No. _____

In the Supreme Court of the United States

Robert F. Kennedy Jr., *Petitioner/Applicant*

v.

Wisconsin Elections Commission, *Respondent*

An Application for an Emergency Injunction Pending Appeal Restoring Robert F. Kennedy, Jr. to Wisconsin's 2024 Ballot

To the Honorable Amy Coney Barrett,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Seventh Circuit

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PARTIES TO THE PROCEEDINGS

Applicant in this Court was the Appellant/Plaintiff below. He is Robert Kennedy, Jr., and he sought to appear on the Wisconsin presidential ballot and then before he was approved and before a single ballot was printed, he sought to have his name removed from the ballot. This included requesting it from the Wisconsin Elections Commission and then filing suit to have his name removed.

Respondents in this Court is the Appellee/Defendant below. It is the Wisconsin Elections Commission, which is charged with deciding who appears on the Wisconsin Presidential ballot.

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INTRODUCTION

Robert F. Kennedy sought to be removed from the Wisconsin presidential ballot before a single ballot was ever printed and before he'd even been approved by the Wisconsin Elections Commission. His request was denied. He sought a temporary restraining order and a preliminary injunction—fighting to keep his name off the ballot. His requests were denied and his appellate options exhausted in the Wisconsin Supreme Court. And so now he comes before this Court seeking an injunction pending appeal or that the Court construe this application as a petition for a writ of certiorari, grant certiorari, and set the case for expedited review. This same issue will be before this Court in *Kennedy v. Benson,* out of the Sixth Circuit, where two judges noted the first question is of "exceptional importance." There are two issues that inform this application.

First, Wisconsin allows major party candidates an additional month to get off (and on) the Presidential election ballot that is not accorded to independent-candidates. Kennedy sought to be removed from the ballot on August 23, almost two weeks before the major party candidates had to submit the nomination papers. Does forcing a person onto the ballot compel his speech in violation of the First Amendment and does Wisconsin's unequal treatment of independent candidates in this regard violate the Equal Protection Clause?

Second, loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. And this Court will frequently provide

emergency relief when needed to protect First Amendment Rights. Here, the threat of irreparable harm is particularly stark because this case involves communication about the Presidential election from a former candidate who is being forced on the ballot in violation of his First Amendment rights and whose message of support for former President Trump is being compromised. Only an emergency injunction pending appeal will stop this harm. Should the Court issue an emergency injunction?

JURISDICTION

This Court possesses jurisdiction under Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1254, and it possesses authority to grant the Applicant's sought relief pursuant to 28 U.S.C. § 1651(a) (All Writs Act), 28 U.S.C. § 2101(f), and S. Ct. Rules 22 and 23.

STATEMENT

It's Robert F. Kennedy's absolute right to endorse Donald Trump for President. Over the past months, he's done that in myriad ways, all over the country and especially in the critical swing state of Wisconsin, where Kennedy has appeared at rallies, spoken on television 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. To ensure that message is conveyed clearly and without confusion, he asked that his name not appear on the Wisconsin ballot. He wanted to be clear: his endorsement was for Trump.

To aid that message, he sought to have his name removed from the ballot *well before* the Wisconsin Elections 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 that message: I am suspending my campaign; 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 created confusion and compelled a message that Kennedy wants no part of—namely, "I still want your votes, I'm still running to win in Wisconsin. I may attend rallies, I may stump for Trump, but where it counts the most—in the seclusion and secrecy of the voting booth—choose me."

In the realm of constitutional rights, this scenario invokes two core constitutional provisions: the First Amendment and the Equal Protection Clause. In Wisconsin, Democrats and Republicans have an additional month to get off (and on) the ballot that Kennedy and the other independent candidates don't have. And on top of that, the Commission won't allow Kennedy to withdraw even though he sought to do so before the Commission formally acted to place him on the ballot and even though it creates voter confusion—conveying a message that Kennedy himself does not endorse. Yet, 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.

To vindicate his First Amendment and Equal Protection rights, Kennedy sought a temporary restraining order and preliminary injunction, asking that (among

other forms of relief) his name not be presented on the ballot.[1] Wisconsin law allows for stickers to be placed over a candidate's name in cases of death. Wis. Stat. § 7.37(6). That same relief could remedy the violation of Kennedy's constitutional rights.

When Kennedy sought this relief in the State courts, the trial court didn't look at this as a matter of constitutional rights, but as a question of equities: Kennedy initially put himself out there as a candidate in Wisconsin and he can't *now* complain that he's being held to that.[2] It looked at Kennedy's claim as a question of equity and not as a means of protecting constitutional rights.[3] In equity, it saw Kennedy as being to blame: he shouldn't have started a process and been surprised that he'd have to see it through.[4] As much as that has some visceral appeal to the playground principles of justice, that paradigm doesn't work when it comes to constitutional rights. Constitutional rights are different and Kennedy's are violated by compelled speech and association, and the differing standards in Wisconsin between independent and major parties violate his right to Equal Protection. Once that's established (and it was) the question is whether there was a remedy—can we protect Kennedy's rights under the First Amendment and the Equal Protection Clause?

However, that question was never answered. After the trial court's denial of the temporary restraining order and later preliminary injunction, Kennedy sought an interlocutory appeal.[5] Three substantive briefs were filed, totaling more than 61

[1] App. 001; App. 008; App. 010; App. 026.
[2] App. 048.
[3] App. 035.
[4] App. 048.
[5] App. 052.

pages.[6] After those were filed, the Wisconsin Supreme Court bypassed the Wisconsin Court of Appeals and took the case itself.[7] Then, rather than addressing the merits of Kennedy's claims, it found that his arguments were not developed and the appeal was dismissed.[8] The Court's order cited two cases, where parties had made arguments in footnotes without citation to caselaw—a strange analogy given the 61 pages of briefing Kennedy had filed.[9] Two days later, Kennedy sought reconsideration, attaching the briefing and *very respectfully* alerting the Court to the fact that the constitutional arguments were raised, briefed thoroughly, and addressed by the opposing party.[10] To wit, until the Wisconsin Supreme Court found that Kennedy's arguments had not been developed, neither the opposing party, the amicus, or the lower courts had had any problem deciphering Kennedy's claims.

To that end, Kennedy comes to this Court hoping for relief on a claim that has been pursued for the better part of two months through every level of the Wisconsin court system. Yet despite all that litigation, no Wisconsin court has given his claims a fair reading. And in all of that litigation, Kennedy has exhausted his state appellate court remedies. He sought the preliminary injunction in the trial court and appealed that each step of the way.

In Wisconsin, he could have sought an injunction removing Kennedy from the ballot *directly* in the State Supreme Court (called an original action in Wisconsin) or

[6] App. 052; App. 075; App. 086.
[7] App. 115.
[8] App. 117.
[9] App. 121.
[10] App. 124.

he could have sought review in the fashion he did filing suit, seeking the temporary injunction and appealing it through.[11] Doing so in the manner of filing suit and directly appealing the denial of the injunction (in Wisconsin) exhausts his ability to further seek direct relief in the Wisconsin Supreme Court with an original action.[12] Thus, Kennedy cannot (consistent with Supreme Court Rule 23.3) get relief from the Wisconsin Court system and must, instead, seek it here.

With that procedural understanding, this case is very simple: (i) does the Constitution allow for the sort of two-tiered system of rights that Wisconsin has, which binds independent candidates to a different deadline for removal from the ballot than major party candidates, and (ii) does the Constitution allow the compelled speech forcing Kennedy on the ballot?

ARGUMENT

I. The Standard of Review for Stays and Injunctions Pending Appeal

Those are the constitutional questions that this case presents. And they are questions that this Court should address but that will become moot in a few weeks. Thus, there is a need for an injunction pending appeal. This Court grants an injunction pending appeal when it is likely the Court will reverse, the applicant will suffer irreparable harm absent an injunction, and the equities favor an injunction. *See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020). Here, Kennedy's rights to Equal Protection and Free Speech are violated so long as his name continues to appear on the ballot. And the only way to ensure that this does not

[11] *Id.* at 123.
[12] *Id.*

continue is for the Court to enter an injunction pending appeal barring Wisconsin from including Kennedy's name on the ballot. Failing to do so will mean that the injury to his rights persists and that even if this Court grants relief months down the line, the injury will have stood. No monetary damages can compensate Kennedy.

Thus, for the reasons that follow, Petitioner requests an injunction pending appeal. In deciding that question, there are three parts to this Court's analysis and each are addressed below: first, that the Court is likely to grant review and reverse; second, that Petitioner will suffer harm absent relief; and third, that the equities balance in favor of granting relief. In the alternative, Kennedy requests that the Court construe this application as a petition for a writ of certiorari, grant certiorari, and set the case for expedited review. These same claims are being raised in *Kennedy v. Benson,* Case No. 24–1799 (Sixth Circuit), from a divided denial of rehearing *en banc*.[13] The application in that case will be filed almost simultaneously with this one.

II. The Court is likely to grant review and reverse.

A. The case's procedural history and the Wisconsin Supreme Court's refusal to address the merits of Kennedy's claims.

Wisconsin law favors the two major parties. Under it, independent candidates have until the first Tuesday in August before an election to submit their nomination papers. Wis. Stat. § 10.06(1)(i). That is both the first and the last day they can submit them. And once they are submitted, the Wisconsin Election Commission takes the view that a nominee cannot withdraw. By contrast, the major parties have an additional month to nominate their candidates. An independent candidate must

[13] App. 328.

submit his or her nomination forms *before* the major parties have even nominated their candidate, and this year that date was even before the Democratic convention was held.

On August 23, before the Democrats had even nominated Vice President Kamala Harris as their candidate, Robert F. Kennedy decided he didn't want to appear on Wisconsin's ballot. And he submitted a letter to the Wisconsin Election's Commission to that effect. It's important to note that Kennedy sought withdrawal *before* the Commission had even met and voted whether to approve Kennedy for the ballot and *before* a single ballot was ever printed. Days after the Commission voted to keep Kennedy on the ballot, he filed suit seeking to enjoin the Commission from printing any ballots with his name on them.[14]

In that suit, Kennedy raised two arguments around his First Amendment and Equal Protection Clause claims.[15] Before the Commission even responded substantively, the trial court denied Kennedy's motion for a Temporary Restraining Order.[16] And Kennedy appealed with a 27-page brief addressing his First Amendment and Equal Protection Clause claims.[17] The Commission then filed a 36-page brief in response, citing and discussing those very same cases and whether those seminal cases provided a basis for relief.[18] The next day, Kennedy filed leave to file a reply brief in the Court of Appeals and a reply brief.[19] The Court of Appeals accepted

[14] App. 001.
[15] App. 012.
[16] App. 135.
[17] App. 137.
[18] App. 166.
[19] App. 204; App. 206.

the reply brief, which was 11 pages long and dealt with the bedrock of Kennedy's constitutional claims.[20]

In response to all of that briefing, the Wisconsin Court of Appeals held the appeal in abeyance while the Circuit Court ruled imminently on the preliminary injunction question.[21] To be clear, the request for the temporary restraining order and the preliminary injunction all stemmed from the same allegations and legal arguments made in the briefing before the trial court.

After the Circuit Court denied relief on the preliminary injunction, Kennedy petitioned to appeal that decision building on the briefing that was held in abeyance.[22] Over the next 23 pages, the brief focused entirely on *how* and *why* the Circuit Court erred in denying the temporary injunction.[23] And those arguments dovetailed with the constitutional arguments that were raised in the first petition to appeal that had been held in abeyance. Immediately *after* filing that brief, the Court of Appeals issued its order granting the interlocutory appeal.[24] And it abandoned the normal course for an interlocutory appeal in Wisconsin and given the gravity of Kennedy's claims, it was clear that it was going to rely on the cumulative knowledge and familiarity it had from the 61 pages of petitions for interlocutory appeal:

> We recognize that WEC has not yet responded to Kennedy's current petition. However, this court has thoroughly reviewed the response WEC filed to Kennedy's petition in appeal No. 2024AP1798-LV, and we are well aware of WEC's position and arguments. Because of the extreme time pressure on this case, we have decided to review Kennedy's

[20] App. 206.
[21] App. 217.
[22] App. 052.
[23] *Id*.
[24] App. 221.

> current petition ex parte. We are persuaded that sufficient leave criteria are satisfied and grant Kennedy's leave petition.[25]

That is, the Court fully understood the arguments in support of Kennedy's claims and the Commission's response. In Wisconsin when it comes to most cases of an interlocutory appeal, the granting of the petition acts as the notice of appeal and then a full briefing schedule commences with merits briefing. That didn't happen here. Instead, given the "extreme time pressure," the Court of Appeals issued an order calling for *memorandum* briefing to commence on consecutive days on the question of remedy, while giving leave to make "whatever arguments the parties wish to make on whether the circuit court erred in denying the request for a temporary injunction."[26] This briefing on remedy and whatever other arguments the parties wanted to raise was only 5,500 words—less than half of what would come with normal merits briefs.

Kennedy went first, focusing almost entirely on the question of remedies and the court's equitable powers because those were the issues on which the court asked for briefing.[27] After that filing, and in the span of a few hours, there was a flurry of briefing on bypass and whether it was premature.[28] The Wisconsin Supreme Court granted bypass, but did *not* order a new set of merits briefs.[29] Instead, it kept the Court of Appeals *memorandum* briefing schedule in place, which meant that the Commission had to file a brief that day at noon and Kennedy a few hours later.

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[25] App. 222.
[26] App. 223.
[27] App. 075.
[28] App. 226; App. 262.
[29] App. 115.

The Commission then filed a lengthy brief on the merits of Kennedy's claims, and (importantly) at no place in the brief did it argue that Kennedy's claims were undeveloped.[30] Instead, the brief took the issues head on with the very same cases that Kennedy had used and argued in the two petitions about the Equal Protection Clause and the First Amendment.[31] With the next brief due in a few hours, Kennedy filed a motion for oral argument—asking that it be held over the weekend (if needed).[32] After filing that, Kennedy responded in the ten pages allotted by the Court of Appeals' order for memorandum briefing.[33] That evening, the Court denied oral argument but allowed Kennedy to file an amended reply Saturday by noon, with additional space.[34] And Petitioner did, expanding on some points and adding additional cases.[35]

In response to all that briefing, the Wisconsin Supreme Court held on to Kennedy's appeal for a week and then issued a cursory opinion, holding that the constitutional arguments had been *wholly* undeveloped. *Kennedy v. Wisc. Elec. Comm'n,* 2024 WI 37. In the order, it cited two cases: *Southwest Airlines Co. v. DOR*, 2021 WI 54, ¶ 32 n.10, 397 Wis. 2d 431, 960 N.W.2d 384; *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶ 39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212. Both stand for the unremarkable proposition that the Wisconsin Supreme Court does not address undeveloped arguments. Those cases range from a single paragraph that fails to cite

[30] App. 267.
[31] App. 281–84.
[32] App. 294.
[33] App. 297.
[34] App. 309.
[35] App. 311.

to any legal authorities to arguments raised in a mere footnote. *Parsons,* 2017 WI 39, n.8; *DOR,* 2021 WI 54, ¶ 32, n.10; *State v. Gracia*, 2013 WI 15, ¶ 28 n.13, 345 Wis. 2d 488, 826 N.W.2d 87.

Citing the tension between a bald assertion and the case's actual briefing, Kennedy sought reconsideration and a decision on the merits: agree or disagree with the First Amendment and Equal Protection argument, but there is no way to argue that the claim wasn't developed.[36] A week later, that motion was denied without any explanation.[37] This application *quickly* followed, where Kennedy seeks to have this Court address the constitutional claims that the Wisconsin courts have up to now completely dodged.

B. This case raises important constitutional questions—namely, whether third-party candidates receive the same protections as major-party candidates.

For fifty years, this Court has been clear: ballot access questions implicate the First and Fourteenth Amendments, and statutes that restrict ballot access cannot "unfairly or unnecessarily" burden an independent candidate's interest in the "availability of political opportunity." *See Lubin v. Panish*, 415 U.S. 709, 716 (1974). The precedents surrounding ballot-access issues embody a deep-seated fear of two-party entrenchment and all it portends for those outside the two parties. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). For example, this Court has held a statute restricting ballot access unconstitutional because it all but prohibited a minor political party with a "very small number of members" from appearing on the ballot. *Id.* at 24. As

[36] App. 124.
[37] App. 327.

this Court reasoned, voters have a right to "associate for the advancement of political beliefs" and to "cast their votes effectively," "regardless of their political persuasion." *Id.* at 30. Axiomatically, the First and Fourteenth Amendments, viewed together, require that whatever opportunity the major political parties have to disassociate from a particular candidate be provided on equal terms to independent candidates. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 891–92 (2018).

Here, 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 that he doesn't support—there's a world of difference. Kennedy is trying (as best he can) to avoid voter confusion and preventing 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, this Court has been clear: "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). Among the principal duties of election officials is to make sure that the citizens can "make informed choices in the political marketplace." *Citizens United v. Fed. Election Comm'n.,* 558 U.S. 310, 366 (2010). And that demands transparency, not ambiguity. There is no doubt that the same confusion would not accompany a major party candidate withdrawing in Wisconsin on August 23 (the day Kennedy did), because the Democrats and Republicans had until September 3 to even declare a candidate.

That unequal treatment and protection of Kennedy's First Amendment rights violates the Equal Protection Clause. As this Court noted in *Timmons*, "[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." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (quoting *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 616 (1996)). There, the Court continued with the key provisos that inform Kennedy's claims under the First Amendment: "States may, and inevitably must, enact *reasonable* regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Id.* at 358 (emphasis added). No question there. But it 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." *Id.*

That is, there's a balancing test that courts must strike. We have a fundamental right at issue—Kennedy's constitutional rights are on one side of the ledger and the State's ability to cure confusion on the other. Here, the First Amendment provides Kennedy with "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 633–34 (1943). 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." *Id.* (quotation omitted). 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.'" *Hurley v. Irish-Am. Gay*, 515 U.S. 557, 573 (1995) (*quoting Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 (1986)). 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 as *Timmons* makes clear: "We conclude that the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights—*though not trivial—are not severe*." 520 U.S. at 363. But that right must be accorded with just as much respect as what is afforded the major party candidates. After all, 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." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). Here, in Wisconsin, 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—a full month longer. That is, if Kennedy were a major party candidate, he would not be on the ballot today and would not have had to pursue this suit. And since that's true, it's clear that he's being treated differently and his rights have been violated.

Again, that is one side of the balancing test: Kennedy's rights have been violated. The other side of the balancing test is Wisconsin's interest in having a two-tiered system and whether the State's interests outweigh Kennedy's. To that end, *Timmons* is (again) instructive. The State may have competing interests that would infringe or limit Kennedy's rights, but those interests can't be trivial. In *Timmons,* the issue was "avoiding voter confusion and overcrowded ballots." 520 U.S. at 364. That is, of course, a necessary and laudatory goal. *See id.* 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. It's the Wisconsin Elections Commission—not Kennedy—that has fabricated an overcrowded and confusing ballot. Kennedy filed his papers to withdraw well before the Commission met and voted to *put* him on the ballot. And he did so before the major parties even had to file to get *on* the ballot and before *any* ballots were printed. A violation of Kennedy's rights cannot be cast aside by an illusory state interest in keeping him on the ballot. Put another way, there is no reason—no compelling state interest—for why he could not and should not be off the ballot. *See Kennedy v. Benson*, Case No. 24–1799 (Sixth Circuit) *18 ("Nor are Michigan's practical interests in minimizing administrative burdens and ensuring the stability and integrity of its electoral process enough to trump Kennedy's First Amendment rights.") (Thapar, dissenting).[38]

Those are the fundamentals of Kennedy's claims, all of which are rooted in the first principles of the First and Fourteenth Amendments. Here, Wisconsin's deadlines

[38] App. 345.

for ballot access violate this rule by giving Democrats and Republicans a greater opportunity to disassociate from a candidate or for a candidate to dissociate from the campaign. 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 faster. 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*. And here, the effect of this two-tiered system is Kennedy's First Amendment rights being compromised. The deadlines prevent him from withdrawing, even though the Democratic and Republican Parties (at least in theory) could provide a different nominee to the Commission a full month later.

What's more, the Wisconsin Elections Commission cannot claim any compelling state interest in forcing independent candidates to file paperwork a month earlier. Even if the Commission needs more time to review an independent candidate's paperwork, it does not need a full month. And there is no reason to prevent an independent candidate from dropping out when he or she acts before a key deadline set for major political parties. If the Democrats and Republicans can file (or withdraw) by the first Tuesday in September, then Kennedy and any other independent candidate who wants to remove himself or herself from the ballot must be afforded the same deadline.

C. State courts have the same obligation to protect constitutional rights as federal courts, but the Wisconsin courts refused to address the merits of constitutional claims.

The thrust of Kennedy's claim and the case law that support it are all set out above, and it was all presented to the Wisconsin state courts. But instead of wrestling with those issues and ultimately protecting Kennedy's rights, the Wisconsin Supreme Court (as outlined above) ducked the issue. Yet those issues cannot be ignored, especially when the briefing below set out the claims and legal support for them. Put differently, it was incumbent upon the state court to address and vindicate Kennedy's rights and after all, State courts have the same obligation to protect constitutional rights as Federal courts. *See Brown v. Allen*, 344 U.S. 443, 465 (1953). And the refusal to do so is an error that this Court must remedy.

III. Petitioner will suffer irreparable harm absent an injunction.

When it comes to emergency appeals like this and those that seek an injunction, this Court is very familiar with the standard: is there harm that the Petitioner is currently facing and will an injunction prevent that harm from continuing as the case is heard? *Mitchum v. Foster,* 407 U.S. 225, 242 (1972) (noting "this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights").

Both elements are present. To the first, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And to the second, this Court will frequently

provide emergency relief when needed to protect First Amendment Rights. *See, e.g Roman Cath. Diocese of Brooklyn v. Cuomo,* 592 U.S. 14, 19 (2020).

Here, the threat of irreparable harm is particularly stark because this case involves communication about the Presidential election *from* a former candidate *about* a current candidate. And we're not talking about an event that is not months or years away, the election is weeks away. Without an injunction, this case will soon be mooted. Indeed, that point was made well by Judge Thapar in his dissenting opinion: "To sum up, the Secretary's reinstatement of Kennedy on the ballot unconstitutionally compels Kennedy's speech and violates Michigan's own deadlines. It also forces Kennedy to be on the ballot for an office he no longer intends to hold if he were to win. And it has the unfortunate result of potentially misleading Michigan voters." *Kennedy v. Benson, Case No.* 24 – 1799 *19.[39]

IV. The Public Interest and Balance of Equities favor an injunction.

Here, Kennedy has a meritorious claim on the merits and he's suffering irreparable harm, but there's an additional component that this Court must consider: whether the equities favor an injunction. *Roman Cath. Diocese of Brooklyn,* 592 U.S. at 19 ("We assess requests for temporary injunctive relief under a familiar standard that focuses, among other things, on the merits of the applicants' underlying claims and the harms they are likely to suffer.").

An injunction demanding that accurate information be conveyed to the voters is of national importance. Wisconsin is a swing state, where Kennedy has openly and

[39] App. 346.

energetically campaigned for Trump. Keeping his name on the ballot will compromise that message. It says that despite what Kennedy may say publicly, in the sanctity of the voting booth he still wants Wisconsin citizens' votes. That sort of compelled and confused speech is anathema to the First Amendment.

What's more, it would not conflict with the interest of any voter who might want to vote for Kennedy as she could write in a person of their choice. There is no prohibition upon that. The question here is, instead, whether that voter should be accurately informed that Kennedy is *not* seeking their vote. And the costs of administering a remedy would be minimal. Placing stickers over a candidate's name is provided for by statute and even in the Wisconsin Election Commission's own guides. Wis. Stat. § 8.35 (2)(d) ("If the ballots have been prepared, the committees or body filling the vacancy shall supply stickers as provided under § 7.38(3)(c)"). It is, thus, a procedure both contemplated by state law and provided for in practice.

Finally, this is not a case where Kennedy has sat on his rights. Rather, he sought to get his name off the ballot *before* the ballot was approved, *before* the major party candidates even had to apply, and *before* the ballots were ever printed. When that was denied, and within days, he filed suit. And he has diligently pursued his claims before through the Wisconsin Court system. That included the Wisconsin Supreme Court, which had 61 pages of briefing on these constitutional claims, which it found to be wholly inadequate, and when Kennedy sought reconsideration, it was denied in a single sentence. Kennedy comes to this Court asking that it (as the Court of last relief) grant him the relief he has diligently pursued for the past two months.

CONCLUSION

Kennedy has presented legitimate constitutional claims for why his name should not appear on the ballot. Those claims have been presented and pursued since August 23, without relief, let alone a legitimate airing before the Wisconsin courts. He now comes to this Court seeking justice, and that takes the form of an injunction ordering the Wisconsin Election Commission to cover his name with stickers. Unless that's done, Kennedy's rights under the First and Fourteenth Amendment are (and will continue to be) violated. Thus, and for those reasons, Kennedy respectfully requests an injunction pending any merits consideration.

Respectfully submitted,

October 21, 2024.

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CERTIFICATE OF SERVICE

A copy of this application was served by email and mail to the counsel listed below in accordance with Supreme Court Rules 22.2 and 29.3:

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