STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondents-Appellants.

ROBERT F. KENNEDY, JR.'S SUPPLEMENTAL 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. Introduction

This Court is very familiar with the record and the claims before it. So none of that will be repeated. Instead, it has directed both sides to answer three specific questions centered on remedies. Since all three questions concern the exceedingly broad powers this Court has in equity and since they all concern the question of stickers being placed on the ballot, the first four pages concern those topics. Following that *brief* background, the precise questions are quickly answered. In addition, the Petitioner has briefed a fourth point—what to do with the ballots that have already gone out?

II. The Court's Equitable Powers Allow for Kennedy's Name to be Covered Up on the Ballot.

A court sitting in equity is cloaked with great power to ensure that injuries are redressed. That power flows from the Wisconsin Constitution's promise that "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."[1] Those are not empty platitudes, but promises fulfilled in 176 years of courts remedying constitutional violations. Injunctions are a form of equitable relief, and "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[2] That relief is only limited by the nature of the constitutional violation the party has suffered.[3] That simply means the remedy "must directly address and relate to the constitutional violation itself."[4] In other words, the remedy must be

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[1] WIS. CONST. ART. I, § 9.

[2] *Brown v. Bd. Of Educ.*, 349 U.S. 294, 300 (1955).

[3] *See Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 738, 750 (1974).

[4] *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977).

"tailored to cure the condition that offends the Constitution."[5] And crafting such remedies demands "a special blend" of "what is necessary, what is fair, and what is workable."[6]

Understanding the power that way, Wisconsin courts have broad flexibility to "adapt their decrees to the actual condition of the parties so as to meet the very form and pressure of each particular case, in all its complex habitudes."[7] These remedies are without limit as to "their substance, their form, or their extent."[8] Equity's hallmark is: "flexibility and expansiveness, so that new [remedies] may be invented, or old ones modified, in order to meet the requirements of every case."[9] In less florid but more concrete terms, the Wisconsin Supreme Court has explained how this power operates and where it stems from: "The issue of equitable authority is a variant of the inherent authority doctrine. It permits a court to grant equitable remedies to private litigants in situations in which there is no explicit statutory authority or in which the available legal remedy is inadequate to do complete justice."[10] That is all to say: there is certain and undeniable agreement that court's equitable powers are flexible and expansive to ensure that the harm is cured.[11]

Understanding that the harm must be cured, the Petitioner has offered that while it's not *now* feasible to get new ballots, it is feasible to put

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[5] *Id.* (quotation omitted).

[6] *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).

[7] *Nationstar Mortg. LLC v. Stafsholt*, 2018 WI 21, P30, 380 Wis. 2d 284, 299, 908 N.W.2d 784, 791 (alterations omitted); *see also Hall v. Bank of Baldwin*, 143 Wis. 303, 310, 127 N.W. 969 (1910).

[8] *Meyer v. Reif*, 217 Wis. 11, 20, 258 N.W. 391 (1935) (quoting 1 Pomeroy, Equity Jurisprudence, § 111).

[9] *Id.*

[10] *In Interest of E.C.*, 130 Wis. 2d 376, 388, 387 N.W.2d 72, 77 (1986) (emphasis added).

[11] *See* 1 Wis. Pl. & Pr. Forms § 6:37 (5th ed.).

stickers over Kennedy's name. The reason it's feasible is that for almost fifty years it has been contemplated by the Wisconsin legislature. With the help of the skilled and diligent staff at the Wisconsin Law Library, we were able to track down the iterations of that law—in 1975, the legislature decided that in certain instances "pasters" could be placed over a candidate's name.[12] When that term went out of style in 1985, the legislature replaced it with "stickers."[13] So placing stickers or pasters over a person's name is not something new—it's been available in elections for 49 years. And so, one would presume that the voting machines would accommodate this possibility; it is, again, a provision of state law and it's been around for a long, long time.

The point of citing the state law provision is that placing stickers over a candidate's name can be done. If it can be done, that means the violation of Kennedy's rights can be remedied. Petitioner is not asking for something outlandish, impossible, or uncontemplated by law. And it can be remedied in the same fashion as outlined for instances when a candidate dies. That is, if this court can grant a remedy, the remedy Kennedy proposes is workable and it fits the violation. Putting him on the ballot violates his constitutional rights and covering up his name will cure it. And despite the Commission's protests that it can't be done because the legislature has provided that it can only be done in case's of death, this Court has the flexibility and power to do it: "Though no precedent may be at hand in a given situation, since principles of equity are so broad that the wrong involved or the right to be enforced need not go without a remedy, its doors will swing open for the asking, and a new precedent be made."[14]

With that *brief* history on the broad powers of courts to fashion equitable remedies and how long this statute has been around, it becomes a

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[12] WIS. STAT. § 8.35(2) (1975) (It the ballots have been printed, the committees or body filling the vacancy shall supply pasters as under § 7.38(3)(c)).

[13] WIS. STAT. § 8.35 (2)(D) (1985) (If the ballots have been prepared, the committees or body filling the vacancy shall supply stickers as provided under § 7.38(3)(c)).

[14] *See Meyer*, 217 Wis. at 20 (quotation omitted).

lot easier to address the three questions raised in the Court's order and the fourth proposed by the Petitioner—i.e., what to do about the ballots that have gone out. For ease of reading, the point headings have omitted the background that helpfully framed the questions and been shortened to only the question asked.

a. Does it matter if ballots with stickers on them have not been tested with voting equipment?

No. It doesn't matter. We should presume that this can be done—the law, again, provides for it and has provided for it for almost a half-century. But at a deeper level, the answer to the question is that the lack of testing cuts against the Commission. It has known about this suit and request for over two weeks. In that time, the Commission filed multiple briefs and gathered six declarations about the problems this *could* cause, but in all that time and effort no one did any testing to see what it *would* cause. Not a single test was done to see if the declarant's predictions were right. Thus, the Court should reject the Commission's declarations. Anyone can speculate about anything. If the sky were really going to fall if these stickers were used, the Court should demand more than speculation.

As echoed throughout the briefing, you can't have a provision of state law that contemplate something and then claim it can't be done. Courts presume the legislature knows what it is doing.[15] What's more, the Commission's very own manual from 2024 provides repeated reference to the use of stickers.[16] And we've attached the cover page and relevant pages, with highlights, to show that stickers (or pasters) on ballots is not just a vestige of the 70's, but something contemplated and addressed—by the Commission—this *very* year. Put succinctly, given that State law provides the use of stickers and the Commission's refusal to test the stickers, it should be presumed that there is an adequate remedy at law.

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[15] *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996).

[16] https://elections.wi.gov/sites/default/files/documents/ED%20Manual-August%202024_0.pdf.

b. If there was a vacancy in a statewide office race due to the death of a candidate, would the stickers have to be placed on the ballots statewide?

Yes. In that instance, all of the statutory provisions provided for by the legislature have been met. There would be no means or reason or ability for the Commission to deny that relief. Indeed, one would imagine that in such an instance the Party would be suing for the precise relief that Kennedy now seeks, and no court would countenance the Commission saying to the effect: "we *think* that the stickers would gum up the machines, so it just can't be done. Sorry." Put differently and in terms of the Equal Protection Clause arguments made in the earlier briefs: if it could be done there, then it should be done here.

c. Do clerks, as WEC has suggested, have discretion to not have the stickers applied to the ballots?

No. The clerks do not have discretion to not apply the stickers. Petitioner submits that the Commission's argument is just a plain misreading of the law. Placing stickers on the ballot must be done at the clerk's direction—not discretion. Adding the "s" and transposing the "c" makes a world of difference in the two word's meaning. Put simply, the plain reading of the text does not allow for any discretion. The law provides direction, and that is enough.

d. What should be done about the ballots that have already been sent out?

Kennedy is not seeking to create any more confusion than what the Commission has already wrought. Thus, Petitioner is not asking that a second set of ballots go out. For those ballots that went out, what's been done is done. This case now centers on the rest of the ballots that the stickers can and should be placed on. The perfect cannot be the enemy of the good. Thus, we are not asking that two sets go out. But that for those ballots that

a sticker can be placed on, the Commission and the clerks must be directed to place it on.

III. Conclusion

This Court has received a lot of briefing in the past week and the issues now focus on the question of remedy. This Court has the power to order that Kennedy's name be covered up. Since placing stickers on the ballot is contemplated by law and would be done in other instances, it can and should be done here. To do so, again, cures the constitutional violation and gives Kennedy the relief he deserves.

Dated at Madison, Wisconsin, September 19, 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 7,844 words.

Electronically signed by Joseph A. Bugni
Joseph A. Bugni