No. 24A399

In the Supreme Court of the United States

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ROBERT F. KENNEDY, JR.,

Applicant,

v.

WISCONSIN ELECTION COMMISSION,

Respondent.

———— ♦ ————

BRIEF IN OPPOSITION TO APPLICATION FOR AN EMERGENCY INJUNCTION PENDING APPEAL TO AMY CONEY BARRETT, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT COURT FOR THE SEVENTH CIRCUIT

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PRELIMINARY STATEMENT

Applicant Robert F. Kennedy, Jr. seeks the extraordinary relief of an emergency injunction pending appeal, one week before the general election, that would require the county and municipal clerks of Wisconsin to handcraft and apply millions of stickers to Wisconsin ballots in order to cover his name—at least those ballots that have not already gone to voters and been returned.

The absurdity of this proposal is evident on its face, and Applicant comes nowhere close to showing why it would be appropriate.

First, his requested relief would violate *Purcell* at its most fundamental level. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

Second, the balancing of equities weighs dispositively against him. Below, Respondent Wisconsin Elections Commission presented evidence from staff and county election clerks around Wisconsin discussing the disastrous impacts the sticker plan would have; in response, Applicant offered nothing. Today, it is not possible to affix tiny stickers to the ballots remaining with clerks, and hundreds of thousands of ballots have been sent to voters, with many already returned.

Third, Applicant would be very unlikely to succeed on the merits of his claims. The Wisconsin Supreme Court unanimously decided his interlocutory appeal on independent and adequate state law grounds: Applicant's failure to adequately develop the constitutional issues he raised. The standard of review would not be *de novo*, but rather deferential review of the trial court's discretionary decision not to grant a temporary injunction. Applicant did not offer the Wisconsin Supreme Court

a developed theory of why Wisconsin's statutes are unconstitutional under equal protection or First Amendment principles. And while he suggests that this case is like *Kennedy v. Bensen*, a Sixth Circuit case that drew some dissenters from a denial of a petition for rehearing *en banc*, the facts that troubled the dissenters there are not present here.

BACKGROUND

I. Applicant qualifies to be on the Wisconsin ballot; he subsequently seeks to be removed, but Respondent determines that Wisconsin law does not allow a candidate who has qualified to withdraw.

Robert F. Kennedy, Jr. and Nicole Shanahan submitted nomination papers and declarations of candidacy to the Wisconsin Elections Commission on August 6, 2024, as independent candidates for President and Vice President in the November 2024 general election. On August 23, Applicant sent a statement to the Commission that he was withdrawing his candidacy and requesting that his name not be printed on the ballot in Wisconsin. (A.-App. 031.)

Respondent, the Wisconsin Elections Commission, must provide required election notices to county clerks "no later than the 4th Tuesday in August," Wis. Stat. § 10.06(1)(i), which this year was August 27. The required election notices contain the candidate and statewide referenda information that county clerks need to begin preparing ballots. The Commission convened on August 27 to perform this responsibility, consider challenges to nomination papers, and certify candidate names for the November general election ballot. (A.-App. 031.)

Wisconsin Stat. § 8.35(1) provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person." That statute allows no candidate to withdraw once she has qualified—regardless of party affiliation. Based on Wis. Stat. § 8.35(1), the Commission voted to deny Applicant's request to withdraw from the ballot. (A.-App. 031.) Applicant made no argument to the Commission that either Wis. Stat. § 8.35(1) or any other Wisconsin statute was unconstitutional.

II. County and municipal clerks prepare for the November election.

County and municipal clerks then carried out the task of designing the ballot forms and having ballots printed. "[I]mmediately upon receipt" of the Commission's notices, county clerks must prepare the ballot form, Wis. Stat. § 7.10(2), including integrating ballot information for local races and referenda onto ballot styles for each municipality. There are approximately four million ballots printed in the state. (A.-App. 036.)

The county clerks' preparatory work was completed by September 18, the last date by which county clerks must deliver printed ballots to municipal clerks. Wis. Stat. § 7.10(3). By September 19, municipal clerks delivered absentee ballots to electors who had already requested them. Wis. Stat. § 7.15(1). And under the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301–20311, municipalities sent ballots to all military and overseas voters no later than September 21.

III. Applicant seeks a temporary injunction to require Respondent to remove him from the Wisconsin ballot; the trial court denies relief, and a unanimous Wisconsin Supreme Court affirms.

On September 3, Applicant filed a petition for judicial review against the Commission in a Wisconsin trial court and moved for a temporary injunction. Respondent presented affidavits from Election Commission staff and county election clerks around Wisconsin attesting to the harms presented by Applicant's requested relief. They explained that incorrectly placed stickers would produce errors in how the voter's choices are registered); that stickers could peel off, getting stuck in the voting tabulator, or stick to and rip other ballots, making a jammed scanner unavailable on election day; that miscounting can result even if a clerk correctly cuts out and places the sticker because tabulators are programmed to register the ballot's weight, and added weight may produce a double ballot error; and that tabulators may mistake the shadow or wrinkle of a sticker as a vote, registering an overvote. They explained that creating and placing tiny stickers cut to obscure only Applicant's name on four million ballots would be a herculean task for clerks, including those who are part-time and have other, fulltime jobs. (A.-App. 036–037 (trial court considering evidence presented in clerk affidavits).)

After reviewing the parties' briefs and declarations from Commission staff and county clerks, the trial court issued an oral ruling denying the temporary injunction. (A.-App. 029–050.)

On the balancing of equities, the court held that the equities of harms to clerks, voters, and the public outweighed Applicant's asserted interests and injury. The court

pointed to the unbudgeted costs for clerks, missed deadlines for sending ballots, and the "logistical nightmare" posed by Applicant's proposal. The court cited its charge to avoid confusion and incentives not to vote in the time leading up to the election. (A.-App. 035–038.) The court weighed those harms against Applicant's asserted harms, noting that he was seeking to obtain ballot access in other States, and knew or should have known that Wisconsin law does not permit candidates to withdraw at the time he submitted his nomination papers. (A.-App. 035–036; 048.)

On the likelihood of success, the court reasoned that Wis. Stat. § 8.35(1) does not permit withdrawal from the ballot once a candidate submits his nomination papers and declaration of candidacy. The court also concluded that Applicant's constitutional challenges were unpersuasive: Applicant offered no support for a constitutional right to be *removed* from the ballot. (A.-App. 039–048.)

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

Applicant petitioned for leave to appeal a non-final order. The court of appeals granted that petition and ordered briefing, including questions relating to stickering ballots. Respondent petitioned the Wisconsin Supreme Court for bypass, meaning that that court hears the appeal directly instead of the intermediate appellate court. Wis. Stat. § 809.6(1)(a).

On September 27, 2024, a unanimous Wisconsin Supreme Court concluded that Applicant had failed to demonstrate that the trial court had not appropriately exercised its discretion. The court expressly stated that it was not deciding the merits

of the case but rather simply reviewing "whether the circuit court properly exercised its discretion in denying the requested temporary injunction." (R.-App. 4.) The court concluded that Applicant "has failed to satisfy this burden;" it held that "Kennedy's appellate briefs fail to develop arguments showing an erroneous exercise of discretion." (R.-App. 4.)

As to the likelihood-of-success factor, the court noted that "Kennedy's appellate briefs omit any argument that the circuit court misinterpreted Wis. Stat. § 8.35(1)." (R.-App. 4.) As to Applicant's constitutional claims, the court explained:

> While Kennedy's appellate briefs do mention his constitutional arguments (equal protection, free speech, and freedom of association) in cursory terms, *they fail to develop those arguments to even a minimal standard sufficient for us to consider their merits*. . . . They wholly fail to provide legal arguments on the merits of his constitutional claims, supported by citation to legal authority, from which we could make a legal determination as to whether the circuit court erred in finding them to be without merit.

(R.-App. 4–5.) As a result, the supreme court concluded "that Kennedy has failed to satisfy his burden of demonstrating an erroneous exercise of discretion" by the state trial court. (R.-App. 5.)

As to irreparable harm, the supreme court held that Applicant's inadequate briefing on the federal constitutional claims negatively impacted its ability to review the first injunction factor under state law—"whether Kennedy will suffer any irreparable harm in the absence of a temporary injunction." (R.-App. 5 n.2.) It explained: "His claims of harm are based on his alleged constitutional violations. Since he does not provide us a sufficient basis to assess those claims, we cannot

determine whether the circuit court erred in finding that he will not suffer irreparable harm in these circumstances." (R.-App. 5.)

Applicant filed a motion to reconsider, which was summarily denied.

On October 21, Applicant filed his application with Justice Barrett, over three weeks after the Wisconsin Supreme Court decision.

IV. The election process has moved forward.

Applicant's interest in having voters choose him for President has continued in some States but not others. Also pending before a Justice of this Court, for example, has been Applicant's Application for Emergency Injunction to be *placed* on the ballot in the State of New York. *Team Kennedy v. Berger*, No. 24A285.[1]

Meanwhile, the Wisconsin election has moved forward in full force. Respondent collects daily data from all 72 Wisconsin counties. Respondent provides data to the public about absentee ballots issued to voters by municipal clerks and returned to the clerks by those voters: https://elections.wi.gov/resources/statistics/october-28-november-6-daily-absentee-ballot-reports-november-5-2024-general (last visited Oct. 28, 2024). As of October 28, 2024, the totals were 1,040,395 absentee ballots issued by clerks and 858,166 absentee ballots returned.

[1] Justice Sotomayor denied that application on September 27, 2024. *Docket for No. 24A285 Team Kennedy v. Berger*, Sup. Ct. of the U. S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24a285.html (last visited Oct. 28, 2024).

ARGUMENT

APPLICANT IS NOT ENTITLED TO THE EXTRAORDINARY RELIEF OF AN INJUNCTION PENDING APPEAL.

Applicant seeks an original writ of injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). The injunctive power under 28 U.S.C. § 1651(a) is an extraordinary remedy that is to be used "sparingly and only in the most critical and exigent circumstances," and only where the legal rights at issue are "indisputably clear." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations omitted). The bar for obtaining such relief is especially high where, as here, the applicant "seek[s] an injunction prior to full argument and contrary to the lower courts' determination." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 36 (2020) (Sotomayor, J., dissenting). Particularly, the justification required for the issuance of a preliminary injunction is "significantly higher" than what is required for the issuance of a stay pending appeal, because such relief "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1312.[2]

A party seeking a preliminary injunction pursuant to 28 U.S.C. § 1651(a) must also satisfy the general elements for preliminary injunctive relief. *See Roman Cath.*

[2] Applicant erroneously asserts that this Court's authority to award his requested relief also derives from 28 U.S.C. § 2101(f), which authorizes a stay pending application for writ of certiorari of a "final judgment or decree." (Application 2.) Applicant does not seek a stay, much less a stay in connection with any "final judgment or decree;" he seeks affirmative injunctive relief that was denied by the Wisconsin courts.

Diocese of Brooklyn, 592 U.S. at 16 (citing *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). This means that the party "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 7.

I. The *Purcell* doctrine forecloses Applicant's requested relief.

As of today's filing, October 28, the general election is eight days away. As a threshold issue, the *Purcell* doctrine disposes of Applicant's extraordinary request for relief: to handcraft and affix stickers to millions of Wisconsin ballots.

This Court has explained the serious problems associated with modifying election procedures this close to elections: "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Indeed, even "seemingly innocuous late-in-the-day" changes can "interfere with administration of an election and cause unanticipated consequences." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). As Justice Kavanaugh rightly observed, "election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes." *Id.*

The injunction Applicant seeks here starkly presents those hurdles. He proposes that, about a week before the general election, Wisconsin election clerks stop running the election and turn to custom cutting and affixing stickers to cover his name to every Wisconsin ballot not yet sent to voters. Achieving that in a week is impossible. In the proceedings below, Respondent introduced evidence from county clerks attesting to the thousands of hours such a project would entail: work for clerks who are fully occupied with running the election and many of whom have other, fulltime jobs in addition to their parttime clerk positions. Applicant's proposal would also cause Wisconsinites to vote with two different types of ballots: the unstickered version used by voters who have already voted or received their ballots, including ballots sent to overseas voters under UOCAVA, and the version (theoretically) available to voters voting in-person on November 5. The chaos and confusion Applicant would inject into the Wisconsin election is just the type of last-minute change *Purcell* warns federal courts to avoid.

II. The balancing of equities weighs dispositively against relief.

Beyond *Purcell*, the balancing of equities weigh dispositively against Applicant's request for extraordinary relief.

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

Most basically, his suggestion is prohibited by Wisconsin law. Wisconsin Stat. § 5.51(4) bars election officials from attaching a sticker to a ballot: "[n]o stickers may be placed on a ballot by election officials except under s. 7.37 (6)." The sole exception addresses a situation where a candidate dies and his party selects a replacement nominee. Wis. Stat. § 7.38(1), (3). That exception does not apply here, of course, because Applicant is alive and well. Applicant tells this Court that Wis. Stat. § 7.38(3) provides for stickers (Application 19–20), but he neglects to mention it is solely for the situation where a candidate dies.

Courts cannot grant injunctions that violate state law. Courts acting in equity have discretion unless a statute clearly provides otherwise. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001). That is because "clearly-worded statutes have the power to divest courts of their equity powers." *Findlay Truck Line, Inc. v. Central States, Se. & Sw. Areas Pension Fund*, 726 F.3d 738, 753 (6th Cir. 2013). In *Findlay Truck Line,* the Sixth Circuit held the trial court lacked authority to issue a preliminary injunction that violated plain statutory language. Here, state statute expressly prohibits the relief sought.

Even if Applicant had died and Wis. Stat. § 7.38 were available, it would not work the way he assumes. That statute is about a political party's ability to replace its deceased candidate with a different nominee, allowing voters to select that candidate. It requires the political party to provide properly-sized stickers featuring the new candidate's name. Wis. Stat. § 7.38(3) (party must supply stickers with the new nominee's name that are no larger than the space provided on the ballot for the

original candidate's name and office). That is a wholly different process than the remedy Applicant seeks here.

It is for good reason that Applicant's idea is not the law. Respondent presented evidence below about the harms posed by Applicant's plan, including affidavits by election officials and clerks from around Wisconsin. Applicant provided no contrary evidence of any kind.

Hand cutting and affixing stickers for millions of ballots would be a herculean task, requiring tens of thousands of man hours—hours that no longer exist before November 5. And it could jeopardize the proper administration of the election. Below, Respondent explained the harms presented by stickers in electronic tabulation machines—the counting method used in the vast majority of Wisconsin polling places—including breakdown of tabulators at many polling places and inaccurate counting of ballots.

The Wisconsin Legislature prohibits clerks from adding stickers to ballots other than in the extraordinary circumstance of a candidate's death. The Wisconsin trial court was well within its discretion in concluding that the competing equities weighed against Applicant's request.

III. Applicant demonstrates no likelihood of success on appeal, much less the indisputably clear right he must show.

Applicant also demonstrates no likelihood of success on appeal. This Court does not review decisions like this one, where the Wisconsin Supreme Court decided the matter on an independent and adequate state ground: his failure to adequately brief

the case to that court, including the failure to adequately develop the federal constitutional arguments he raises here. Even if the appeal were potentially subject to this Court's review, Applicant ignores the standard of review that would apply; it is an appeal of the trial court's discretionary decision not to grant preliminary relief. Further, Applicant has presented no case law supporting his assertion that Wisconsin law is unconstitutional, much less demonstrated a clear right to relief under governing law. And although he compares this case to the Sixth Circuit's decision in *Kennedy v. Benson*, No. 24-1799, 2024 WL 4327046 (6th Cir. Sept. 27, 2024), a case about Michigan's ballot process, the facts that gave the *Benson* dissenters pause in that case are not present here.

A. The Wisconsin Supreme Court unanimously decided the appeal on an adequate and independent state law ground.

Out of the gate, this appeal is not appropriate for this Court because the Wisconsin Supreme Court's unanimous decision rested on adequate and independent state grounds.

As this Court has long recognized, "[t]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). The Supreme Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.* Therefore, "[t]his Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of

the federal claim and an 'adequate' basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). "This rule applies whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (holding modified by *Martinez v. Ryan*, 566 U.S. 1 (2012)).

The Wisconsin Supreme Court's review was an interlocutory appeal of the state trial court's denial of Applicant's motion for a temporary injunction. (R.-App. 1.) The supreme court affirmed the trial court decision denying that motion and dismissed the interlocutory appeal. (R.-App. 6.) In so doing, the supreme court did not tackle Applicant's federal constitutional claims because it concluded they had been inadequately briefed. (R.-App. 4–5.) The court held that Applicant failed to meet his burden under state law to show that the circuit court erroneously exercised its discretion in denying his motion for a temporary injunction. (R.-App. 5.)

In his Application, Applicant dedicates many pages to his disagreement with that decision, arguing that his arguments were, indeed, properly developed. But that is not a question for this Court to resolve. That independent and adequate ground for the Wisconsin Supreme Court's decision means that this Court cannot review it.

B. Applicant entirely ignores the standard of review.

Beyond the lack of federal question, nowhere does Applicant mention, much less grapple with, the standard of review on appeal. Applicant seems to assume that this Court would review his case de novo. But that is not the case: this appeal seeks review of the trial court's discretionary decision not to grant preliminary relief.

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

The trial court's discretionary decision is upheld as long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995). Here, Applicant offers the Court no explanation of how the trial court failed to conduct that analysis.

C. Applicant does not establish a likelihood of success on his constitutional arguments.

Applicant offered the Wisconsin Supreme Court no argument at all that Respondent erred in applying Wis. Stat. § 8.35(1), the statute that prohibits all candidates from withdrawing from the ballot once they have qualified. Instead, he asserts that either section 8.35(1) or the statutes setting nomination paper deadlines are unconstitutional as applied to him. But as the trial court below recognized, Applicant offered no support for his assertion that a candidate has a constitutional right to be removed from the ballot.

1. Applicant did not argue to the Wisconsin Supreme Court, and does not argue here, that Respondent violated state law in determining he would remain on the ballot. Wisconsin Statute § 8.35(1) provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot *may not decline nomination*. The name of that person *shall* appear upon the ballot except in case of death of the person." Respondent interpreted this statute to mean that Applicant—who had submitted his nomination papers and a declaration of candidacy two weeks prior—was barred from withdrawing absent death. The Wisconsin Supreme Court noted that Applicant made no argument that Respondent or the trial court misunderstood state law. (R.-App. 4. ("[W]e note that Kennedy's appellate briefs omit any argument that the circuit court misinterpreted WIS. STAT. § 8.35(1).").) That means that Applicant's appeal here is purely a claim that Wisconsin law is unconstitutional, at least as applied to him.

2. For that constitutional claim, Applicant misunderstands the standard of review for a constitutional challenge to statutes governing nomination papers and withdrawal of candidacy. He suggests it is strict scrutiny (Application 17 (arguing that Respondent fails to claim a "compelling state interest")), but that is incorrect. Such challenges are reviewed under a balancing test that weighs the state's interests in orderly and reliable election administration against the alleged burden on the rights of the candidate or voter. Unless the burden is severe, reasonable requirements are upheld.

States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots: "As a practical matter, there must be a substantial regulation

of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted). Instead, "a more flexible standard" applies: courts weigh the "character and magnitude" of the burden the law imposes against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Regulations imposing a "severe" burden on the plaintiff's rights must be narrowly tailored and advance a compelling state interest, but lesser burdens trigger less exacting review. *Id.* (citation omitted). The State's "important regulatory interests are generally sufficient to justify" an election law that imposes only "reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights. *Id.* (quoting *Celebrezze*, 460 U.S. at 788).

Under those standards, reasonable ballot access deadlines for independent candidates are constitutional. Applicant complains that differing ballot access deadlines for independent and major party candidates give major parties an advantage. Even if this were a case about ballot *access*, that difference is not constitutionally significant. Wisconsin's deadlines reasonably reflect the difference in time needed to process nominations.

This Court has held that "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify

for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Celebrezze*, 460 U.S. at 788 n.9.

In *Celebrezze*, the Court considered what nomination paper deadlines were reasonable restrictions on independent candidates. It rejected the March deadline then in Ohio law, but it noted that, based on the facts about reviewing papers and ballot preparation stipulated to in the district court, a 75-day statutory deadline would have been reasonable. *Celebrezze,* 460 U.S. 800 & n.28. In 1983, when *Celebrezze* issued, two-thirds of the States had nomination paper deadlines for independent candidates in August or September, with many others in June or July. *Celebrezze*, 460 U.S. at 795 n.20; *see also U.S. Taxpayers Party of Fla. v. Smith*, 871 F. Supp. 426, 436–37 (N.D. Fla. 1993).

Wisconsin is in the mainstream of those deadlines. Wisconsin's nomination procedures in Wis. Stat. §§ 8.20(8)(am) and 8.16(7) reflect two different procedures: independent candidates submit nomination papers, while major party candidates are nominated and certified by their party. They provide a reasonable, nondiscriminatory process—and reasonable deadlines—by which candidates must demonstrate sufficient support.

Independent candidates demonstrate sufficient elector support to qualify for the ballot by submitting nomination papers with signatures from throughout the state. *See* Wis. Stat. § 8.20(2)–(10). The nomination papers must be submitted to the Elections Commission by "the first Tuesday in August preceding [the] presidential election," which, this year, was August 6. Wis. Stat. § 8.20(8)(am). Major party

candidates—candidates of parties entitled to partisan primary ballots—have demonstrated sufficient elector support through their party's performance in prior elections or other means. *See* Wis. Stat. § 5.62(1)(b)1., (2)(a). They select their nominees for president and vice president at their respective conventions and certify the names of the nominees. *See* Wis. Stat. § 8.16(7). The certification must be submitted to the Elections Commission no later than "the first Tuesday in September preceding [the] presidential election," which, this year, was September 3. *Id.*

Those deadlines reasonably reflect the time needed to review nomination paper signatures for sufficiency and process challenges to those papers from voters and opposing candidates. The extra time is not needed for major party candidates because they do not file nomination papers. Applicant makes no claim here that the August 6 deadline was a burden at all, much less of such magnitude such that it ran afoul of the Constitution.

3. Applicant suggests that equal protection principles provide a right for him to be removed from the ballot, but he still offers no case law supporting his view that equal protection affords a right for a candidate to be *removed* from the ballot.

To the extent Wisconsin law addresses the ability of a candidate to "disassociate" with a party, Wis. Stat. § 8.35(1) makes no reference to political party. It provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person." Wis. Stat. § 8.35(1).

Applicant's theory—that major party candidates have longer to withdraw—is based on differing nomination deadlines for independent and major party candidates; his premise is that if he had been a major party candidate, he could have waited longer to file his papers, thus giving him more time to decide not to run at all. But this Court has recognized that different nomination deadlines are constitutional. Applicant offers no support for his view that those deadlines become unconstitutional because they implicitly require independent candidates to commit sooner not to withdraw.

4. Applicant also has not demonstrated that he has a First Amendment right to remove himself from the ballot, either under a compelled speech or associational rights theory.

First, a candidate's name on a ballot is not compelled speech. Applicant asserts that he wants voters (at least Wisconsin voters) to know that he supports a different candidate for the Presidency. (A.-App. 21–22.) The ballot is not the way to express such views.

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997), this Court rejected a political party's claim that a Minnesota law violated the First Amendment on the theory it prevented the party from communicating its support of that candidate:

> We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.

Id. at 362–63. The Court reasoned that the party retained many options in speaking about who it supported:

> The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate.

Id. at 363. Similarly, in *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005), the Ninth Circuit rejected a compelled speech claim regarding words in a ballot initiative title, and noted that plaintiff remained free to publicly disassociate himself from the message.

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

Second, Applicant's free association argument is a non-starter. Voters may have associational rights to have a candidate's name *included* on the ballot because a voter wishes to associate with the candidate by casting his vote in the candidate's favor. *Bullock v. Carter,* 405 U.S. 134 (1972); *see also Berg v. Egan*, 979 F. Supp. 330, 336 (E.D. Pa. 1997) (citation omitted). Such interests favor keeping Applicant on the ballot so that voters, including those who have objected to his removal from the ballot, can select him.

Applicant has never offered support for a converse rule of law: that voters and candidates have a constitutional right to have a candidate's name *removed* from the ballot. In a case brought by voters seeking to remove a candidate's name from a

Maryland ballot after that state's deadline, the Maryland court of appeals explained why that state's prohibition on removal violated no constitutional right:

> This case is therefore unlike cases in which candidates were denied access to the ballot, and the challenged provisions restricted the pool of candidates on the ballot from whom voters could readily choose. As applied in this case, these provisions did not limit candidate access to the ballot or the ability of a voter to select a preferred candidate. Appellees conceded that, while early candidacy filing deadlines have sometimes been held unconstitutional when they restrict access to the ballot, they were unable to find a case holding that a withdrawal deadline was unconstitutionally early. This should not be surprising, as a withdrawal deadline by itself does not restrict access to the ballot.

Lamone v. Lewin, 190 A.3d 376, 391 (Md. App. 2018).

Applicant has failed to demonstrate that Wisconsin statutes are unconstitutional under equal protection or First Amendment principles.

D. This case has different facts from those in *Kennedy v. Benson*.

Applicant suggests that his effort here is essentially a companion case to *Kennedy v. Benson*, No. 24-1799, where a divided Sixth Circuit panel rejected Applicant's effort to be removed from the ballot in Michigan, and the majority of the Sixth Circuit voted not to rehear the case en banc. Applicant has applied for an emergency injunction in that case, too. *Kennedy v. Benson*, No. 24A405.

For two basic reasons, this case is different from *Benson*.

First, there is no federal question here because the case was decided on independent state grounds.

Second, a disputed issue in *Benson* was whether Michigan's secretary of state violated state law by putting Applicant back on the ballot after the statutory deadline for finalizing the ballot had passed. *See Kennedy*, 2024 WL 4327046, at *6

(McKeague, J., dissenting) ("Critically, Kennedy's asserted injury arose not from Secretary Benson's refusal to accept his withdrawal in August, but from her decision to put his name back on the ballot on September 9—after the statutory deadline.") The dissenting judges in *Benson* viewed that question as relevant in balancing the equities for and against injunctive relief. *Id.* at *5; *see also Benson*, No. 24-1799, 2024 WL 4501252, at *6–18 (6th Cir. Oct. 16, 2024) (Thapar, J., and Readler, J., dissenting). But here, Applicant makes no claim to this Court that Respondent failed to follow Wisconsin law in applying Wis. Stat. § 8.35(1), which prohibits all candidates from removing their names from the ballot once they qualify, absent death.

CONCLUSION

This Court should deny Applicant's application for an emergency injunction pending appeal.

Respectfully submitted,

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October 28, 2024

CERTIFICATE OF SERVICE

A copy of this Brief in Opposition to Application for Emergency Injunction was served by email and mail to the counsel listed below in accordance with Supreme Court Rule 29.3:

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2024 WI 37

Supreme Court of Wisconsin

ROBERT F. KENNEDY, JR.,
Petitioner-Appellant,
v.
WISCONSIN ELECTIONS COMMISSION,
Respondent-Respondent.

No. 2024AP1872
Filed September 27, 2024

The Court entered the following order on this date:

This is a review of a circuit court order denying Robert F. Kennedy, Jr.'s request for a temporary injunction requiring the Wisconsin Elections Commission (WEC) to remove Kennedy as a candidate for President on the November 5, 2024 Wisconsin general election ballot. The case is before this court on bypass of the court of appeals pursuant to WIS. STAT. § (Rule) 809.60.

The facts relevant to this matter are as follows. On August 6, 2024, Kennedy and Nicole Shanahan submitted nomination papers and declarations of candidacy to WEC as independent candidates for President and Vice President in the November 2024 general election. On August 23, 2024, Kennedy sent a letter to WEC stating that he was "withdraw[ing] his candidacy from the 2024 United States Presidential Election" and requesting that his name not be printed on the ballot in Wisconsin. WEC considered Kennedy's request at an August 27, 2024 statutorily mandated meeting, at which WEC was required to certify the candidates to be placed on the ballot. *See* WIS. STAT. § 10.06(1)(i). The commissioners voted 5-1 to deny Kennedy's request to withdraw from the ballot based on WIS. STAT.

§ 8.35(1), which provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person." WEC included Kennedy's name on the certified list of candidates for President.

On September 3, 2024, Kennedy filed a petition for judicial review of WEC's decision under WIS. STAT. § 227.52 in the Dane County circuit court. Kennedy also immediately filed a motion for a temporary injunction that would compel WEC to remove his name from the ballot. After receiving briefing from the parties and declarations from WEC staff and various municipal clerks, and after having afforded Kennedy an evidentiary hearing at his request, the circuit court issued an oral ruling denying the temporary injunction motion on September 16, 2024. The circuit court memorialized its oral ruling in a written order that same day.

On September 17, 2024, Kennedy filed a petition for leave to appeal the denial of his motion for a temporary injunction, which the court of appeals granted on September 18, 2024. The following day, WEC filed a petition to bypass the court of appeals, which we granted on September 20, 2024.

In the circuit court ruling under review, the court examined whether Kennedy had satisfied the criteria for issuing a temporary injunction. A temporary injunction may be granted if: (1) the movant is likely to suffer irreparable harm if an injunction is not issued; (2) the movant has no other adequate remedy at law; (3) an injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35. The circuit court noted that a motion for injunctive relief is addressed to the sound discretion of the circuit court. Temporary injunctions are not to be issued lightly; the cause must be substantial. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).

The circuit court focused on the first, third, and fourth temporary injunction factors.[1] Regarding the first factor, the circuit court concluded that Kennedy had not demonstrated irreparable harm since Kennedy had voluntarily submitted his nomination papers and declaration of candidacy, thereby choosing to place his name before the voters. The circuit court also pointed to the fact Kennedy had simultaneously claimed harm in some states from not being removed from the ballot and harm in other states from not being placed on the ballot. On the other side of the balance, the circuit court noted the harm that would be inflicted on the public if the requested injunction were granted, including the high cost of reprinting ballots or the logistical problems in conducting an election with ballots on which stickers were placed to obscure Kennedy's name, as he requested. While the circuit court did not rely solely on this court's decision in *Hawkins v. WEC*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877, it said it was mindful of the admonition there that court orders issued during or close to elections can cause harm to the public in the form of voter confusion or an incentive for voters to refrain from voting. The circuit court further determined that Kennedy's requested injunction would alter the status quo and grant him the ultimate relief he sought in his petition, rather than maintain the status quo. *See School District of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997) ("The purpose of 'a temporary injunction is to *maintain the status quo*, not to change the position of the parties or *compel the doing of acts which constitute all or part of the ultimate relief sought*.' *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29, 34 (1964) (emphasis added)."). With respect to the likelihood of success on the merits of Kennedy's claim, the circuit court agreed with WEC's interpretation of WIS. STAT. § 8.35(1) that once a candidate has submitted nomination papers and a declaration of candidacy that meet the required qualifications to be on the ballot, the candidate's name must be placed on the ballot, unless the candidate dies prior to the election. The circuit court further concluded that Kennedy's claims of constitutional violations of his equal protection and free speech rights lacked legal merit, which meant that Kennedy had no likelihood of success on the merits. Considering all of these factors, the circuit court denied the motion for a temporary injunction.

[1] Regarding the second factor, there appears to be no dispute that money damages would not be an adequate remedy for Kennedy's alleged harm. *See Sprecher v. Weston's Bar, Inc.*, 78 Wis. 2d 26, 50, 253 N.W.2d 493, 504 (1977).

In this appeal our task is not to decide the merits of the case, but simply to review whether the circuit court properly exercised its discretion in denying the requested temporary injunction. *Serv. Emps. Int'l Union*, 393 Wis. 2d 38, ¶93 (circuit court's decision to grant or deny a motion for a temporary injunction is reviewed for an erroneous exercise of discretion). We will sustain a discretionary decision as long as the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898.

As the party challenging the circuit court's exercise of discretion, Kennedy has the burden of demonstrating an erroneous exercise of discretion. *See Colby v. Colby*, 102 Wis. 2d 198, 207–08, 306 N.W.2d 57 (1981). The challenger must demonstrate that the circuit court did not examine the relevant facts, apply a proper standard of law, or reach a conclusion that a reasonable judge could reach by applying a demonstrated rational process. We conclude that he has failed to satisfy this burden.

It is worth pointing out that, in addition to the case law that places the burden of demonstrating an erroneous exercise of discretion on the appellant, the court of appeals' order granting leave to appeal twice explicitly directed Kennedy's counsel to address the merits of his appeal in his appellate briefs, as well as to answer specific questions posed by the court of appeals. *Kennedy v. WEC*, No. 2024AP1872, unpublished order at 2 (Wis. Ct. App. Sept. 18, 2024) ("Granting Kennedy's leave petition now will allow briefing on the merits of Kennedy's claim to commence immediately—specifically, whether the circuit court erred by denying Kennedy's motion for a temporary injunction."); *id.* at 3 ("In addition to whatever arguments the parties wish to make in their briefs on whether the circuit court erred by denying Kennedy's request for a temporary injunction, the parties shall address the following questions in their briefs: . . . . ").

Despite this additional admonition from the court of appeals, Kennedy's appellate briefs fail to develop arguments showing an erroneous exercise of discretion. We focus initially on the fourth injunction factor—whether Kennedy has demonstrated that the circuit court erred in concluding that he lacked a reasonable probability of success on the merits. First, we note that Kennedy's appellate briefs omit any argument that the circuit court misinterpreted WIS. STAT. § 8.35(1). While Kennedy's appellate briefs do mention his constitutional arguments (equal protection, free

speech, and freedom of association) in cursory terms, they fail to develop those arguments to even a minimal standard sufficient for us to consider their merits. Kennedy's appellate briefs focus primarily on the additional questions posed by the court of appeals, but they wholly fail to provide legal arguments on the merits of his constitutional claims, supported by citation to legal authority, from which we could make a legal determination as to whether the circuit court erred in finding them to be without merit.[2] The inadequacies of Kennedy's appellate briefs therefore render us unable to perform the required review of the circuit court's exercise of discretion with respect to the fourth factor. *See Southwest Airlines Co. v. DOR*, 2021 WI 54, ¶32 n.10, 397 Wis. 2d 431, 960 N.W.2d 384 ("Further, Southwest's due process and equal protection arguments are undeveloped, and we generally do not address undeveloped arguments." (citation omitted)); *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212 ("'[W]e do not usually address undeveloped arguments,' and we will not do so here." (alteration in original) (citation omitted)).

The inadequacy of Kennedy's briefs on the fourth factor also impact our ability to review the first factor regarding whether Kennedy will suffer any irreparable harm in the absence of a temporary injunction. His claims of harm are based on his alleged constitutional violations. Since he does not provide us a sufficient basis to assess those claims, we cannot determine whether the circuit court erred in finding that he will not suffer irreparable harm in these circumstances.

Having failed to demonstrate error by the circuit court on both the probability of success on the merits and the presence of irreparable harm, it is unnecessary to address the other factors. We conclude that Kennedy has failed to satisfy his burden of demonstrating an erroneous exercise of discretion. We emphasize that we are not making any legal determinations on our own regarding the claims made by Kennedy and we are not agreeing with the circuit court's legal conclusions on those claims. We simply are unable to make such determinations, given the inadequate briefing presented to us. Consequently, because there is no basis in this appeal on which we could determine that the circuit court erroneously exercised its

[2] It is worthwhile to note that, after we granted the petition for bypass and Kennedy filed a motion for oral argument in which he lamented that WEC's response brief had addressed the merits of his claims, we gave Kennedy's counsel extra time to file an amended and longer reply brief.

discretion, we must affirm the circuit court's order denying Kennedy's motion for a temporary injunction.

The order of the circuit court denying the motion for temporary injunction is affirmed.

KENNEDY *v.* WEC
JUSTICE REBECCA GRASSL BRADLEY, concurring

REBECCA GRASSL BRADLEY, J., with whom ANNETTE KINGSLAND ZIEGLER, C.J., joins, concurring.

Robert F. Kennedy Jr. withdrew his candidacy and requested his name not appear on the ballot—before any ballots were approved or printed. WEC refused, fomenting voter confusion in a battleground state that could decide who will be the next President of the United States. Under state statutes, different rules apply to major party candidates, triggering colorable federal constitutional claims. *See, e.g.*, WIS. STAT. § 8.35(1). The manner in which the case is postured places the court in the position of not deciding the merits, but reviewing what is a circuit court's discretionary decision to deny a request for an injunction. This court concludes the constitutional arguments are insufficiently developed, preventing us from determining whether the circuit court erred in rejecting them. I do not disagree, but the timelines under which WEC—and this court—operate hamstring candidates in Kennedy's situation, leaving little time to brief and argue substantial issues lest this court ultimately invoke the doctrine of laches against a party for any delay. *See, e.g.*, *Trump v. Biden*, 2020 WI 91, ¶¶13-22, 394 Wis. 2d 629, 951 N.W.2d 568.

Kennedy could have filed an original action petition with this court rather than proceeding in circuit court, but this court's decisions to grant or deny original action petitions lack predictable standards, leaving parties to guess the right avenue for challenging WEC's decisions. *See, e.g.*, *Trump v. Evers*, No. 2020AP1971, unpublished order (Wis. Dec. 3, 2020); *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930, unpublished order (Wis. Dec. 4, 2020); *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 995 N.W.2d 779; *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; *Phillips v. Wis. Elections Comm'n*, 2024 WI 8, 410 Wis. 2d 386, 2 N.W.2d 254. Proceeding in the circuit court first leaves a party with less time for meaningful appellate review. Filing an original action risks wasting time that could have been spent litigating in circuit court.

The ramifications in this case are immense. Important constitutional claims go unreviewed. Voters may cast their ballots in favor of a candidate who withdrew his candidacy, thereby losing their right to cast a meaningful vote. Ballots listing a non-candidate mislead voters and may skew a presidential election. In this case, the damage to voter participation in electoral democracy is real.