No. 235P24 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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ROBERT F. KENNEDY, JR. v. NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ALAN HIRSCH, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, KEVIN N. LEWIS, AND SIOBHAN O'DUFFY MILLEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS	From N.C. Court of Appeals P24-624 From Wake 24CVS27757

* * * * * * * * * * * * * * *

ORDER

"[O]ur state constitution 'declare[s]' our rights so that 'the great, general, and essential principles of liberty and free government may be recognized and established.' " *Bouvier v. Porter*, 386 N.C. 1, 2, 900 S.E.2d 838, 842 (2024) (alteration

in original) (quoting N.C. Const. art. I). The text recognizes that "[a]ll political power is vested in and derived from the people," N.C. Const. art. I, § 2, and that the people "have the inherent, sole, and exclusive right of regulating the internal government," *id.* art. I, § 3. "The people exercise this 'exclusive right' through one of our most fundamental political processes—elections." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842.

"Since 1776 the state constitution has recognized the importance of elections and their integrity in the Declaration of Rights." *Id.* The Free Elections Clause requires that "[a]ll elections shall be free." N.C. Const. art. I, § 10. This language is plain: "it protects voters from interference and intimidation in the voting process," *Harper v. Hall*. 384 N.C. 292, 361, 886 S.E.2d 393, 438 (2023), and guarantees that "(1) each voter is able to vote according to his or her judgment, and (2) the votes are . . . accurately counted." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. "This Court has consistently interpreted the North Carolina Constitution to provide the utmost protection for the foundational democratic freedom[ ] of . . . voting." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 55, 707 S.E.2d 199, 208–09 (2011) (Newby, J., dissenting).

To protect this important right, the elections process should ensure that voters are presented with accurate information regarding the candidates running for an elected office. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346–47, 115 S. Ct. 1511, 1519 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14–15, 96 S. Ct. 612

(1976)) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."). Where a ballot contains misleading information or inaccurately lists the candidates, it risks interfering with the right to vote according to one's conscience.

Defendants filed a petition for writ of supersedeas seeking to stay enforcement of the Court of Appeals' 6 September 2024 interlocutory order and simultaneously filed a petition for discretionary review seeking review of the same order.

> Interlocutory determinations by the Court of Appeals, including orders remanding the cause for . . . other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

N.C.G.S. § 7A-31(c) (2023). We conclude that defendants have not met their heavy burden under this standard, and accordingly we deny their petition for discretionary review and also deny their petition for writ of supersedeas.

Neither party in this case disputes that plaintiff submitted a resignation of candidacy. N.C.G.S. § 163-113 (2023). Therefore, by law, a vote for plaintiff in this election will not count. *Id.* But if plaintiff's name appears on the ballot, it could disenfranchise countless voters who mistakenly believe that plaintiff remains a candidate for office. The trial court did not appropriately weigh this consideration in its ruling, instead focusing on the minimal harm to plaintiff himself and the

significant resources the State would need to expend to create an accurate ballot for this election.

Moreover, although N.C.G.S. § 163-165.3(c) requires the State Board to promulgate rules for the reprinting of ballots "where practical" in response to replacement candidates or other late changes, we are unpersuaded by the practical objections defendants raise in their submissions to this Court. To a large extent, any harm suffered by defendants in light of the Court of Appeals' order is of their own making. Indeed, defendant Bell candidly admitted that she was aware on Friday, 23 August 2024, that plaintiff had suspended his campaign and intended to remove his name from ballots in battleground states. Additionally, a representative of plaintiff's presidential campaign emailed the State Board on 23 August 2024 to inquire about removing plaintiff's name from ballots, putting the State Board on notice that plaintiff intended to remove his name. Rather than following up with plaintiff or the We The People Party, defendant Bell instructed the County Boards of Election to continue the ballot preparation process, which they did over the weekend. By Monday, 26 August 2024, plaintiff contacted the State Board regarding the process for withdrawing. Nevertheless, the State Board did not instruct the County Boards to pause ballot preparation. On Tuesday, 27 August 2024, the State Board received plaintiff's formal withdrawal request but gave no further instructions other than stating that the We The People Party needed to submit a formal withdrawal request. And perhaps most strikingly, after the State Board received the We The People

Party's formal withdrawal request on Wednesday, 28 August 2024, and scheduled an emergency board meeting, director Bell instructed the County Boards to continue printing ballots. When the State Board held its emergency meeting on Thursday, 29 August 2024, it voted 3-2 that removing plaintiff's name would not be practical in light of the current state of ballot production.

Thus, despite being on notice of plaintiff's intention to withdraw his name from the ballot for nearly a week, the State Board directed the County Boards to continue ballot production, including over the weekend, rather than communicating and cooperating forthrightly with plaintiff and the We The People Party. We decline to grant defendants extraordinary relief when they are responsible for their own predicament. *Cf., e.g.*, *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) ("One who seeks equity must do equity. The fundamental maxim, 'He who comes into equity must come with clean hands,' is a well-established foundation[al] principle upon which the equity powers of the courts of North Carolina rest.").

We also note that defendant Bell indicated in her affidavit that ballot content was not "finalized" until, at the earliest, 21 August 2024. She stated that for a "handful" of ballot styles, parties had until 22 August 2024 to fill nomination vacancies. Therefore, by the time plaintiff announced the suspension of his campaign and his intention to remove his name from ballots in battleground states, the ballot preparation was in its infant stages. At this time, the State Board could have communicated with plaintiff or the We The People Party to clarify plaintiff's

intentions before ballot production had progressed too far. Yet, as noted, defendant Bell and the State Board forged ahead and directed County Boards to continue ballot preparation. The State Board's substantial harm arguments thus ring hollow.

We acknowledge that expediting the process of printing new ballots will require considerable time and effort by our election officials and significant expense to the State. But that is a price the North Carolina Constitution expects us to incur to protect voters' fundamental right to vote their conscience and have that vote count. N.C. Const. art. I, § 10; *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842.

For all these reasons, the Court of Appeals properly issued its writ of supersedeas to prevent the dissemination of inaccurate ballots and to ensure that voters in our state are able to vote their conscience and have those votes counted. Accordingly, defendant's petition for writ of supersedeas and petition for discretionary review are denied.

By order of the Court in Conference, this the 9th day of September 2024.

/s/ Allen, J.
For the Court

Justices Earls, Dietz, and Riggs, dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of September 2024.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. Phillip J. Strach, Attorney at Law, For Kennedy, Robert F. Jr. - (By Email)
Mr. J. Matthew Gorga, Attorney at Law - (By Email)
Mr. Jordan A. Koonts, Attorney at Law - (By Email)
Mr. Terence Steed, Special Deputy Attorney General, For North Carolina State Board of Elections, et al. - (By Email)
Ms. Mary Carla Babb, Special Deputy Attorney General, For North Carolina State Board of Elections, et al. - (By Email)
Aaron T. Harding, For Kennedy, Robert F. Jr. - (By Email)
Aaron Siri, Esq., For Kennedy, Robert F. Jr. - (By Email)
Elizabeth Brehm, For Kennedy, Robert F. Jr. - (By Email)
Alycia Perkins, For Kennedy, Robert F. Jr. - (By Email)
Ms. Sarah G. Boyce, Deputy Attorney General, For North Carolina State Board of Elections, et al. - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Justice BERGER concurring.

I concur with the Special Order entered by the Court today denying the State's petition for writ of supersedeas and petition for discretionary review. To the extent there is substantial harm or the potential for substantial harm, it is to the voters of North Carolina, not the State Board of Elections.

I write separately to emphasize that, if we were to reach the merits of this case, more should be done to uphold and preserve the integrity of the upcoming election. There are now hundreds of thousands of invalid ballots in existence, if not more. Thus, there is the potential, however slight, that North Carolina voters could acquire both versions of seemingly legitimate ballots during the 2024 election. Whether by unintentional acts or by those who would deliberately inject chaos into the election, the substantial confusion that could result would appear to warrant attention.

A fair counting of official ballots must be defended, *see Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937), and invalid ballots could "sow confusion and ultimately dampen confidence in the integrity and fairness of elections." *Rep. Party of Penn. v. Degraffenreid,* 141 S. Ct. 732, 734 (2021) (Thomas, J., *dissenting*). Because elections are free when "vote[s are] accurately counted," *Harper v. Hall*, 384 N.C. at 364 (2023), we should not leave open the possibility that these invalid ballots could be commingled with official ballots.

Thus, one could argue that the order entered by the Court of Appeals enjoining the State Board of Elections "from disseminating ballots listing petitioner as a

candidate for President of the United States," and also directing that the Board "disseminate ballots without the name" of petitioner does not go far enough. All previously printed ballots listing Robert F. Kennedy, Jr.'s name should be destroyed, and the director of the State Board of Elections and the director of each county Board of Elections should be required to certify destruction of these invalid ballots to maintain public confidence in the upcoming election.

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Justice EARLS dissenting.

I fully join my colleague Justice Riggs in her comprehensive dissent. I write separately to emphasize a couple of additional considerations that underlie my concern that contravening state and federal laws to satisfy the shifting desires of a particular political candidate and his political party erodes the rule of law and contributes to a loss of faith in the impartiality of the state judiciary.

The Constitution of the State of North Carolina declares in Article I that "all persons are created equal" (Section 1); that "All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised" (Section 7); that "all elections shall be free" (Section 10); and that "No person shall be denied the equal protection of the laws" (Section 19). Given the unequivocal state law mandate that absentee ballots in a general election must be mailed 60 days before election day (this year, September 6),[1] N.C.G.S. § 163-227.10(a) (for a statewide general election); N.C.G.S. § 163-258.9(a) (for military and overseas voters), and the federal law mandate that absentee ballots for federal offices must be mailed to overseas voters 45 days before election day (this year, September 21), 52 U.S.C. § 20302(a)(8);

[1] There is evidence in the record from an affidavit of Wake County Board of Elections member Gerry Cohen, attached to Defendants' Petition for Writ of Supersedeas, that the State Board of Elections has never deviated from that deadline absent a separate and express statutory authorization to do so. *See* Cohen Aff., ¶ 3.

N.C.G.S. § 163-258.9(a), this Court's decision to allow the Court of Appeals unexplained mandatory injunction contravening those laws is unjustified.[2] It amounts to a suspension of state law not mandated by the representatives of the people, and grants a favor to one candidate not extended to other candidates, namely, additional time to decide whether to stand for office.

The right to vote is sacred, and fundamental to our system of democracy. *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " (quoting *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979))); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). Abridging that right for voters who vote absentee by mail, and particularly overseas voters, in order to satisfy a particular candidate, no matter what party or what political office they seek, is not consistent with free elections and equal protection of the laws. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) (noting that election laws may not be "inconsistent with the Equal Protection Clause of the Fourteenth Amendment"); *Burdick,* 504 U.S. at 441 (upholding reasonable, nondiscriminatory restrictions in the election process as necessary "to maintain the integrity of the

[2] Highlighting the importance of the timely mailing of absentee ballots, North Carolina law also provides that "[i]n every instance the board of elections shall exert every effort to provide absentee ballots, of the kinds needed by the date on which absentee voting is authorized to commence." N.C.G.S. § 163-227.10(a).

democratic system”). The rules governing elections should be the same for everyone and the courts should enforce those rules equally.

With regard to the equal protection concern, it is worth noting that other offices on the ballot in certain jurisdictions were provided notice that they had until a date certain to correct issues with who might be a candidate for those offices. There is evidence in the record, from an affidavit submitted by Board executive director Karen Brinson Bell, that Board officials contacted political party officials in mid-August to inform them of vacancies and withdrawals on the ballot. Ex. B, C, D (communications from Board general counsel Paul Cox to Democratic Party, Republican Party, and Libertarian Party officials) [hereinafter Bell Aff.]. Party officials were told in those same notices that any replacement nominees *must be certified by 22 August* in order for those names to appear on printed absentee ballots. *Id.* But it was days after that deadline, applicable to all other candidates, that Mr. Kennedy submitted his request to withdraw.[3] Mr. Kennedy does not explain why he is entitled to such special treatment.

And nor could he. His request, if tolerated, opens the door to candidates and

[3] The majority reasons that the Board should have acted sooner based on Mr. Kennedy’s public announcement that he intended to remove his name from ballots in battleground states. The majority neglects to mention that North Carolina was not mentioned by name in that announcement. The announcement also stated that Kennedy was “suspending” his presidential campaign “but not terminating it.” CNN Politics, Hear the Moment RFK Jr. Suspends his Presidential Campaign, at 1:15 (August 23, 2024), https://www.cnn.com/2024/08/23/politics/video/rfk-jr-robert-kennedy-suspends-campaign-announcement-arizona-digvid.

parties of all stripes demanding last-minute changes to already printed ballots. Importantly, the 100 county boards of election, not the state, bear the cost and responsibility of printing and distributing ballots. Bell Aff. ¶ 23; N.C.G.S. §§ 163-33(6), -165.3. Were county boards required to accommodate such late-breaking requests, the toll on budgets and limited staff capacity could be profound. If that door is not made open to other candidates, Mr. Kennedy receives the special treatment he demands. Such special treatment undermines our system of fair elections—where every candidate abides by the same set of rules. *Cf. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 610 (2021) (Newby, J. concurring in result) (noting the General Assembly's "constitutional mandate to protect fair play in elections").

If this case seems like much ado about nothing, it bears considering that 2,348 different ballot styles are in use in this state for this election. Bell Aff. ¶ 7. That figure reflects all of the contests and referenda on which voters in North Carolina's 100 counties have a say in November, from contests for the office of US president to the local soil and water conservation district supervisor, and everything in between.[4] More than 2,910,000 general election ballots have already been printed to facilitate our sacred exercise of the franchise. Bell Aff. ¶ 56.

We know that ballot layout matters enormously for an accurate count of the

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[4] *Candidate Filing Period: Soil & Water Districts, 2024 General Election*, North Carolina State Board of Elections, https://www.ncsbe.gov/news/events/candidate-filing-period-soil-water-districts-2024-general-election (accessed 9 September 2024).

voters' will. *See generally Bush v. Gore*, 531 U.S. 98 (2000). That's why North Carolina statutorily mandates that all ballots are "readily understandable by voters" and designed to "facilitate an accurate vote count." N.C.G.S. § 163-165.4(1), (4). They must "[p]resent all candidates and questions in a fair and nondiscriminatory manner." *Id.* at (2). And it's why "the work of preparing and proofing the ballots" takes weeks, and this year began in early August. Bell Aff. ¶ 9.

Why such a lengthy process? Consider the steps in finalizing a ballot. First, obviously, officials have to know what goes on the ballots. Bell Aff. ¶ 9. Then the ballot itself must be prepared. When a voter fills in an oval next to a candidate's name, that mark must be translated to the correct contest, candidate, or referenda in official tallies. Bell Aff. ¶ 11. State and county boards take careful steps to ensure that a voter's ballot selection is accurately read by tabulators and voting machines. Bell Aff. ¶ 11–12. Which requires the uniform and accurate coding of those machines. Proofreading all of the ballots across the state, as required by law, takes roughly a full calendar week. Bell Aff. ¶ 12; N.C. G.S. § 163-165.3(a)(4)–(5). Only after these steps can the approved ballots be disseminated, by the sixty-day deadline required by state law: this year September 6. N.C.G.S. § 163-227.10.

As the sample ballots—that election officials had already made publicly available—show, presidential contenders are at the top. Bell Aff. ¶ 16. Deleting an entire political party from the presidential ballot item thus potentially requires reconfiguring the layout for the entire contest, possibly the entire first ballot column,

and potentially the other columns and page breaks too. Bell Aff. ¶ 51.

This brief recitation serves to underscore that, since the Court of Appeals has issued an "extraordinary remedy" to require state and county boards to re-prepare, re-print, and disseminate ballots *without* Mr. Kennedy's name, on the very day state law requires them to be sent out, depriving voters of their statutorily guaranteed voting period and at a substantial cost of money and time resources, it must be for a very, very good reason. *AEP Industries v. McClure*, 308 N.C. 393, 401 (1983). And likelihood of success on the merits is certainly an important part of the calculus. Indeed, without such likelihood of success, the courts have no legal authority to otherwise disregard state and federal law. We as a Court are not free to simply balance the equities and decide who gets harmed more if, in the first place, there is no valid legal claim to justify our intervention. That is, in fact, policymaking at its best, something this Court previously has expressed a reluctance to countenance. *See, e.g., Rhyne v. K-Mart Corp.,* 358 N.C. 160, 169 (2004) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws."); *Harper v. Hall*, 384 N.C. 292, 322–23 (2023) (same).

Here there is no valid reason justifying intervening in the election contrary to state law and established election rules for North Carolina. Mr. Kennedy filed his motion for emergency relief on 3 September 2024, a week before ballots were to be disseminated, wanting his name removed from all of North Carolina's 2,348 ballots.

The superior court denied his request. After reviewing all the evidence and the arguments of counsel, the court found that Mr. Kennedy "will suffer no practical, personal, or pecuniary harm should his name remain on the ballot." By contrast, it found the harm to North Carolina's election officials and voters "would be substantial." Because Mr. Kennedy failed to show irreparable harm that outweighed the harm to the public, he was not entitled to his injunction as a matter of law. *See A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401 (1983); *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357 (1980). That means the superior court *did not examine* the credibility of Mr. Kennedy's underlying claims—alleged statutory and constitutional rights to have his name removed at this late stage. No valid claim, no injunction.

Mr. Kennedy appealed. Below, the Court of Appeals issued an unexplained order reversing the superior court. It directed the Board to "disseminate ballots without the name of petitioner Robert F. Kennedy, Jr. appearing as a candidate for President of the United States."

Today, the majority in its order likewise declines to explain what entitles Mr. Kennedy to this extraordinary measure. The North Carolina judicial system has not adequately explained to the public why their ballots are to be reprinted, *after* they were already ready to be mailed, after the statutory deadline.

That fact should give grave pause. In a democracy, "government should be by 'settled, standing laws,' not by 'absolute arbitrary power.' " Margaret Radin, *Can the*

Rule of Law Survive Bush v. Gore?, *in* Bush v. Gore, *the Question of Legitimacy* 110, 111 (Bruce Ackerman, ed. 2002) (quoting John Locke, *Of the Extent of Legislative Power*, *in Two Treatises of Government* (3d ed. 1698)). Giving reasons for decisions that transcend the immediate case outcome not only limits the independent will of the judiciary, but it also informs citizens and empowers their constitutional role in our democracy. William Haltom & Mark Silverstein, *The Scholarly Tradition Revisited: Alexander Bickel, Herbert Wechsler, and the Legitimacy of Judicial Review*, 4 Constitutional Commentary 25, 26 (1987) (summarizing scholarship on the necessity of reasoned judicial decisions). Finally, it is the way our judicial system guarantees the equal protection of the laws, so that future cases and future litigants are governed by the same principles and treated equally. *See Blankenship v. Bartlett*, 363 N.C. 518, 521–22, 525–26 (2009); *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 387 (2023) (order) (Earls, J., dissenting) ("A court's legitimacy is earned over time. But it can be destroyed much more quickly. That is because our authority largely depends on the public's willingness to respect and follow our decisions." (cleaned up)).

Our precedent holds that an appellate court is not bound by superior court findings of fact on appeals from an order of a superior court granting or denying a preliminary injunction. *A.E.P. Indus., Inc.*, 308 N.C. at 402; *see also Pruitt v. Williams,* 288 N.C. 368, 372–73; *Telephone Co. v. Plastics, Inc.,* 287 N.C. 232, 235 (1975); *Huskins v. Hospital,* 238 N.C. 357, 362 (1953). But the appellate court is still required to "review and weigh the evidence and find facts for itself." *A.E.P. Indus.,*

Inc., 308 N.C. at 402. That review ought to include the "considerations specific to election cases" and take into account the risk of voter confusion from late-coming court orders that change election rules. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

The specific facts of this case cast serious doubt that Mr. Kennedy would succeed on the merits were the merits ever given serious consideration. A political party that weeks ago fought to be recognized as a political party in this state, now, literally days before ballots will be distributed, apparently decides that its presidential candidate should be removed from the ballot in certain swing states while remaining on the ballot in other states,[5] even though doing so would mean that the party is no longer recognized for future elections as a political party in North Carolina. N.C.G.S. §§ 163-96(a)(1), -97. Voters across the state expecting to receive their absentee ballots and seeking to participate in elections for multiple state and federal offices, are denied the benefit of state law, local governments must expend hundreds of thousands of dollars, and election workers in every county of the state must redo their ballots to allow this late-devised political strategy to be carried out. The rules of our elections allow such attempted gaming of the presidential election system when done far enough in advance, but it is not fair to the rest of the state to

[5] For example, Mr. Kennedy has filed a brief in New York arguing that he would be irreparably harmed if he were omitted from that state's ballot. See Team Kennedy, et al., vs. Berger, et al., No. 1:24-cv-3897-ALC, Docket No. 54, Pln's Reply Memo. Supporting PI, p. 9 and 9 n.5.

disregard state election laws to accommodate a late-breaking political strategy. Even a second grader knows it is not fair to change the rules in the middle of the game just because you fear you are not winning.

On the merits of the statutory argument, in addition to the points made in Justice Riggs' dissent, I would note that N.C.G.S., § 163-113, relied on by Mr. Kennedy to justify relief, actually does not apply to him. This statute governs the withdrawal of candidates who have been nominated through a primary process, as the statutes referenced in that provision make clear. *See* N.C.G.S. §§ 163-182.15, 163-110. Mr. Kennedy is a presidential candidate, nominated through a convention process. Thus, by its express terms, the statute does not apply to Mr. Kennedy at all. It cannot be a basis for granting the relief he seeks. Put another way, Mr. Kennedy cannot use a law that does not apply to him to justify setting aside state law requirements concerning when absentee ballots must be mailed to voters.[6]

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[6] Presidential elections are unique and the processes for nominating and electing presidential candidates are governed by an entirely different article of the election code than the laws governing other elections. *See* N.C.G.S. § 163, Article 18. Notably, under state law, when a duly recognized political party decides to place a presidential candidate on the state's ballot, the party, not the candidate, controls who that candidate is and what happens in the event of a vacancy. *See* N.C.G.S. § 163-209(a). In fact, when voting for president during a general election, voters are voting for electors. N.C.G.S. § 163-209(a) ("A vote for the [presidential] candidates named on the ballot shall be a vote for the electors of the party or unaffiliated candidate by which those candidates were nominated . . . ."). And the electors themselves are chosen by political parties. N.C.G.S. § 163-1(c).

This point raises further procedural concerns about whether an individual candidate, Mr. Kennedy, is even the proper party to bring a suit for the relief he wants—to withdraw entirely from the ballot without a replacement. Presumably he seeks to eliminate the presidential ballot line item of the party he represents, We The People, altogether. Bell Aff. Ex. K. But the political party, not the candidate, is the proper party to seek that relief. That party is not before us today.

Next, Mr. Kennedy's constitutional argument on the merits is borderline frivolous. There is no precedent for the notion that a candidate's or a party's right to not have their speech compelled is implicated by the orderly application of state election laws. There are rules under state law for how and when previously identified candidates can be removed from a ballot and those rules should be fairly applied to all candidates. Nothing about them compels speech, perhaps most significantly because a ballot is not the candidate's speech. "Ballots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (rejecting the notion that there is "a right to use the ballot itself to send a particularized message").

Ultimately, without an explanation or adequate justification for this mandatory injunction, the public is left in the dark about why voting laws requiring the mailing of absentee ballots are being violated; it is impossible to guarantee that future candidates will be treated equally, and consequently impossible to guarantee the rule of law. *See generally* Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 Notre Dame L. Rev. 1093 (2001) (arguing the case was a "self-inflicted wound"). Therefore, I respectfully dissent.

The Court of Appeals Order muddles this distinction: It orders ballots disseminated "without the name of petitioner Robert F. Kennedy, Jr." but says nothing of the status of Kennedy's vice-presidential running-mate or We The People's presidential ballot line. Such confusion further supports that this Court should allow the Defendant's Petition for Writ of Supersedeas. Pointedly Mr. Kennedy identifies no statute authorizing a presidential nominee of a party to authorize a change to a party's nominee.

Justice RIGGS joins in this dissent.

No. 253P24 – Kennedy v. North Carolina State Board of Elections, et al.

Justice DIETZ dissenting.

I respectfully dissent. As explained below, I believe our election laws support the State Board of Elections' determination. I would therefore issue a writ of supersedeas staying the Court of Appeals order.

Having said that, I want to emphasize that the majority's thoughtful analysis is entirely reasonable. As the majority observes, the single most important goal of our election process is to ensure that every vote counts. Had the State used the earlier ballots, an untold number of voters would have voted for Robert F. Kennedy, Jr. without knowing that he formally resigned as a candidate and, as a result, their vote in the presidential race would not count. Our election officials must do everything in their power to avoid that outcome.

Still, I believe this Court's role is to follow the law as it is written. In my view, our election laws permitted the State Board of Elections to decline to reprint new ballots but also compelled the Board to take other steps, explained in more detail below, to inform voters that Kennedy resigned and that a vote for him would not count.

To begin, a bit about the applicable election laws. State law unquestionably gives the nominee of a political party the right to "resign as a candidate" at any time before the State sends out absentee ballots to military and overseas voters. N.C.G.S. § 163-113. But "resigning as a candidate" is not the same as having the candidate's name removed from the ballot. We know this for several reasons.

First, when the nominee of a political party resigns in this way, the same series of state laws provides a process for that political party to choose a replacement candidate. N.C.G.S. § 163-114. When this occurs, the law expressly states that the new nominee does not have an absolute right to have her name added to the ballot in place of the candidate who resigned. Instead, if the new nominee is chosen after the "general election ballots have already been printed," then the State Board of Elections must assess whether it is "practical" to make the change. N.C.G.S. § 163-165.3(c). If it is not practical, the candidate who resigned remains on the ballot. *Id.*

This shows that the law governing resignation of a candidate does not *impliedly* include an absolute right to be removed from the ballot because, if it did, it would conflict with the language in this accompanying provision that *expressly* says the opposite.

Second, the plain language of the resignation provision in N.C.G.S. § 163-113 simply does not address changes to the ballot. But it certainly could have. The General Assembly understands how to include this language because another withdrawal statute, dealing with the primary election, includes express instructions about how the withdrawal impacts whether the candidate's name will be "printed on the primary ballot." N.C.G.S. § 163-106.4.

Finally, as a matter of general election law, a provision permitting a candidate to resign is not the same as a provision requiring the ballot to be changed or reprinted.

We know this not just from the plain meaning of these words and their use in our own election laws, but by examining the laws of other states.

Many of our sister states have similar election laws that permit candidates to withdraw up until ballots are sent out, but leave it to election officials to determine whether it is feasible to reprint ballots. *See, e.g.*, S.C. Code Ann. § 7-13-380 (after ballots have been printed, withdrawal does not require reprinting, but the appropriate authority may do so if it determines it is "feasible"); Ga. Code Ann. § 21-2-134(a)(1) (providing that withdrawal of candidacy voids votes for that candidate but leaving it to election officials' discretion whether ballots should be reprinted); Utah Code Ann. § 20A-9-207(3)(d) (providing that, where a candidate for state or local office withdraws within 65 days of an election, notice should be included in the ballot "if practicable"); Col. Rev. Stat. § 31-10-903 (providing that when a candidate resigns or withdraws, the name "shall be erased or canceled, if possible, before the ballots are delivered to the voters").

All of this is to say, I do not believe Kennedy's right to be removed from the ballot is governed by the "resign as a candidate" provision in N.C.G.S. § 163-113. Instead, it is governed by the separate "Late Changes in Ballots" provision in N.C.G.S. § 163-165.3. That provision permits the Board of Elections to authorize "reprinting, where practical, of official ballots" as a result of "late changes." *Id.* § 163-165.3(c).

Here, the State Board of Elections properly determined that it would not be practical to reprint the ballots. Why? Because another state law, the Uniform Military and Overseas Voters Act, required absentee ballots to be sent to military and overseas voters no later than September 6. *See* N.C.G.S. § 163-258.9(a). This uniform law, enacted in a number of states, is designed to ensure that military personnel and overseas civilians can overcome "logistical obstacles to participating in American elections." *Uniform Military and Overseas Voter Act*, *Prefatory Note*, National Conference of Commissioners on Uniform State Laws, at 1 (2010).

In testimony given under oath in an affidavit to this Court, State Elections Director Karen Brinson Bell testified that it would take a minimum of 18 to 23 days to generate, print, proof, and assemble new ballot packets. Bell Aff. ¶ 50. Taking this testimony as true, even if the Board of Elections had started the process as soon as Kennedy's press conference announcing his withdrawal, there would not have been time to prepare new ballots before the September 6 deadline in the Uniform Military and Overseas Voters Act.

In my view, the inability to comply with this legal deadline was a valid basis for the Board's determination of impracticality. The General Assembly created that state deadline (which provides even more time than a corresponding federal deadline) to ensure that the brave servicemembers defending our nation have time to vote in the elections of the democracy they are defending.

Having said that, I have questions about Karen Brinson Bell's affidavit. First, according to State Board of Elections records, the Board gave political parties until August 22 to make additions or changes to the ballot and the Board received changes or additions up to at least August 21. Bell Aff. ¶ 50, Ex. B, C, D. Thus, under the 18-day to 23-day timeframe asserted in Bell's affidavit, even the existing ballots would not be ready by the September 6 deadline.

Likewise, the affidavit states that the bulk of the preparation time is the 12 to 13 days it would take for a third-party vendor to print the ballots. But according to the same affidavit, the county boards of elections sent their original printing requests between August 24 and August 26 and by August 28 most counties had received their printed ballots from the vendor and the rest were near completion. Bell Aff. ¶¶ 37–38, 50.

Why would it take *more* time to redo these ballots than it did to create the first set of ballots two weeks ago, when elections workers presumably would work longer and harder because of the emergency nature of this ballot change? And why would reprinting ballots to remove Kennedy's name—with the Board presumably requesting expedited service from the vendor because of the looming deadline—take more than twice as long as printing the original ballots two weeks ago when there was no exigency?

Simply put, I question whether the State Board of Elections and its staff were sufficiently vigorous in assessing how long it truly would take to prepare new ballots

on an expedited basis. Moreover, as the majority points out, the State Board of Elections received valid, written notice of Kennedy's resignation yet waited days before acting on it. In any event, these questions are beyond this Court's time-constrained review of an emergency petition for an extraordinary writ. *See State v. Jordan*, 385 N.C. 753, 757 (2024) (noting that appellate courts only review legal questions and "cannot find facts"). Thus, I must accept the sworn testimony in the affidavit as true. Doing so, I conclude that it was impractical to prepare new ballots without Kennedy's name before the September 6 deadline set by law.

Nevertheless, I acknowledge the majority's concern that we must protect the fundamental right of voters to vote and then have that vote counted. Ballots listing Kennedy's name as a candidate for president will likely confuse voters and, worse yet, lead them to wrongly believe their vote for Kennedy will count. It will not.

But there are ways to minimize harm to voters while adhering to our existing election law provisions. Many states address last-minute withdrawals after ballots are printed by posting notices at polling places. *See, e.g.*, Ga. Code Ann. § 21-2-134(a)(1); La. Stat. Ann. § 18:503; Wyo. Stat. Ann. § 22-5-401(e). In Georgia, for example, the law provides that if a candidate resigns after ballots are printed, "prominent notices shall be posted in all polling places in which the name of the withdrawn candidate appears on the ballot stating that such candidate has withdrawn and that all votes cast for such withdrawn candidate shall be void and shall not be counted." Ga. Code Ann. § 21-2-134(a)(1).

I see nothing in our State's election laws that would prohibit a similar notice at polling locations. These notices also could be sent to voters who requested absentee ballots. Indeed, I think our constitutional protections of voting rights would *compel* the State Board of Elections to take these steps. Even if the Board was unwilling to do so—due to partisanship on the Board or any other reason—interested parties could bring suit to compel it, or the General Assembly could intervene and enact a law requiring it.

In sum, I view my role as enforcing the law as it is written and, as explained above, I believe our election laws support the Board's determination. Thus, while I respect the majority's well-reasoned decision, I would allow the petition for a writ of supersedeas and stay the order of the Court of Appeals.

Justice RIGGS dissenting.

The magnitude of the harm wrought by the Court of Appeals' order, both to voters of the state who have been guaranteed by their elected legislature sixty days in which to receive and cast absentee ballots and to the overworked and underpaid public servants working as election administrators in a time when such service has subjected those public servants to harassment and peril, *see* Linda So & Jason Szep, *U.S. Election Workers Get Little Help from Law Enforcement as Terror Threats Mount*, Reuters (Sept. 8, 2021) (identifying more than 100 threats of death or violence received by forty election workers in highly contested battleground states during the 2020 elections),[1] is egregious and unjustified. A currently anonymous panel of three intermediate state appellate judges have taken into their hands the power to significantly shorten the absentee voting period and to throw into disarray preparations for a presidential election in this state.

Elections—the cornerstone of our democracy—are not games or exercises in ego-stroking. With a disturbing disregard for the impact on millions of North Carolina voters, plaintiff Robert F. Kennedy, Jr., (Mr. Kennedy) seeks to have his cake and eat it, too. Forcing the state to put his name on the ballot, creating for the state costs both practical and legal, he now wants to reprint millions of ballots

[1] *See also* Ruby Edlin & Lawrence Norden, *Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference*, Brennan Ctr. for Just., (Apr. 25, 2023) (highlighting that threats, abuse, and harassment have led to resignations of experienced election administration professionals).

because he has decided to suspend his campaign without actually ending it or foreclosing the possibility of his election. *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07 (August 23, 2024), https://www.cnn.com/2024/08/23/politics/video/rfk-jr-robert-kennedy-suspends-campaign-announcement-arizona-digvid. Here, the whims of one man have been elevated above the constitutional interests of tens of thousands of North Carolina voters who have requested an absentee ballot and seek to exercise their right, under North Carolina law, to cast their ballot as soon as possible after the statutory deadline required to distribute absentee ballots.

The Court of Appeals' gross overstep of its powers, in disregard of the duly-enacted law of this state and of the federal and state constitutions, has and will cause further irreparable harm to this state, magnifying the harm of Mr. Kennedy's apparent gamesmanship. This Court's failure to intervene to uphold the rule of law and the well-defined constitutional and statutory norms underpinning our election machinery makes this a dark day in the history of the state's judiciary. North Carolina voters deserve better.

The North Carolina State Board of Elections (the Board) seeks from this Court a writ of supersedeas to allow the Board—in accordance with state law—to mail absentee ballots to the more than 125,500 military, overseas, and absentee voters who have already exercised their right under North Carolina law to request and cast an absentee ballot. Instead, with only a cursory explanation, this Court denies the

request of the Board and effectively truncates, by at least two weeks, the absentee period for the voters of North Carolina. This ruling guarantees the maximum detrimental effect of an impetuous decision from the Court of Appeals requiring the Board to remove a candidate's name from the ballots—creating substantial work for election administrators and reduced access to the franchise for no appreciable benefit to the electorate or to the trustworthiness of our electoral system. Because the failure of this Court to allow the writ of supersedeas irreparably harms the voters of North Carolina and detrimentally affects the Board's ability to administer the election process in an orderly and efficient manner, I dissent.

The purpose of a writ of supersedeas is "to preserve the status quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961) (per curiam). To determine whether this Court should order a writ of supersedeas, the Court considers whether the party requesting the writ has shown a likelihood of success on the merits and whether irreparable harm will occur absent a stay. *See* N.C. R. App. P. App'x D (providing guidance that a party requesting a writ of supersedeas should provide a factual and legal argument "that irreparable harm will result to petitioner if it is required to obey decree pending its review; [and] that petitioner has meritorious basis for seeking review"). In this case, both criteria are amply satisfied. The Board has demonstrated the likelihood of success on the merits and that the Board and, significantly, the voters of North Carolina will suffer irreparable harm if this Court fails to allow the writ.

The Board Has Shown It is Likely to be Successful on the Merits.

Mr. Kennedy challenged the Board's decision denying the request to remove his name from printed ballots because, in his view, N.C.G.S. § 163-113 provides him with the statutory right to be removed from the ballot. However, N.C.G.S. § 163-113 does not provide a statutory right for a candidate to remove his name from already-printed ballots. Thus, the Board is likely to be successful on the merits.

In its entirety, N.C.G.S. § 163-113 states that:

> A person who has been declared the nominee of a political party for a specified office under the provisions of G.S. 163-182.15 or G.S. 163-110, *shall not be permitted* to resign as a candidate unless, prior to the first day on which military and overseas absentee ballots are transmitted to voters under Article 21A of this Chapter, that [the] person submits to the board of elections which certified the nomination a written *request that person be permitted to withdraw*.

N.C.G.S. § 163-113 (2023) (emphases added). The first clause issues a mandatory directive: Candidates nominated under the specified provision "shall not be permitted to resign as a candidate." *Id.*; *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (1st ed. 2012) (noting that shall is mandatory). The second clause enumerates conditions under which a nominated candidate may request permission to withdraw. *See* N.C.G.S. § 163-113. The statute does *not* say a nominated candidate has a right to withdraw. Nor can the indeterminate title of the provision, *see id.* ("Nominee's right to withdraw as candidate."), contradict the statute's clear language. *Carter v. United States*, 530 U.S.

255, 267 (2000) (Thomas, J.) ("[T]he title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself." (cleaned up)).

Further, when a candidate *does* have a statutory right to withdraw, the State election code says so explicitly. *See, e.g.*, N.C.G.S. § 163-106.4 (2023) (granting any person who has filed a notice of candidacy "the right to withdraw it at any time" prior to a specific deadline). Such meaningful variation shows the legislature knows how to give candidates a statutory right to withdraw and did not do so here. Scalia & Garner, *Reading Law* at 170 (recognizing that a material variation in terms suggest a variation in meaning).

Not only is there no statutory right to withdraw, but Mr. Kennedy conflates withdrawal under section 163-113 with the relief he seeks: removal from already-printed ballots. That conflation is erroneous. The same words are generally presumed to carry the same meaning when they appear in different but related sections of the code. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 536 (2013). In contrast, "different words used in the same statute should be assigned different meanings." *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 704 (4th Cir. 2010). Here, the General Assembly chose different words for a reason: it repeatedly distinguishes between withdrawing from an electoral contest and removing a candidate's name from the ballot in the General Statutes. *See, e.g.*, N.C.G.S. § 163-106.4 (contemplating a candidate who has withdrawn yet whose name remains printed on the primary ballot); N.C.G.S. § 163-165.3 (2023) (addressing a scenario

where a candidate withdraws, yet the withdrawn candidate's name appears on the ballots and votes cast for the withdrawn candidate are assigned to the replacement candidate not named on the ballot). Presuming intentional word usage further affirms that section 163-113 has nothing to do with having one's name removed from a ballot.

Furthermore, interpreting "withdrawal" in section 163-113 to be synonymous with "removal" from the ballot creates a conflict with the Board's statutory obligation to ready ballots for mail exactly sixty days ahead of the election—the exact conflict presented in this case. *See* N.C.G.S. § 163-227.10 (2023). Such an interpretation would also conflict with the Board's statutory obligations to "certify that the content and arrangement of the official ballot are in substantial compliance" with state law and to "proofread the official ballot of every county, if practical, prior to final production." N.C.G.S. § 163-165.3(a)(4)–(5). Reading these two words to have distinct meanings avoids this conflict and brings coherence to the state's election laws. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (Thomas, J.) (recognizing that the construction of statutory terms "must, to the extent possible, ensure that the statutory scheme is coherent and consistent").

Mr. Kennedy argues that his statutory construction must be correct because he sees no benefit to being allowed to withdraw from the electoral contest if he nonetheless is forced to keep his name on the ballot. That is demonstrably inaccurate. His argument ignores the fact that he also represents his party, the We The People

(WTP) party, on the ballot. A political party in North Carolina is "[a]ny group of voters which, at the last preceding general State election, polled for its candidate for Governor, or for presidential electors, at least two percent (2%) of the entire vote cast in the State for Governor or for presidential electors." N.C.G.S. § 163-96(a)(1) (2023). Currently, the WTP party does not have a candidate for Governor on the ballot. Therefore, if Mr. Kennedy's name as presidential candidate for the WTP party is removed from North Carolina ballots, the party, which was only recognized as a political party in North Carolina on 16 July 2024, will no longer be recognized as a political party here. *See* N.C. State Bd. of Elections, *State Board Recognizes We The People as Official NC Political Party*, (July 16, 2024), https://www.ncsbe.gov/news/press-releases/2024/07/16/state-board-recognizes-we-people-official-nc-political-party. Thus, in future elections, the WTP party would have to submit anew petitions for the formulation of a new political party to the Board. *See* N.C.G.S. § 163-96(a)(2) (requiring "signatures of registered and qualified voters in this State equal in number to one-quarter of one percent [ ] of the total number of voters who voted in the most recent general election for Governor" for the Board to recognize a new political party). Thus, the allowance of withdrawal without removal creates another pathway for the WTP party to retain party recognition and North Carolina WTP voters can still accrue benefit from Mr. Kennedy's name remaining on the ballot. The legislature plainly understood this, even if Mr. Kennedy does not.

Indeed, this explanation is consistent with the rule that the party must withdraw presidential candidates from the election—it is not just up to a presidential candidate to unilaterally remove their name from the ballot in the run-up to an election. On Monday, 26 August 2024, three days after Mr. Kennedy suspended his campaign, the vice-chair of the WTP party emailed the Board about the suspension. The vice-chair inquired about the possibility of removing Mr. Kennedy's name from the ballot and "the repercussions for the party should the nominee be withdrawn." Ultimately, on Wednesday, 28 August 2024, the WTP party sent a request to remove Mr. Kennedy, as its presidential nominee, from the North Carolina ballots but did not present an alternate representative for the party. *See* N.C.G.S. § 163-114 (2023) (providing a procedure for filling vacancies among party nominees occurring after nomination and before elections). The Board called an emergency meeting on Thursday, 29 August 2024, and voted to allow the WTP party to remove its presidential candidate, but due to the status of the ballot preparation across the state, voted to keep his name on the ballot.

Finally, the General Assembly unambiguously afforded the Board discretion to determine how to respond to late ballot changes. *See* N.C.G.S. § 163-165.3(c) ("The State Board shall promulgate rules for late changes in ballots. The rules shall provide for the reprinting, *where practical*, of official ballots as a result of replacement candidates to fill vacancies in accordance with G.S. 163-114 or other late changes." (emphasis added)). The Board published a procedure to address late changes in

ballots. *See* Late Changes to Ballots, 08 N.C. Admin Code 06B.0104 ("If the vacancy occurs before the absentee voting period begins, the responsible county board of elections, or State Board of Elections if the contest spans more than one county, may determine whether it is practical to have the ballots reprinted with the name of the replacement nominee as authorized by G.S. 163-114."). In accordance with this policy, the Board determined it was impractical to print new ballots and comply with the state law requiring absentee ballots to be mailed one week later, on 6 September 2024.

In sum, the plain language of N.C.G.S. § 163-113 and a fair reading of the statute within its broader statutory context contradicts Mr. Kennedy's assertion of a statutory right to be removed from the ballot at this stage of the election process. The statute does not grant Mr. Kennedy a "right" to be removed from the ballot. This straightforward statutory analysis should end the judicial branch's role in Mr. Kennedy's quest. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must construe the statute using its plain meaning." *State v. Borum*, 384 N.C. 118, 124 (2023) (internal quotations omitted) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990)). The Board did not violate N.C.G.S. § 163-113, and the Board is likely to be successful on the merits. Thus, this Court should grant the Board's petition for writ of supersedeas to stay the order of the Court of Appeals before it causes any additional harm to the voters of North Carolina.

Mr. Kennedy's Claim of Compelled Speech is Unsupported.

Mr. Kennedy's constitutional arguments are no more availing than his statutory arguments, and the Board is likely to succeed on the merits of these claims as well. Mr. Kennedy argues that the Board's refusal to remove his name from the North Carolina ballots amounts to compelled speech in violation of his free speech rights. We disagree with Mr. Kennedy's interpretation, and even if this were compelled speech (and it is not), the burden imposed on voters and election administrators greatly outweighs any burden on the free speech of a candidate required to keep his name on the ballot when he explicitly is still running for the office of President of the United States. *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07.

In cases such as this one, inquiries into the propriety of a state election law depend upon whether the law severely burdens a parties free speech rights or only "reasonabl[y], nondiscriminator[ily] restrict[s]" those rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (cleaned up) (recognizing that the mere fact a state's system limits the field of candidates from which voters might choose does not of itself compel close scrutiny from a court). The Supreme Court of the United States' guidance on this front is well-settled: Courts consider the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" and balances that against the "precise interest put

forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (citations omitted).

Neither the trial court nor the Court of Appeals analyzed this issue. The parties have not fully briefed the issue, and Mr. Kennedy provides no legal citation for the proposition that a candidate's name on a government-issued ballot is protected speech. Mr. Kennedy's name remains on the ballot in twenty states other than North Carolina, and he has filed lawsuits to add his name to the ballot in at least two additional states.[2] Mr. Kennedy still seeks the office of the presidency: in his words, he "could conceivably still end up in the White House in a contingent election." *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07. Mr. Kennedy does not reconcile his desire to remain a candidate in the majority of states with his position that keeping his name on the ballot in North Carolina would irreparably injure his free speech rights. In *Anderson*, the Supreme Court of the United States concluded that constitutional challenges such as this should be resolved through "an analytical process that parallels its work in ordinary litigation." 460 U.S. at 789. This issue should not be resolved without any analysis in a single-page order entered by an intermediate court on the day ballots are ready and required to be mailed to voters. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("In awarding or withholding immediate relief, a court is entitled to and should consider the

[2] Caitlin Yilek & Allison Novelo, *Map Shows Where RFK Jr. Is on the Ballot in the 2024 Election*, CBS News (Sept. 6, 2024), https://www.cbsnews.com/news/rfk-jr-map-on-the-ballot-states/.

proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles.").

Even if this issue was properly before the Court, we know of no case where a court, federal or state, has treated the declination to remove a name from a government ballot, this close to an election, as compelled speech or a constitutional free speech injury. Rather the Supreme Court has said "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (citation omitted).

And even if the Board's decision, in its discretion under state law, to leave Mr. Kennedy's name on the ballot when the burden of repreparing and reprinting ballots would be so costly and difficult did qualify as the government compelling Mr. Kennedy's speech, such a burden on his free speech rights would not outweigh the harms wrought on election administrators and voters. Keeping one man's name on the ballot when he still wants the office and fought to have his name put on that ballot cannot be of more constitutional significance than the ability of thousands of eligible voters to access the franchise via absentee voting. Nor do Mr. Kennedy's free speech rights outweigh the risks of creating disarray in a statewide election. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49 (2011) (quoting *Timmons*, 520 U.S. at 358). In this case, any burden to Mr. Kennedy of keeping his name on the ballots in North Carolina pales in

comparison to the State's interest in affording military, overseas, and other absentee voters the statutorily-mandated voting period.

This Court Should Act to Avoid Irreparable Harm to the Voters of North Carolina.

On the day the Board was required by duly-enacted state law to mail absentee ballots to voters, the Court of Appeals ordered the Board to modify prepared, printed, and ready-to-mail ballots. The Court of Appeals' order essentially modified state election law—without any legal analysis—in a manner that irreparably harms the Board and the voters of North Carolina. This directive has the irrefutable effect of shortening the statutory voting window for absentee voters. *See* N.C.G.S. § 163-227 (requiring absentee ballots to be mailed sixty days before the election). Further, barring intervention by this Court, the Board estimates that North Carolina taxpayers will pay upwards of a million dollars to remove Mr. Kennedy's name from our ballots. We should have acted promptly to avoid both of these unjustified outcomes.

Voting is a fundamental right ranking "among our most precious freedoms," *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes,* 393 U.S. 23, 30 (1969)), and our Court should preciously respect and defend that freedom. We should be clear with the public about the impact of this ruling on the franchise: we have effectively rubberstamped the Court of Appeals' decision to eliminate one-quarter of the absentee voting period established by the North Carolina General Assembly. Any examination of irreparable harms should certainly look at the burdens on the Board

and election administrators; even more significantly, though, we must also address the burden on the right to vote.

Removing a candidate's name from a ballot is not simple after the ballot preparation process is complete. For the upcoming general election, North Carolina has already created, proofed, coded, and printed almost three million ballots; these ballots include 2,348 different ballot styles reflecting "the version of a ballot within a jurisdiction that an individual voter is eligible to vote." N.C.G.S. § 163-165(3). Each ballot style has been proofed to ensure it meets the statutory criteria for official ballots. N.C.G.S. §§ 163-165.4 to -165.6. Each ballot style has also been coded to ensure that the vote tabulators correctly read the contest and candidate on the ballot. Changes made at the top of the ballot create a likelihood that candidates and contests further down the ballot may not be coded properly. *Id.* Thus, once Mr. Kennedy's name, currently in the second position on the ballot, is removed from the 2,348 different ballot styles, all contests and candidates below his name will require re-proofing, re-coding, and quality control testing before reprinting. The Board estimates that this entire revisited process will take at least two weeks to complete. Under the Court of Appeals' order, the statutorily required sixty-day absentee voting period will be reduced by at least two weeks. *See* N.C.G.S. § 163-227.10(a); N.C.G.S. § 163-258.9(a) (2023) (deadline for military and overseas voters). Additionally, because the Board explains that complying with the Court of Appeals' order will take approximately two weeks, there is a risk of reducing the federally mandated absentee

voting to less than the minimum time required under federal law. 52 U.S.C. § 20303(a)(8) (requiring states to mail absentee ballots to absent uniformed service voters and overseas voters "not later than 45 days before the election"). Not insignificantly, this work must be done by state and county election officials when they should be focused on preparations for early voting and other election-related tasks.

The concept of judicial restraint flew out the window when the Court of Appeals required, outside the normal course of appeal litigation, the Board of Elections to modify 2,348 ballot styles on the day that the first 125,500 of those ballots were printed, packaged, and ready to be mailed to military, overseas, and absentee voters. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (highlighting an important principle of judicial restraint protects the state's interest in running an orderly, efficient election, preventing voter confusion, and giving citizens confidence in the fairness of the election). And that intermediate appellate court order also required non-compliance with state law requiring absentee ballots to be mailed out sixty days before an election. The Court of Appeals sits inappropriately as a policy-making body when it unilaterally decides to deprive voters of fully one-quarter of the absentee voting period. This should evoke constitutional and institutional outrage in any reasonable high court. Not only does the lower appellate court's order offend every traditional sense of judicial restraint, it also stands in stark contrast to repeated guidance from the Supreme Court of the

United States counseling against last-minute judicial alteration to state election law. *See Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam) (holding that because of the impending election and the necessity for clear guidance for voters and election administrators, courts should not alter election law right before elections).

When confronted with requests to modify election law in the run-up to an election, the Supreme Court of the United States has repeatedly emphasized that appellate courts should not modify election law in the period close to an election. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) (explaining that the Supreme Court's election-law precedent establishes that "federal district courts ordinarily should not enjoin state election laws in the period close to an election, and [ ] that federal appellate courts should stay injunction when . . . lower federal courts contravene that principle"). Even amid a national pandemic, the Supreme Court has rebuffed efforts to modify election law on the eve of an election. *See*, *e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (staying a district court order that allowed ballots mailed and postmarked after election day to be counted). The Supreme Court has even denied an emergency application for a stay of a state election law when the Court believed "that both sides have advanced serious arguments on the merits." *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (emphasizing that "this Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election"). This Court also has followed suit and avoided changing election law just before an election.

See Pender County v. Bartlett, 361 N.C. 491, 510 (2007) (declining to enforce a required change in districting until after the 2008 election because the decision, issued on 24 August 2007, was too close to the upcoming election).

Finally, in balancing the equities of potential harm wrought in this matter, it should be noted that Mr. Kennedy waited until 3 September 2024 to file for a temporary restraining order after filing suit seeking the removal of his name from the ballot—only three days before absentee ballots must be mailed out under state law. Given the date of Mr. Kennedy's decision to "suspend" his campaign on 23 August 2024 and seek alteration of ballots on 28 August 2024, the delay in filing for an injunction cuts against the alleged irreparable harm to which Mr. Kennedy describes himself as subject. In many other election law cases, even where litigants seek relief that would affect a much broader class of individuals, this kind of delay has been deemed fatal. *See, e.g.*, *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining a bond referendum election for school maintenance funding because the Board of Education waited too long to set the date of the special election); *Spencer v. Pugh*, 543 U.S. 1301 (2004) (Stevens, J., in chambers) (declining to enter injunctive relief to keep parties planning to "mount indiscriminate challenges at polling places" out of polling places because the short time until voting began limited the Court's ability to fully evaluate the filings of the parties); *Kishore v. Whitmer*, No. 20-11605, 2020 WL 3819125 (E.D. Mich. July 8, 2020), *aff'd*, 972 F.3d 745 (6th Cir. 2020) (denying plaintiffs' request for injunctive

relief from state law requiring them to collect signatures to add a presidential candidate to the ballot where plaintiffs did not act diligently to obtain the required signatures); *see also Perry v. Judd*, 471 F. App'x 219, 220 (4th 2012) (denying candidate's emergency motion to be added to the ballot because of candidate's lack of diligence in challenging election rules and the affect on timely mailing of absentee ballots) (unpublished).

Today, any public aspersions cast on the impartiality, independence, and dignity of our state courts are well-earned. I despair of this Court's current failure to engage in plain reading of the law and its failure to forcefully defend the rights of the people, particularly when it comes to participation in the political process. I dissent.

Justice EARLS joins in this dissent.