 257-0945

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 6,057 words.

Electronically signed by Joseph A. Bugni
Joseph A. Bugni

INDEX TO APPENDIX

FILED
09-03-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV002653
Honorable Stephen E Ehlke
Branch 15

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ROBERT F. KENNEDY, JR.,

Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.

Respondent.

Case Code: 30607
[Administrative
Agency Revie]

PETITION FOR REVIEW COVER LETTER

TO: **Wisconsin Elections Commission**
Meagan Wolfe; Ann S. Jacobs; Marge Bostelmann; Don M. Millis; Carrie Riepl; Robert Spindell; Mark L. Thomsen
201 West Washington Avenue, Second Floor
P.O. Box 7984
Madison, WI 53707-7984

Wisconsin Attorney General
Josh Kaul
Wisconsin Department of Justice
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Wisconsin President of the Senate
Chris Kapenga
Wisconsin State Legislature
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State Capitol
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Wisconsin Senate Majority Leader
Devin LeMahieu
Wisconsin State Legislature

Room 211 South
State Capitol
P.O. Box 7882
Madison, WI 53707
Sen.LeMahieu@legis.wisconsin.gov

Wisconsin Speaker of the Assembly
Robin Vos
Wisconsin State Legislature
Room 217 West
State Capitol
Madison, WI 53708
Rep.Vos@legis.wisconsin.gov

You are hereby notified that the Petitioner named above has filed a review of a decision by the Wisconsin Elections Commission, challenging the decision to be unconstitutional. You are being served the Petition of Review pursuant to Wis. Stat. § 893.825.

Respectfully submitted this 3rd day of September, 2024.

ROBERT F. KENNEDY, JR., *Petitioner*

Electronically signed by Joseph A. Bugni
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Wisconsin Bar No. 1062514
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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ROBERT F. KENNEDY, JR.,

Petitioner,

v.

WISCONSIN ELECTION COMMISSION, ET AL.,

Respondent.

Case Code: 30607
[Administrative Agency Review]

PETITION FOR JUDICIAL REVIEW

Petitioner Robert F. Kennedy, Jr. ("Kennedy" or "Petitioner") by his undersigned counsel, petitions the Court pursuant to Wis. Stat. § 227.52 to review the decision of the Respondent, the Wisconsin Election Commission ("WEC," "Commission" or "Respondent") dated August 27, 2024, which held that Robert F. Kennedy, Jr. would be included on the November 5, 2024 General Election ballot as an independent party. With no compelling reason, the WEC's decision violates the statute, Kennedy's Equal Protection rights, and his First Amendment Rights under the First and Fourteenth Amendments of the U.S. Constitution and Article I, sections 1 and 3 of the Wisconsin Constitution.

The grounds for this Petition are as follows:

PARTIES

1. Kennedy is a resident in Katonah, New York and previously filed to be a candidate in Wisconsin for the upcoming general election for the office of President of the United States.

2. WEC is a Wisconsin organization with its principal office at 201 West Washington Avenue, Second Floor, Madison Wisconsin 53703. The meeting and vote in question took place in Madison, Wisconsin, located in Dane County.

VENUE AND JURISDICTION

3. Venue is proper in Dane County for the following reasons. WEC's principal office is located in Dane County, and the decision that Kennedy is aggrieved by was held in Dane County. Pursuant to Wis. Stat. § 227.53(1)(a)(3), venue "shall be held in the county . . . where the dispute arose."

4. This Court has jurisdiction under Wis. Stat. § 227.52, which permits judicial review of administrative decisions which "adversely affect the substantial interest of any person, whether by action or inaction, whether affirmative or negative in form."

FACTS

5. Kennedy filed to be a candidate for the office of President of the United States in Wisconsin for the November 5, 2024 General Election on April 19, 2023.

6. Kennedy publicly suspended his Presidential campaign on August 23, 2024.

7. The same day that he suspended his campaign, Kennedy requested to the WEC that his name not appear on Wisconsin's general election ballot.

8. On August 27, 2024, WEC held a Ballot Access Meeting in Madison, Wisconsin. During this meeting, the Commission voted on a motion that would put Kennedy on the November 5, 2024 General Election ballot. The Motion carried 5-1.

9. The motion to include Kennedy on the ballot came four days after his request to be removed. Kennedy was summarily aggrieved by the WEC's decision.

GROUNDS FOR REVIEW

10. Kennedy is substantially aggrieved by the WEC's decision to keep him on the November 5, 2024 General Election Ballot as a presidential candidate. The WEC's decision is unlawful, arbitrary, capricious, erroneous, and an abuse of discretion, and should be reversed, vacated, and remanded for the following reasons:

    a. The WEC's decision violates Kennedy's First Amendment Rights by compelling him to state that he is a candidate for something that he has publicly stated he is not. Compounded with this, Kennedy is being compelled to associate with a campaign that he has publicly disavowed. The First Amendment protects Kennedy from being forced to convey a message that he is against both through speech and association, and the WEC's decision directly violates both protections.

    b. The WEC's decision places Kennedy's own health and safety at risk. Following Kennedy's decision to terminate his presidential bid, the Secret Service protection afforded to presidential candidates was terminated. By including Kennedy's name on the ballot, the WEC

forces his association in this political process, which poses significant health and safety risks to Kennedy.

c. The WEC had no compelling reason for keeping Kennedy on the November 2024 General Election ballot. The motion to include Kennedy as a presidential candidate directly violated his request to be removed from the ballot, which was submitted four days prior to the WEC meeting. The Commission has no reason to prevent a candidate from dropping out when he acts in good faith to remove himself.

d. The WEC leaves Kennedy with almost zero recourse to be made whole from their decision. Immediate judicial review pursuant to Wis. Stat. § 227.52 is the only practical recourse. This is Kennedy's only source of recourse.

RELIEF REQUESTED

WHEREFORE, Petitioner requests judgment in its favor as follows:

A. Preliminarily order WEC to advise all municipal clerks in this state that they should not mail any absentee ballots until this court has issued a ruling on the merits of this Petition.

B. Declaring that the WEC's decision is reversed, set aside, and vacated, or in the alternative, remanded to the WEC for further action; and

C. Such other relief as the Court may deem just and equitable.

Respectfully submitted this 3rd day of September, 2024.

Respectfully submitted,

ROBERT F. KENNEDY, JR., *Petitioner*

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ROBERT F. KENNEDY, JR.,

Petitioner,

v.

WISCONSIN ELECTION COMMISSION, ET AL.,

Respondent.

Case Code: 30607
[Administrative Agency Review]

PETITIONER'S NOTICE OF MOTION AND MOTION FOR A TEMPORARY INJUNCTION

TO: Wisconsin Election Commission

PLEASE TAKE NOTICE that Petitioner Robert F. Kennedy, through counsel, moves this Court, pursuant to Wis. Stat. §§ 227.54 and 813.02, for a temporary injunction requiring the WEC to not include Kennedy as a candidate on the November 5, 2024 General Election ballot and preventing them from mailing any absentee ballots until this Court has issued a ruling on the merits of the Petition. The Petitioner asks this Court to set this matter for a hearing as soon as possible.

In support of this motion, the Petitioner states the following:

1. Kennedy filed to be a candidate for the office of President of the United States in Wisconsin for the November 5, 2024 General Election on April 19, 2023.

2. Kennedy publicly suspended his Presidential campaign on August 23, 2024.

3. The same day that he suspended his campaign, Kennedy requested to the WEC that his name not appear on Wisconsin's general election ballot.

4. On August 27, 2024, WEC held a Ballot Access Meeting in Madison, Wisconsin. During this meeting, the Commission voted on a motion that would put Kennedy on the November 5, 2024 General Election ballot. The Motion carried 5-1.

5. The motion to include Kennedy on the ballot came four days after his request to be removed. Kennedy was summarily aggrieved by the WEC's decision.

This motion is further supported by the Petitioner's Brief in Support of the Motion for a Temporary Injunction.

Respectfully submitted this 3rd day of September, 2024.

ROBERT F. KENNEDY, JR., *Petitioner*

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STATE OF WISCONSIN CIRCUIT COURT BRANCH ___ DANE COUNTY

ROBERT F KENNEDY, JR.,

Petitioner,

v.

CASE NO: 2024CV002653

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondent.

PETITIONER'S NOTICE OF MOTION AND MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER

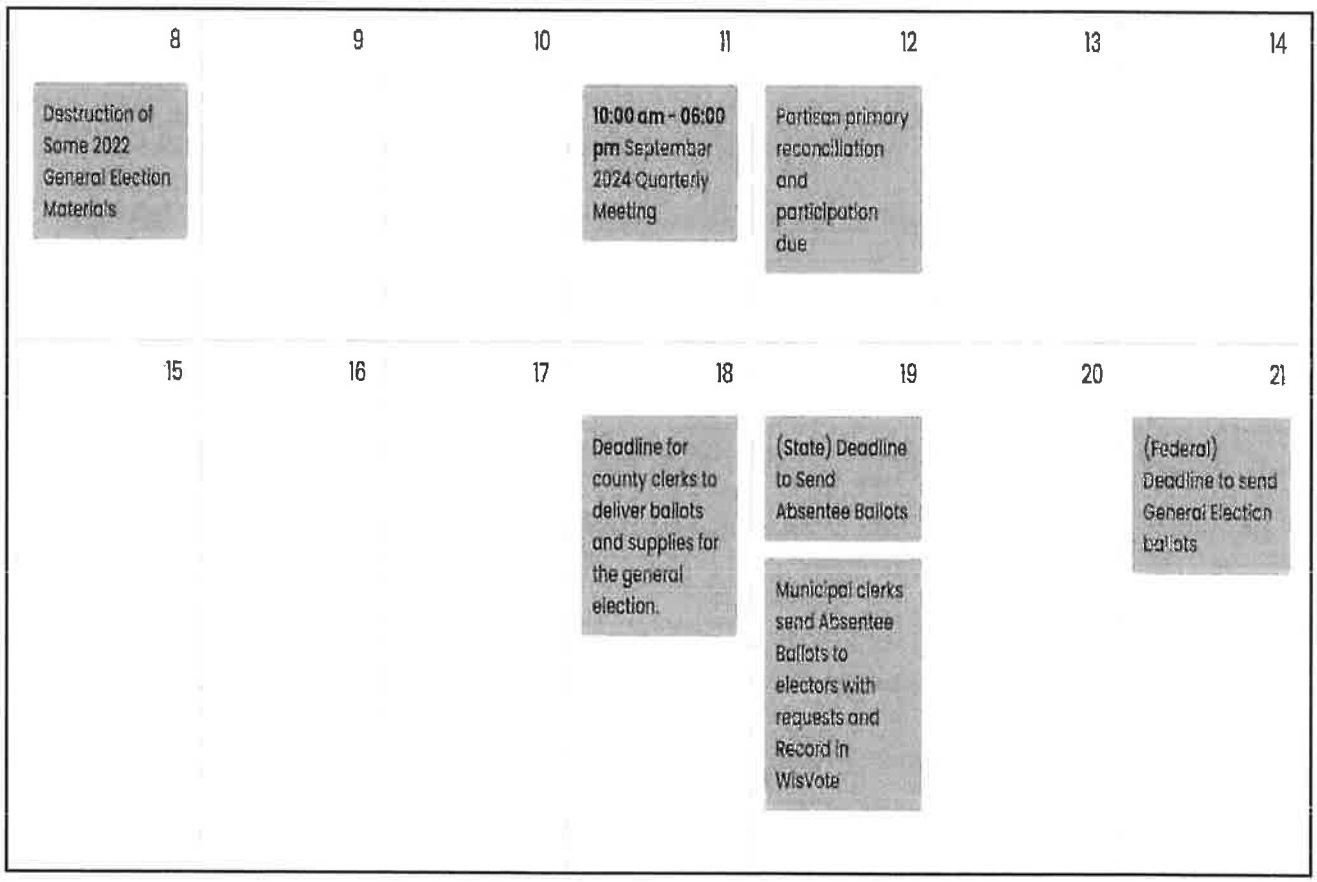
Petitioner Robert F. Kennedy, by undersigned counsel, hereby moves the Court for an emergency, *ex parte* temporary restraining order under Wis. Stat. § 813.025. Petitioner further requests that this motion be decided without a hearing by 5:00 p.m. on September 6, 2024.

The grounds for this motion are set out in full in the brief in support of the motion for temporary injunction. The need for emergency relief is supported in particular by these four salient facts.

1. Petitioner was previously a candidate for the Presidency of the United States and has sought to be removed from the ballot in Wisconsin.
2. His ability to be removed from the ballot could be compromised once those ballots begin printing. As the Wisconsin Supreme Court held in *Hawkins*: "We agree with the Commission that requiring municipalities to print and send a second round of

ballots to voters who already received, and potentially already returned, their first ballot would result in confusion and disarray and would undermine confidence in the general election results."[1]

3. When it comes to ballots in Wisconsin, there are three deadlines that matter: The August 28 deadline for County Clerks to prepare ballots and send proofs to the WEC, which has already passed, and two looming deadlines, September 18 and 19, when the ballots have to be delivered. Here is a screenshot from the very helpful website at WEC laying out the dates for September:



[1] *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877.

4. These ballots can, however, be approved and sent out before those deadlines. That is why in the motion for temporary injunction requests that the Court "Preliminarily order WEC to advise all municipal clerks in this state that they should not print or mail any absentee ballots until this court has issued a ruling on the merits of this Petition."
5. Additionally, upon information and belief, all of the defendants have been served. Undersigned counsel does not, however, have the Affidavits of service which will, I am told, arrive before ten tomorrow.

Given the looming deadlines and the possibility of Petitioner's claims being mooted, Petitioner asks that this Court enter an emergency, *ex parte* temporary restraining order under Wis. Stat. § 813.025 by 5:00 p.m. on September 6, 2024.

Respectfully submitted this 4th day of September, 2024.

Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff *Pro Hac Vice* Motion forthcoming	ROBERT F. KENNEDY, JR., *Petitioner* *Electronically signed by Joseph A. Bugni* Joseph A. Bugni *Wisconsin Bar No.* 1062514 HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com (608) 257-0945

FILED
09-05-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV002653

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

ROBERT F. KENNEDY, JR.,

Petitioner,

v. Case No. 24-CV-2653

WISCONSIN ELECTIONS COMMISSION,

Respondent.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that, subject to and without waiving any objections or defenses, including but not limited to insufficient service of process, jurisdiction, or this Court's competency to proceed, Assistant Attorney General Steven C. Kilpatrick appears as counsel for Respondent Wisconsin Elections Commission in the above-captioned action, and therefore requests that all documents hereafter filed in this action be served upon Assistant Attorney General Killpatrick personally at his office located at 17 West Main Street, Madison, Wisconsin 53703; by first-class mail at Post Office Box 7857, Madison, Wisconsin 53707-7857; or via the electronic filing system for the Dane County Circuit Court.

Dated this 5th day of September 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

Attorneys for Respondent

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kilpatricksc@doj.state.wi.us

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a *Notice of Appearance* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of September 2024.

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General

FILED
09-05-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV002653

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

ROBERT F. KENNEDY, JR.,

Petitioner,

v. Case No. 24-CV-2653

WISCONSIN ELECTIONS COMMISSION,

Respondent.

NOTICE OF ADDITIONAL APPEARANCE

PLEASE TAKE NOTICE that, subject to and without waiving any objections or defenses, including but not limited to insufficient service of process, jurisdiction, or this Court's competency to proceed, Assistant Attorney General Charlotte Gibson appears as counsel for Respondent in the above-captioned action, and therefore requests that all documents hereafter filed in this action be served upon Assistant Attorney General Gibson personally at her office located at 17 West Main Street, Madison, Wisconsin 53703; by first-class mail at Post Office Box 7857, Madison, Wisconsin 53707-7857; or via the Wisconsin Circuit Court Electronic Filing System.

Assistant Attorney General Charlotte Gibson appears in addition to Assistant Attorney General Steven C. Kilpatrick who has previously appeared in this matter.

Dated this 5th day of September 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General
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Attorneys for Respondent

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gibsoncj@doj.state.wi.us

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a *Notice of Appearance* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of September 2024.

Electronically signed by Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General

FILED
09-05-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV002653

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

ROBERT F. KENNEDY, JR.,

Petitioner,

v. Case No. 24-CV-2653

WISCONSIN ELECTIONS COMMISSION,

Respondent.

NOTICE OF ADDITIONAL APPEARANCE

PLEASE TAKE NOTICE that, subject to and without waiving any objections or defenses, including but not limited to insufficient service of process, jurisdiction, or this Court's competency to proceed, Assistant Attorney General Lynn K. Lodahl appears as counsel for Respondent in the above-captioned action, and therefore requests that all documents hereafter filed in this action be served upon Assistant Attorney General Lodahl personally at her office located at 17 West Main Street, Madison, Wisconsin 53703; by first-class mail at Post Office Box 7857, Madison, Wisconsin 53707-7857; or via the Wisconsin Circuit Court Electronic Filing System.

Assistant Attorney General Lynn K. Lodahl appears in addition to Assistant Attorneys General Steven C. Kilpatrick and Charlotte Gibson who have previously appeared in this matter.

Dated this 5th day of September 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Lynn K. Lodahl
LYNN K. LODAHL
Assistant Attorney General
State Bar #1087992

Attorneys for Respondent

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a *Notice of Additional Appearance* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of September 2024.

Electronically signed by:

Lynn K. Lodahl
LYNN K. LODAHL
Assistant Attorney General

FILED
09-06-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV002653

BY THE COURT:

DATE SIGNED: September 6, 2024

Electronically signed by Stephen E Ehlke
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 15 DANE COUNTY

ROBERT F. KENNEDY, JR.,

Petitioner,

v. Case No. 2024-CV-2653

WISCONSIN ELECTIONS COMMISSION, et al.,

Respondents.

DECISION AND ORDER
DENYING PETITIONER'S MOTION FOR AN EX PARTE ORDER

Petitioner Robert F. Kennedy, Jr., originally filed a petition commencing a chapter 227 judicial review action to challenge the Commission's decision approving his nomination papers and the inclusion of his name as an independent candidate for President on the November 5, 2024 General Election ballot. Petitioner subsequently filed a motion for emergency *ex parte* temporary restraining order, asking the court to rule on it, without hearing, by 5:00 p.m. today. In his motion for an *ex parte* order Petitioner asks this court to stay enforcement of the Commission's order placing him on the November ballot. Respondent Wisconsin Elections Commission opposes any *ex parte* temporary restraining order and urges the Court to deny Petitioner's request.

Having considered Petitioner's request for an *ex parte* temporary restraining order, it is denied. A matter of such consequence deserves a full development of the record with appropriate briefing by all sides. Accordingly, a telephonic scheduling conference is scheduled for September 11, 2024 at 2:15 p.m. IT IS SO ORDERED.

FILED
09-06-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV002653

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**

Robert F. Kennedy Jr. vs. Wisconsin Elections Commission, et al

Notice of Hearing

Case No: 2024CV002653

COURT ORIGINAL

This case is scheduled for: **Telephone scheduling conference**

NOTICE OF HEARING		
Date 09-11-2024	**Time** 02:15 pm	**Location** 7th Floor, Courtroom 7D - Branch 15 215 S Hamilton Street Madison WI 53703-3285
Circuit Court Judge/Circuit Court Commissioner Stephen E Ehlke		
Re Administrative Agency Review		

This matter will not be adjourned by the court except upon formal motion for good cause or with the specific approval of the court upon stipulation by all parties.

PETITIONER'S ATTORNEY IS TO SET UP THE TELEPHONE CALL FOR THIS HEARING. ALL OTHER PARTIES MUST PROVIDE A TELEPHONE NUMBER TO PETITIONER'S ATTORNEY NO LATER THAN 3 BUSINESS DAYS PRIOR TO HEARING DATE. THE COURT CAN BE CALLED AT (608) 267-2517.

If you require reasonable accommodations due to a disability to participate in the court process, please call 608-266-4311 prior to the scheduled court date. Please note that the court does not provide transportation.

Dane County Circuit Court
Date: September 6, 2024

DISTRIBUTION	Address	Service Type
Court Original		
Cricket Beeson		Electronic Notice
Elizabeth A. Brehm	745 Fifth Avenue, Suite 500, New York, NY 10151	Mail Notice
Joseph Aragorn Bugni		Electronic Notice
Aaron Siri	745 Fifth Avenue, Suite 500, New York, NY 10151	Mail Notice
Charlotte Gibson		Electronic Notice
Steven Carl Kilpatrick		Electronic Notice
Lynn K Lodahl		Electronic Notice

STATE OF MICHIGAN

COURT OF APPEALS

ROBERT F. KENNEDY JR.,

Plaintiff-Appellant,

v

SECRETARY OF STATE,

Defendant-Appellee.

UNPUBLISHED
September 6, 2024

No. 372349
Court of Claims
LC No. 24-000138-MB

Before: GADOLA, C.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Robert F. Kennedy, Jr., appeals as of right from the September 3, 2024 opinion and order of the Court of Claims that denied his request for mandamus, declaratory, and injunctive relief. Plaintiff wanted to remove his name from the general election ballot, but defendant denied his request. Because the statutory prohibition against candidate withdrawal cited by defendant does not apply to plaintiff, we REVERSE and REMAND for entry of an order granting immediate mandamus relief to plaintiff.

FACTS AND PROCEDURAL HISTORY

Plaintiff sought, and obtained, the nomination of the Natural Law Party to appear on the ballot in Michigan. In April 2024, the Natural Law Party filed a certification of nomination that listed plaintiff as the party's nominee.

In August 2024, plaintiff suspended his presidential campaign. On August 23, 2024, plaintiff wrote a letter to Jonathan Brater, the Director of the Michigan Bureau of Elections, and asked that his name not appear on the ballot. Plaintiff informed Director Brater that he intended to withdraw from the election.

Defendant responded in a short email on August 26, 2024 and declined to accept plaintiff's withdrawal. According to defendant's email, "Michigan Election Law does not permit minor party candidates to withdraw. MCL 168.686a(2)." Defendant has made no effort to rely on that subsection once the litigation in this matter began, however, and it appears by all accounts that that subsection does not apply to plaintiff.

After additional email exchanges, defendant again denied plaintiff's request to withdraw. This time, defendant cited MCL 168.686a(4) and stated that, in her estimation, plaintiff could not withdraw his name from the ballot.

Plaintiff filed a complaint in the Court of Claims in which he sought mandamus relief. The complaint was filed after hours on the Friday of a holiday weekend—Labor Day weekend. The complaint was docketed on September 3, 2024. That same day, and without receiving an answer, the Court of Claims denied relief in a written opinion. The Court of Claims relied on MCL 168.686a(4) in support of its conclusion that plaintiff was not entitled to have his name withdrawn from the ballot.

Plaintiff filed his claim of appeal, along with his appellate brief, on September 4, 2024, at approximately 10:00 p.m. Consistent with this Court's order, defendant has filed her appellee brief on an expedited basis.

ANALYSIS

At its core, plaintiff contends that he is entitled to a writ of mandamus. This Court reviews for an abuse of discretion the trial court's decision whether to grant or deny mandamus relief. *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016). Mandamus is an extraordinary remedy that will only issue if the plaintiff demonstrates:

> that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided. [*Id.* (citation and quotation marks omitted).]

As an initial matter, defendant argues that plaintiff's complaint is barred by the doctrine of laches. This matter was not raised before the Court of Claims because the court issued its opinion before defendant had the opportunity to answer the complaint. Defendant notes that the statutory deadline to send county clerks the list of candidates for office at the upcoming general election is Friday, September 6. See MCL 168.648 (requiring notice at least 60 days in advance of the election). Defendant also asserts that ballots must be printed almost immediately after this deadline in order for local clerks to meet the deadlines for providing absent voter ballots and military and overseas ballots. See MCL 168.713; MCL 168.759a. Defendant contends that plaintiff engaged in unreasonable delay by waiting to withdraw for over four months after receiving the Natural Law Party's nomination. Defendant also argues that plaintiff's conduct in both the Court of Claims and in this Court was dilatory.

The equitable doctrine of laches can be applied in election cases to bar untimely challenges. See, e.g., *Davis v Sec'y of State*, __ Mich App __, __; __ NW2d __ (2023) (Docket No. 362841), slip op at 9. "When no acceptable explanation is proffered for a plaintiff's delay, a plaintiff's requested relief should be barred by unexcused laches." *Id.* Lawsuits filed in election matters "are especially prone to causing profound harm to the public and to the integrity of the election process

the closer in time those challenges are made to the election, making laches especially appropriate to apply in such matters." *Id.*

On the issue of laches, it should be acknowledged that plaintiff waited four months after his nomination to attempt to have his name withdrawn from the ballot. At the same time, however, it is not apparent that he delayed in withdrawing, as there is no evidence in the record about when the desire to withdraw arose. In addition, it cannot be denied that plaintiff appears to have tarried somewhat in his attempts to obtain relief in both the Court of Claims and in this Court. Nevertheless the trial court was able to render its decision in time for defendant to comply with her statutory duties notwithstanding these delays, and we are able to do so as well. Furthermore, the law generally favors merit-based decisions. See *Davis*, __ Mich App at __, slip op at p. 11. Accordingly, we reject defendant's laches argument.

Turning to the merits of the question involved, the parties direct the Court's attention to statutes that pertain to the nomination process for presidential candidates. For instance, the parties' briefing references MCL 168.686. That statute is pertinent to an extent, because it provides for the nomination of presidential and vice presidential candidates. Nevertheless, the statute is silent on the issue of withdrawal.

Defendant takes the position that the answer to the withdrawal question is found in the subsequent section of this state's election law, MCL 168.686a. In general, the process for nominating a minor political party candidate is set forth in MCL 168.686a. See *Holliday v Sec'y of State*, __ Mich App __, __; __ NW3d __ (2024) (Docket Nos. 372241; 372255; 372256), slip op at p. 17. By all accounts, plaintiff was nominated by what this state's election law refers to as a "minor political party." MCL 168.686a(1) provides that "[i]f a political party entitled to a position on the ballot failed to have at least 1 candidate who polled at least 5% of the total vote cast for all candidates for secretary of state at the last preceding election at which a secretary of state was elected, candidates for that political party shall be nominated as provided in section 532." Meanwhile, § 532 provides, in somewhat circular fashion, that the nomination of minor party candidates "shall be made by means of caucuses or conventions which shall be held and the names of the party's nominations filed at the time and manner provided in section 686a of this act." MCL 168.532.

As directed by § 532, we turn back to § 686a. Defendant originally relied on § 686a(2) to deny plaintiff's request to withdraw, but now defendant appears to have abandoned reliance on that subsection. Given that this subsection applies to "County caucuses" and given that it refers to offices other than the office of president, the court agrees with defendant that this subsection neither applies to, nor controls the outcome of, this case.

Defendant now relies on MCL 168.686a(4). That subsection pertains to the nomination of minor political parties, and provides as follows:

> The state convention shall be held at the time and place indicated in the call. The convention shall consist of delegates selected by the county caucuses. The convention may fill vacancies in a delegation from qualified electors of that county present at the convention. *The convention may nominate candidates for all state offices*. District candidates may be nominated at district caucuses held in

> conjunction with the state convention attended by qualified delegates of the district. If delegates of a district are not present, a district caucus shall not be held for that district and candidates shall not be nominated for that district. Not more than 1 business day after the conclusion of the convention, the names and mailing addresses of the candidates nominated for state or district offices shall be certified by the chairperson and secretary of the state convention to the secretary of state. The certification shall be accompanied by an affidavit of identity for each candidate named in the certificate as provided in section 558 and a separate written certificate of acceptance of nomination signed by each candidate named on the certificate. The form of the certificate of acceptance shall be prescribed by the secretary of state. The names of candidates so certified with accompanying affidavit of identity and certificate of acceptance shall be printed on the ballot for the forthcoming election. *Candidates so nominated and certified shall not be permitted to withdraw.* [Emphasis added.]

Plaintiff argues that § 686a(4) only applies to candidates for "state offices" and that its prohibition against withdrawal does not apply to candidates for the office of President of the United States. In light of the plain and unambiguous language of the statute, we agree.[1] As plaintiff notes, the fourth sentence of § 686a(4) directs that the minor party's convention "may nominate candidates *for all state offices*." The office of President of the United States is not a "state office," but instead is a federal office. The text of the statute does not mention any federal offices at all. And this is significant, because the prohibition against withdrawing applies to "Candidates so nominated . . . ." When read in context, see *McCahan v Brennan*, 492 Mich 730, 730; 822 NW2d 747 (2012), it is apparent that the "Candidates so nominated" are those that are nominated by the minor political party "for all state offices" as referenced earlier in the same subsection.

Instead of being controlled by § 686a, the nomination process for the office of president is controlled by MCL 168.686. Unlike § 686a, MCL 168.686 expressly mentions nominations for "the offices of president of the United States and vice-president of the United States . . . ." Section 686 does not contain the prohibition against withdrawing after certification that is found in § 686a(4), however. In fact, § 686 does not mention withdrawal at all. We find that the omission of the prohibition against withdrawal in § 686 is significant and that it demonstrates that the Legislature did not intend to constrain candidates for the office of president in the same manner as candidates for state office. See *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011) ("Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion."). Stated otherwise, the Legislature made clear its intention in § 686a to restrict the ability of candidates seeking state offices to withdraw, but it did not likewise restrict the ability of candidates for the office of President of the United States in § 686. And without that restriction, defendant had no basis to deny plaintiff's request to withdraw his name from the ballot.

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[1] We note that MCL 168.686a(4) also relates to candidates nominated for "district offices" at district caucuses. But that aspect of the provision is not at issue in this case. Consequently, our description of MCL 168.686a relates to the nomination of candidates at state conventions.

While not argued by defendant, we note the circular references between § 686a and § 532. In particular, § 532 refers to "all candidates" nominated by the minor political party, and it refers to § 686a and the statute's requirements. However, § 686a(4) only refers to candidates for "state offices." When construing these provisions, we must read them in a manner that is consistent with one another, if possible. *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994). Here, we construe these statutes to mean that § 686a(4) refers to *all state offices*, not all offices in general. Any contrary conclusion would require us to overlook § 686a(4)'s express limitation to "state offices," which we cannot do.

CONCLUSION[2]

Plaintiff sought to have his name withdrawn from the ballot in advance of the upcoming general election. While the request was made close to the deadline for defendant to give notice of candidates to local election officials, it was not made so late that laches should apply. Additionally, we conclude that the absence of any statutory authority prohibiting his withdrawal gave plaintiff a clear legal right to have his name removed from the ballot. Defendant had no ability to disregard that request. And, at this point, no other remedy aside from mandamus is available to plaintiff, given the impending deadline for defendant to send notice to local election officials. Finally, removing plaintiff from the ballot is a ministerial task. See *Barrow v Detroit Election Comm*, 301 Mich App 404, 412; 836 NW2d 498 (2013). Accordingly, we hold that plaintiff is entitled to mandamus relief and that defendant shall remove plaintiff's name from the ballot, as requested.

We REVERSE and REMAND for entry of an order granting immediate mandamus relief. This order has immediate effect. MCR 7.215(E)(2). We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra

[2] Because we hold that plaintiff is entitled to immediate mandamus relief, we need not address his remaining arguments.

North Carolina Court of Appeals

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No. P24-624

ROBERT F. KENNEDY, JR.

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ALAN HIRSCH, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, KEVIN N. LEWIS, AND SIOBHAN O'DUFFY MILLEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From Wake
(24CVS27757)

ORDER

The following order was entered:

By unanimous vote, the motion for temporary stay and petition for writ of supersedeas filed in this cause by petitioner Robert F. Kennedy, Jr. on 5 September 2024 are allowed as follows: The Petition for Writ of Supersedeas is allowed and the "Order on Plaintiff's Motion for Temporary Restraining Order, and, in the Alternative, an Expedited Preliminary Injunction" entered on 5 September 2024 by Judge Rebecca Holt is hereby stayed. Respondents are hereby enjoined from disseminating ballots listing petitioner as a candidate for President of the United States. The stay and injunction will remain in effect until the disposition of petitioner's appeal or until further order of this Court. This cause is remanded to the Superior Court of Wake County for entry of order directing the State Board of Elections to disseminate ballots without the name of petitioner Robert F. Kennedy, Jr. appearing as a candidate for President of the United States.

By order of the Court this the 6th of September 2024.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 6th day of September 2024.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:
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The Honorable Clerk of Superior Court, Wake County