20-463

No. 21-

In The

SUPREME COURT of the UNITED STATES

Robert A. Heghmann,

Petitioner,

v.

The Democratic National Committee, Tom Perez, Chairman, Frank Leone, Doris Crouse-Mays, Members, the Democratic Congressional Campaign Committee, Rep. Ben Rey Lujan, Chairman, Elaine Luria and Hon. Karen L. Hass, Clerk, U.S. House of Representatives,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, a registered voter, filed suit claiming that the Democratic Congressional Campaign Committed violated his rights as a voter by violating the Constitutional Rights of African-American Candidates in his Congressional District during the run up to the 2018 Congressional Elections. In dismissing the Complaint, the Courts below ruled that to have standing a Plaintiff must either (1) be an African-American candidate in the Congressional Election or (2) be a voter who is supporting a specific African-American candidate who is being discriminated against.

Does a voter have standing to challenge racial discrimination by the Democratic Party in Congressional Primary Elections based upon the challenged discrimination limiting his choice of candidates by preventing would be candidates from entering the Congressional Primaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Page

PUBLICATIONS

STATEMENT OF FACTS

Refusing to accept the result of the 2016 Presidential Campaign and the election of Donald J. Trump as President, the leaders of the Democratic Party were bound and determined to remove President Trump by Impeachment. To do that the Democratic Party had to gain control of the House of Representatives where the process of Impeachment begins. In order to obtain control of the House of Representatives the Democratic Party used the Democratic Congressional Campaign Committee, (hereinafter "the D-Triple-C) to hijack the Primary Election Process in some 95 Districts including the Primary Election in the 2nd Congressional District in Virginia in which the Petitioner is registered to vote. They began this process by selecting approved candidates as part of its Red to Blue Program who were selected in a Pre-Primary Selection Process conducted in Washington, D.C. by Democratic Party elites totally removed from the actual Primaries being conducted locally in each District including the 2nd C.D. in Virginia.

The D-Triple-C studied the Cook Political Report and the 55 Districts in which Republicans were currently in office and where demographics might determine the outcome of the 2018 election. The D-Triple-C decided that their best chance to "flip" those districts and others was to nominate white candidates, preferably women. Therefore, the D-Triple-C secretly in Washington selected 88 white candidates to the exclusion of candidates of color for its Red to Blue Program. When civil rights groups saw the "white only" candidates selected by the D Triple C, they complained vigorously. As a result, the D-Triple-C did add 8 minority candidates to the Red to

Blue Program to run in mainly minority-majority Districts. Despite this late addition, the Red to Blue Program was comprised of 95 candidates of which 88 (including Elaine Luria the D Triple C candidate nominated in the Virginia's 2nd C.D.) or 91.6% were White and 8 or 8.4% were minority.

With the Pre-Primary Selection Process complete, the D-Triple-C corrupted the state primaries. First, it went into their selected districts and announced its selection for the nomination to the exclusion of all other local candidates, including candidates of color who had been campaigning sometimes for months. This had an immediate impact upon the local candidates and their ability to attract political contributions as well as votes. The D-Triple-C then put enormous resources behind the Red to Blue Candidate and literally "swamped" the local candidates who were totally unable to complete thereby guaranteeing that the Red to Blue candidate was nominated.

The Petitioner is a retired white Republican attorney. Virginia is an open primary state which allows a voter to choose between the Republican or Democratic Primary regardless of party registration. Seeing the tactics adopted by the D-Triple-C, the Petitioner filed this action in the U.S. District Court to protect the rights of voters to have the broadest possible choice of candidates as well as the right of African-American candidates to run in the Democratic Primary on an equal par with white candidates.

OPINIONS BELOW

The District Court dismissed the Petitioner's Complaint for lack of standing. The Court adopted the Defendants' position that the Petitioner, "[c]annot bring a ballot access claim as a voter because he has not identified a single candidate who was excluded from the ballot as a result of the discrimination he alleges". Dismissal Order, Slip Opinion at 12. The Court of Appeals affirmed *per curiam* without further elaboration.

JURISDICTION

This Court has jurisdiction over an Appeal from the Final Judgment of a United States Court of Appeals under 28 U.S.C. Sec. 2101 (c).

ARGUMENT

IN ORDER TO WIN CONTROL OF THE U.S. HOUSE OF REPRESENTITIVES THE DEMOCRATIC CAMPAIGN COMMITTEE THREW AFRICAN-AMERICAN CANDIDATES AND THE CONSTITUTION UNDER THE BUS

In the aftermath of the War of Northern Aggression and adoption of the 13th, 14th and 15th Amendments, the Old South sought ways to keep African Americans from voting and running for office. One of their methods was to make the Political Parties the gate-keepers who decided who could or could not run in Primaries and then the General Elections. State law provided that only the political parties could nominate candidates in the Primaries. Political parties only nominated Members of the Party to run in the Primaries and African Americans could not be Members of the Democratic Party. Therefore, African Americans could not run in Democratic Party

Primaries and since the Democrats always won the General Election, African-Americans could not be elected.

The argument when this systematic exclusion of African-Americans from Democratic Party Primaries was challenged, the argument made was that political parties were private organizations and therefore beyond the reach of the 14th and 15th Amendments. As late as 1935 the U.S. Supreme Court accepted this argument in *Grivey v. Townsend*, 295 U.S. 45 (1935).

Nine years later, the Supreme Court overruled *Grivey* in *Smith v. Allwright Election Judge*, 321 U.S. 649 (1944) and held that when participating in the Primary Process the Democratic Party became a state actor and any attempt to become a "gate-keeper" would violate the 14th and 15th Amendments.

Undeterred, those who would deny minorities their voting rights tried a new tactic. The Democratic Association of Jaybirds (hereinafter "Jaybirds") was a national movement designed to deny African Americans access to the ballot. In order to avoid both the 15th Amendment and *Smith v. Allwright,* the Jaybirds were organized as follows. The all-white Jaybirds held a Jaybird only Pre-Primary Primary. Only white members of the Jaybirds could declare their candidacy for public office in the "Pre-Primary". When the results of the Pre-Primary elections were announced, the winners of the Jaybird Pre-Primaries entered the Democratic State Primary with all the Jaybird voters and financial resources behind them. As a result, the winner of the Jaybird Pre-Primary was always the winner of the Democratic Primary and the winner of the Democratic Primary always won the General Election.

The Jaybirds argued that they were not covered by either the 15th Amendment or *Smith v. Allwright*. The Supreme Court disagreed. In *Terry v. Adams*, 345 U.S. 461 (1953) the Court held that the combination of the election procedure of the Jaybirds and the Democratic Party deprived the Plaintiffs of their 15th Amendment rights.

This concept of a political party being a state actor in the context of Primaries and General Elections is now firmly established in the law.

> The Voting Rights Act uses the same word as the Fifteenth Amendment–"State"–to define the authorities bound to honor the right to vote. Long before Congress passed the Voting Rights Act, we had repeatedly held that the word "State" in the Fifteenth Amendment encompassed political parties. See *Smith* v. *Allwright*; *Terry v. Adams*. How one can simultaneously concede that "State" reaches political parties under the Fifteenth Amendment, yet argue that it "plainly" excludes all such parties in §5, is beyond our understanding. Imposing different constructions on the same word is especially perverse in light of the fact that the Act–as it states on its face–was passed to enforce that very Amendment. See *United States* v. *CIO*, 335 U.S. 106, 112 (1948) ("There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged"). Speculations about language that might have more clearly reached political parties are beside the point. It would be a mischievous and unwise rule that Congress cannot rely on our construction of constitutional language when it seeks to exercise its enforcement power pursuant to the same provisions. (footnote omitted) *Morse v. Republican Party of Virginia*, 517 U.S. 186, 221 (1996)

The D-Triple-C is the functional equivalent of the Jaybirds. In order to enhance their chances of winning the General Election, the D-Triple-C pre-selected the candidates in the Democratic Primary through private interviews in Washington D.C. In order to assure victory in the General Election, the D-Triple-C limited

candidate selection to white candidates, primarily women. Of the candidates selected in the D-Triple-C "Red to Blue" campaign, 92% were white. Only 8% of the candidates were Minority and they were only chosen after civil right groups began to publicly attack the Red to Blue campaign where men and women of color or progressive candidates need not apply. Thus, just like the Jaybirds, the D-Triple-C denied men and women of color their 15th Amendment Rights in the State Democratic Primary.

. The D-Triple-C might have been more responsive to African American Candidates if more African Americans served on the Committee. According to the D-Triple-C web site, the Committee was comprised of twenty-four (24) officers. Of the 24, only two are clearly of African American decent and one of those, Donald McEachin, was born and raised in Nuremberg, Germany. It's unclear how down with the cause Mr. McEachin was since as the Regional Vice Chair covering Virginia, he helped choose Elaine Luria as the candidate in Virginia's 2nd C.D. without even interviewing an African American female candidate who had run for Congress in 2016 and had already declared her candidacy in 2017 and entered the race. Bill Bartel, "I'm mad now": Democrats' favoritism in Hampton Roads agitates Rivals, the Virginia-Pilot, Feb. 20, 2018.

Once the D-Triple-C selected its candidates, it supported them with so much money and resources that local candidates could not compete and the D-Triple-C candidates usually won the State Democratic Primary. One such example was Karen Mallard in Virginia's 2nd C.D.

They're out of money. Even the campaign managers aren't being paid.

"We are all volunteers," said Alex Josey, a retired Army officer from Virginia Beach who's among the force that's been working for [Karen] Mallard and hoping for an upset over Elaine Luria, a strongly-funded candidate thanks to an early endorsement from the Democratic Congressional Campaign Committee.

"It irritates us that the DCCC got involved before the primaries were completed," Josey said. "So, yeah, it makes us work harder." Could Mallard, a schoolteacher and union member, upend Luria, a former naval officer with significantly more money? Voters in Virginia Beach, the Eastern Shore and parts of Norfolk and the Peninsula will decide Tuesday, and the winner will face first-term Rep. Scott Taylor, R-2nd in November, if he makes it past underdog primary opponent Mary Jones, a former chairwoman of the James City County Board of Supervisors.

Mallard has taught public school for 30 years, mostly in Virginia Beach and currently in Chesapeake.

With Taylor considered potentially vulnerable, the DCCC opted to recruit a candidate of its own. U.S. Rep. Donald McEachin, D-4th, told the Hotline in November that the party would have a great candidate in Luria. She formally announced in January, about four months after Mallard began her campaign.

The DCCC announced Luria would get operational and fundraising support. That led to a significant cash advantage for Luria to use TV ads and direct mail in the primary. As of May 23, Luria had outspent Mallard $283,686 to $49,203. Patrick Wilson, Unpaid staff for Va. Beach progressive hoping for upset over party-backed opponent, Richmond Times-Dispatch, June 10, 2018.

Karen Mallard lost the Primary. She never really had a chance. Given the geographic size of Virginia's 2nd Congressional District, paid advertising is absolutely crucial. The C-Triple-C gave their hand-picked candidate Luria an almost $6 to $1 advantage. There was no way for Mallard to overcome that

advantage. The D-Triple-C used this advantage of money and support in every Congressional District in which it ran a candidate.

In dismissing the case the District Court noted that the Petitioner did not identify a candidate he would have voted for. But this argument ignores the reality of the situation. Faced with the enormous cost of challenging the D-Triple-C's anointed candidate, many would be candidates simply choose not to become candidates. This court faced a similar situation in *Bullock v. Carter*, 405 U.S. 134 (1772),

> Many potential office seekers lacking both personal wealth and affluent backers are, in every practical sense, precluded from seeking the nomination of their chosen party, no matter how qualified they might be and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a phenomenon that can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time, it gives the affluent the power to place on the ballot their own names or the names of persons they favor.... *But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.* (emphasis added) *Ibid.* at 143 – 144.

Who knows how many would be candidates faced with the enormous financial commitment to compete against the D-Triple-C's anointed candidate simply do not run? And since that can not be determined how is a would be voter know who he would support?

The D-Triple-C got what it wanted, control of the House of Representatives. And with that control the Democrats voted Articles of Impeachment against President Trump. The Democratic Party got its scalp but in the process it set African-American civil rights back 75 years.

THE PETITIONER HAS STANDING AS A VOTER TO CHALLENGE THE ALLEGED CONSTITUTIONAL VIOLATIONS

"[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties" *Secretary of State of Maryland v. Munson*, 467 U.S. 947, 955 (1984)(citations omitted). The Supreme Court has recognized two exceptions to this Rule. One of these is the Standing Rule for Voters.

"Voters have an interest in candidate ballot access requirements because voting for their preferred candidate is one means through which voters exercise their constitutionally protected interest in associating with politically like-minded individuals." *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (requires that states must examine candidate restrictions that by the extent and nature of the impact they have on voters and their interests); *see also Lubin v. Panish*, 415 U.S. 709, 716 (1975) (commenting on the intertwining of candidates and voter's rights and interests.) This canon has been adopted in International Law. "The passive aspect of the electoral rights protects the right to stand as a candidate and, if elected, to sit as a member of Parliament. These rights are intertwined with those of voters, as the availability of a plurality of candidates is

necessary to preserve the 'free expression of the opinion of the people' as Article 3 requires." The European Convention, Article 3, First Protocol, Right to Free Elections. As the Supreme Court has noted, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter,* 405 U.S. 134, 143 (1972)143 (1972). Our primary concern is with the tendency of ballot access restrictions "to limit the field of candidates from which voters might choose" *Anderson v. Celebreeze*, 460 U.S. 780. 786 (1982).

The Court described its approach to ballot access cases in *Clements v. Flashing:*

> Far from recognizing candidacy as a "fundamental right," we have held that the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." Bullock v. Carter, 405 U.S. 134, 143 (1972). "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." Ibid. In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." Storer v. Brown, 415 U.S. 724, 730 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. Ibid.; Williams v. Rhodes, 393 U.S. 23, 30 (1968). *Clements v. Flashing*, supra., 457 U.S. at 963 – 64.

In her Opinion Dismissing the Petitioner's Complaint, District Court Judge Wright-Allen noted that the D Triple C program would have an impact on the Petitioner's choice as a voter. "Here, the Court recognizes that the alleged actions of Defendants could have *an effect* on Plaintiff as a voter." (emphasis in original) Slip. Opinion at 13. Then without further analysis of that effect, the District Court went

back to the standing issue and found (without any authority) that Petitioner's alleged injury "is too abstract and attenuated to constitute a clear, concrete, and particularized injury" Ibid.

The goal of the D-Triple-C Red to Blue Program was and is to limit the voters' choice to one candidate, the candidate the D-Triple-C selected in the Pre-Primary in Washington. This runs completely counter to the policy reflected in the decisions of this Court.

THE COURT'S EXPECTATION THAT AFRICAN-AMERICAN CANDIDATES WOULD JUDICIALLY CHALLENGE THE D TRIPLE C IS UNREALISTIC

According to the District Court the only voters with standing to challenge the D-Triple-C Red to Blue Program are African-American Candidates or voters who are, in essence, suing on behalf of an African American candidate. This is simply not realistic. If any would be African American candidate sues the Democratic Party either directly or indirectly, it is the equivalent of political suicide. That candidate's future in the Democratic Party at any level is non-existent. This is another reason for rejecting the decisions of the Courts below and recognizing the standing of the Petitioner to file the action in District Court. As this Court has recognized:

> In addition to the limitations on standing imposed by Art. III's case-or-controversy requirement, there are prudential considerations that limit the challenges courts are willing to hear. "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975) (citing Tileston v. Ullman, 318 U.S. 44 (1943); United States v. Raines, 362 U.S. 17 (1960); and Barrows v. Jackson, 346 U.S. 249 (1953)). The reason for this rule is twofold. The limitation "frees the Court not only from unnecessary interpretations of statutes in areas where their constitutional application might be cloudy," United States v. Raines, 362 U.S., at 22, and it assures the

court that the issues before it will be concrete and sharply presented. 5 See Baker v. Carr, 369 U.S. 186, 204 (1962). Munson is not a charity and does not claim that its own First Amendment rights have been or will be infringed by the challenged statute. Accordingly, the Secretary insists that Munson should not be heard to complain that the State's charitable-solicitation rule violates the First Amendment.

The Secretary concedes, however, that there are situations where competing considerations outweigh any prudential rationale against third-party standing, and that this Court has relaxed the prudential-standing limitation when such concerns are present. Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of *jus tertii* standing. *In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.* See, e. g., Craig v. Boren, 429 U.S. 190, 193 -194 (1976). *Secretary of State of Maryland v. J.H. Munson,* 467 U.S. 947, 956-57 (1983).

If independent voters such as the Petitioner are barred from suing to prevent racial discrimination in State Primaries may well mean such cases will not be filed by anyone and racial discrimination will rise from the dead at the expense of African American candidates.

THE CASES CITED BY THE COURTS BELOW ARE NOT RELEVANT TO THE PETITIONER'S STANDING ARGUMENT

In *Lubin v. Panish, supra.*, this Court discussed the public interest in limiting the size and the number of names on the ballot.

The role of the primary election process in California is underscored by its importance as a component of the total electoral process and its special function to assure that fragmentation of voter choice is minimized. That function is served, not frustrated, by a procedure that tends to regulate the filing of frivolous candidates. A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the

> candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. That no device can be conjured to eliminate every frivolous candidacy does not undermine the State's effort to eliminate as many such as possible.
>
> That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. *Ibid.* at 715

This Court has upheld a number of litmus tests used by both parties to limit the ballot to serious candidates. The cases relied upon by the District Court, *Gottlieb v. Fed. Election Comm'n*, 143 F.3d 618 (D.D.C. 1998) and *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193 (2d Cir. 2001) fall within this line of cases which include *Lubin v. Panish*. Limiting ballot access to fund raising ability, standing in polls or endorsements is a far cry from excluding candidates based on the color of their skin. The District Courts emphasis on *Gottlieb* and *Crist* is clearly misplaced.

REASONS FOR GRANTING THE PETITION

It is the "fundamental principle of our representative democracy..."that the people should choose whom they please to govern them'" *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 793 (1995)(citing 2 Elliot's Debates 257 (A. Hamilton, New York) The design of the D-Triple-C Red to Blue Program is to either take this choice away from the people or at the very least limit it. In accomplishing this goal the D-Triple-C set the civil rights of African American candidates in congressional primaries back 75 years. If this Court allows the integrity of the ballot and the right to vote to become the political toy of either political party, our representative democracy will fail.

CONCLUSION

This Court should issue a Writ of Certiorari to the United States Court of Appeals or the Fourth Circuit.

Respectfully submitted,

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CERTIFICATION

A copy of this Petition has been served on Counsel for the Respondents through the ECS System maintained by the U.S. District Court for the Eastern District of Virginia.