No. _____

In the Supreme Court of the United States

JASON GONZALES,
Petitioner,
v.

MICHAEL J. MADIGAN, FRIENDS OF MICHAEL J. MADIGAN, 13TH WARD DEMOCRATIC ORGANIZATION, SHAW DECREMER, SILVANA TABARES, JOE BARBOZA, AND GRASIELA RODRIGUEZ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ANTHONY J. PERAICA
Counsel of Record
STEPHEN F. BOULTON*
JENNIFER M. HILL
ANTHONY J. PERAICA & ASSOCIATES, LTD.
5130 South Archer Avenue
Chicago, Illinois 60632
(773) 735-1700
support@peraica.com

Counsel for Petitioner

**Mr. Boulton's application for admission is pending*

September 2, 2021

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Seventh Circuit affirmed the district court's entry of summary judgment for Defendants on the grounds that the pre-election publicity of Petitioner's allegations of misconduct, made during an election campaign, served to eliminate any violation of 42 U.S.C. §1983 or 42 U.S.C. §1985(3) stemming from Defendants' alleged misconduct, even if proven to exist at trial.

One question is presented:

Do the protections of the First Amendment bar use of a candidate's unproven allegations of electoral misconduct during an election campaign as a basis for the entry of summary judgment against the candidate's post-election claims for deprivation of constitutional rights based on the same allegations as made during the campaign?

LIST OF PARTIES

The parties in the below action were: Jason Gonzales, Plaintiff-Appellant; Michael J. Madigan, Defendant-Appellee; Friends of Michael J. Madigan, Defendant-Appellee; 13th Ward Democratic Organization, Defendant-Appellee; Shaw Decremer, Defendant-Appellee; Silvana Tabares, Defendant-Appellee; Joe Barboza, Defendant-Appellee; Grasiela Rodriguez, Defendant-Appellee; Prisoner Review Board, Defendant; and Ray Hanania, Defendant.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (N.D. Ill.):
Docket No. 16-cv-7915
Gonzales v. Madigan, et al., 403 F. Supp. 3d 670 (N.D. Ill. 2019).
August 23, 2019.
Reconsideration: May 23, 2020.

United States Court of Appeals (7th Cir.):
Docket No. 20-1874
Gonzales v. Madigan, et al., 990 F.3d 561 (7th Cir. 2021).
March 8, 2021.
Rehearing: April 6, 2021.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OPINION BELOW

The initial opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Gonzales v. Madigan*, 990 F.3d 561 (7th Cir. 2021). The Seventh Circuit affirmed the August 23, 2019 decision of the United States District Court for the Northern District of Illinois, Eastern Division, reported at *Gonzales v. Madigan*, 403 F. Supp. 3d 670 (N.D. Ill. 2019). The courts denied Gonzales' constitutional and statutory claims due to publication in the media.

STATEMENT OF JURISDICTION

The United States' Supreme Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Seventh Circuit's opinion was rendered on March 8, 2021. The Petition for Panel Rehearing En Banc was denied on April 6, 2021.

U.S. Supreme Court order, dated March 19, 2020, provides for extension of deadline to file petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution—Article III

The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority; . . .

First Amendment To U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ninth Amendment To U.S. Constitution

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment to U.S. Constitution

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1985(3)

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted

authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioner Jason Gonzales filed nomination papers to appear on the ballot in the March 15, 2016 Democratic Party Primary seeking nomination as the Democratic candidate for Illinois State Representative for the 22nd Representative District; a district covering an area in the City of Chicago near Midway Airport that had become heavily Hispanic in population. The other candidates on the ballot were: Defendant Michael Madigan, Speaker of the Illinois House of Representatives and Representative of the area then comprising the district since 1971, Defendant Joe Barboza; and Defendant Grasiela Rodriguez, the latter two being Hispanic. Gonzales' candidacy was openly portrayed as an electoral challenge to Madigan's long tenure as Representative based upon the substantial shift to a Hispanic population in the district.

During the primary campaign, Gonzales publicly asserted both on his own and in local media that Barboza and Rodriguez were sham candidates placed on the ballot though efforts of Madigan and his operatives, solely to split the Hispanic vote to defeat Gonzales. None of the statement or articles, however, contained any evidence beyond the mere allegation that Gonzales believed he had observed an operative of Madigan filing the nomination petitions for the pair. At least one published news article contained the affirmative denial of the Madigan campaign that Barboza and Rodriguez were put up as candidates by Madigan and his operatives.

Gonzales produced evidence that there was voter confusion among the Hispanics, as to who was actively

seeking the 22nd District seat. Voters told Gonzales that they were not going to vote because with several Hispanic names on the ballot splitting the vote, the winner was obvious: it would be the incumbent. Others stated that they did not like either Gonzales or Madigan, so they considered the other two candidates—Rodriguez and Barboza. Gonzales testified that voters did not believe him when he told them Rodriguez and Barboza were straw candidates, not actively running candidates. Voters did not understand how sham candidates could get on the ballot.

On March 15, 2016, Madigan won the Primary election handily, gaining over 65% of the primary vote.

On August 5, 2016, Gonzales filed his Complaint in the District Court against the three opponents and other claimed operatives of Madigan, alleging deprivation of Petitioner's constitutional and federal rights under color of state law individually, in their official capacity, and as members of a conspiracy in violation of 42 U.S.C. §1983, along with related state claims. On June 20, 2017, the District Court dismissed Petitioner's First Amended Complaint with prejudice on ground of a lack of action taken under color of law. On July 17, 2017, however, Petitioner moved under Rule 59(e) to alter the judgment and amend the complaint to add a claim under 42 U.S.C. §1983(5). On September 11, 2017, the Court granted that motion, vacated the June 20, 2017 judgment, and allowed the filing of Petitioner's Second Amended Complaint. Extensive motion practice resulted in dismissal of all claims but those arising under Section 1983 for deprivation of Equal Protection and conspiracy through

vote dilution, as well as claims under Section 1985(3) and state law claims for conspiracy to deprive Petitioner of his constitutional rights. Petitioner's claim is limited to money damages, and no new election was sought as relief.

After extensive discovery, on June 7, 2019, the Defendants filed their Motion for Summary Judgment. After the matter was briefed, the United States District Court for the Northern District of Illinois granted summary judgment; thereby ending the lawsuit on August 23, 2019.

The District Court found that a jury could reasonably find that Barboza and Rodriguez's purported candidacies were orchestrated by Madigan's associates, working on Madigan's behalf, in that Barboza and Rodriguez had been solicited to run by Madigan operatives, and that Madigan operatives had helped circulate nominating petitions in an effort to configure or otherwise dilute Gonzales' support among Hispanic voters. The District Court also determined that a reasonable jury could find that the actions of the Defendants affected the act of voting by altering the makeup of the primary ballot, and that the evidence supported a reasonable inference that Madigan authorized or at least was aware of the recruitment effort.

The District Court also found, however, that summary judgment was appropriate because during the campaign Gonzales had publicized his allegations that Barboza and Rodriguez were sham candidates, and media articles contained the allegations, thereby allowing the voters to "punish Madigan at the polls,"

which precluded Petitioner's claims. Summary judgment for the Defendants was granted on all remaining claims.

Petitioner filed his notice of appeal to the Court of Appeals for the Seventh Circuit and Docketing Statement on May 26, 2020. After the matter was briefed, a panel of the Seventh Circuit heard oral arguments on November 10, 2020. On March 8, 2021, the Seventh Circuit issued its ruling affirming the entry of summary judgment. On March 22, 2021, Petitioner petitioned the Seventh Circuit for a Rehearing En Banc, which was denied on April 6, 2021. On April 14, 2021, the Seventh Circuit issued its mandate.

REASONS FOR ALLOWANCE OF THE WRIT

The judiciary is one of three equally important branches of the United States government. The power of the judiciary is set forth in Article III of the United States Constitution. "The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., Art. III, Sec. 1. "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority. . ." U.S. Const., Art. III, Sec. 2. Article III federal judges have no fixed term and by design are supposed to be insulated to allow the judges to apply the law with only justice in mind and not electoral or political concerns.

The foundation of jurisdiction of the federal judiciary has been placed at issue by the lower courts.

Despite the power of and the obligations of the judiciary, the federal district court in the Northern District of Illinois and the Court of Appeals in the Seventh Circuit refrained from addressing Jason Gonzales' constitutional rights.

The Northern District of Illinois, Eastern Division, concluded that a jury viewing the evidence in the light most favorable to Gonzales could reasonably find that the defendants, working on Madigan's behalf, orchestrated and solicited Barboza and Rodriguez to run and helped circulate their nominating petitions in an effort to confuse or otherwise dilute Gonzales' support among Hispanic voters and perhaps others. However, since these matters were publicized, the court found that "publicity placed the alleged misconduct squarely within the political realm" and granted summary judgment.

The rejection of Gonzales' claims is a disturbing precedent because it creates a chilling effect upon political speech in a political campaign by use of a candidate's own unproven allegations as a basis for summary judgment. Accordingly, this case presents an important question for the future of political discussion in this country. The entry of summary judgment, premised upon the naked assumptions that all the voters, not only heard the allegations, but considered them in voting, is a subtle but disturbing encroachment on the protections of the First Amendment for political campaign speech, perhaps the most protected form of speech in American law.

The underlying district decision of this case is in conflict with precedent of the United States Court of Appeals for the Seventh Circuit. Under the Seventh Circuit precedent of *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), judicial relief was appropriate where there was "deception on the face of the ballot" that "clearly debased the rights of all voters in the election." Under the holding of this case, in the future a candidate's mere public allegation of misconduct, made with no proof and fully denied by the opponent, is evidence to be used to defeat claims made under civil rights statues for deprivation of rights by electoral misconduct. The District Court distinguished *Smith,* and adopted the holding of *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 939 (7th Cir. 2018), in which judicial relief was denied, on ground that one politician proposing and advocating a voter referendum that adversely affected another politician was not actionable since in that context "the price of political dirty tricks must be collected at the ballot box rather than the courthouse." Despite the very different fact pattern of *Jones*, the District Court distinguished "cases where the fraud remains hidden during the campaign" such as *Smith*, from those in which "the fraud is publicized and widely communicated" such as *Jones*, holding that Petitioner's own publicity destroyed his claim. App. 23.

The decision below creates an untenable chilling effect on future campaign speech, as every candidate believing that misconduct is occurring in a campaign faces an untenable choice: make a public allegation during the campaign and abandon any claim for relief under federal civil rights statutes such as Section 1983

or Section 1985(3), whether the allegations are ultimately proven or not, or stay silent during the campaign, looking solely to possible action in court.

The First Amendment requires that unhindered political campaign discussion be protected from the imposition of such a conundrum by the courts. This disturbing precedent therefore must be reviewed.

Furthermore, the Seventh Circuit has repeatedly declined to decide "when a politically retaliatory step goes too far" or how to balance politician's speech given each person's rights under the First Amendment and Equal Protection Clause. *Jones v. Markiewicz-Qalkinbush*, 892 F. 3d 935 (7th Cir. 2018). In this matter, after the Seventh Circuit touted all of Defendant Madigan's accolades in office, the court brushed off Plaintiff's arguments. "We mean no disrespect to politicians in recognizing that many false statements are made during political campaigns and that many a stratagem that one side deems cleaver will be seen by the opposition as a dirty trick." App. 5. The Seventh Circuit would not extend *Smith v. Cherry* to this case, because there were no predecessor and no successor cases, even though the case presented the very factors favoring judicial relief articulated by the *Smith* court, namely (1) "deception on the face of the ballot" that (2) "clearly debased the rights of all voters in the election," factors plainly met by sham candidacies designed to fool voters.

By failing to address and tackle the issues involved, the lower federal courts have provided *carte blanche* to political organizations to trample on and disparage the rights of the people, including Jason Gonzales,

protected under the Constitution, including the 1st, 9th, and 14th Amendments.

The United States Supreme Court should take up this matter, not only to effectuate its inherent power, but also establish that those who seek political office and the political organizations that support them are not above the law.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER THE JUDGMENT BELOW CREATED AN UNCONSITUTIONAL CHILLING EFFECT UPON POLITICAL CAMPAIGN SPEECH.

The use of a candidate's unproven allegations in a campaign, made without proof, as conclusive evidence to defeat a Section 1983 claim creates not only an untenable conflict with the constitutional protections of political speech, but also a conflict with the precedent of this Court.

"The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 785, 131 S. Ct. 2806, 2846, 180 L. Ed. 2d 664 (2011). "Political speech is central to the meaning and purpose of the First Amendment." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 328, 130 S. Ct. 876, 892, 175 L. Ed. 2d 753 (2010).

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First

> Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Buckley v. Valeo, 424 U.S. 1, 14-15, 96 S. Ct. 612, 632, 46 L. Ed. 2d 659 (1976).

Violations of the First Amendment arise from the deterrent, or "chilling" effect of government action that falls short of a direct prohibition against the exercise of First Amendment rights. *Laird v. Tatum*, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972).

At least twice in recent years this Court has struck down statutes that imposes a parallel choice in the area of campaign finance. In *Davis v. Federal Election Comm'n*, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008), this Court struck down a state statute which raised contribution limits for opponents when a candidate's use of personal funds exceeded a certain level. The Court found the statue unconstitutional because it imposed an "an unprecedented penalty" on the candidates exercise of the First Amendment by creating a "statutorily imposed choice", namely "abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits." 554 U.S. at 739, 128 S. Ct. at 2772.

Similarly, in *Arizona Free Enterprise Club's Freedom Club PAC, supra,* this Court struck down a law that affirmatively granted an opponent matching funds once a candidate exceeded a certain level of

personal campaign funding combined with monies from outside groups. In the case, Chief Justice Roberts wrote: "There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs, including discussions of candidates." 564 U.S. at 755, 131 S. Ct. at 2828–29, 180 L. Ed. 2d 664. The Chief Justice elaborated on the central need for protection of campaign political speech:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of our system of government. As a result, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.

564 U.S. 721 at 2817, 31 S. Ct. at 2816–17. (citations omitted). The Court then stated the principle at play, albeit in a funding context, but in terms fully applicable the choice created by the precedent of the case below:

> And forcing that choice - trigger matching funds, change your message, or do not speak - certainly contravenes the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

564 U.S. at 739, 131 S. Ct. at 2819–20. (citations omitted.)

In the District Court summary judgment was unambiguously premised on the unproven allegations of Petitioner during the electoral campaign, as the

Court held that "the undisputed fact that, before election day, Gonzales publicized and campaigned on the allegation that Barboza and Rodriguez were sham candidates precludes his claim." App. 23.

The central pillar of the Seventh Circuit's Opinion, that the voters were not deceived, is an exercise in speculation that - at best - belongs to the jury. Courts do not make "credibility determinations nor choose between competing inferences" at the summary judgment stage. *Sarsha v. Sears, Roebuck & Co.,* 3 F. 3d 1035 (7th Cir. 1993). The court must draw all reasonable inferences in favor of the nonmoving party, and not weigh the evidence. *Reeves v. Sanderson Plumbing, Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000). When conflicting theories are presented, it is "clearly within the province of the jury to choose the one they believed more reasonable." *Fritz v. Pennsylvania R. Co.,* 185 F.2d 31, 34 (7th Cir. 1950).

That choice has not been granted in this case, as the courts below have employed sheer speculation on the educational effect of the statements of Gonzales and media, then added more speculation on the effect of the publicity on voters numbering in the tens of thousands (i.e. all were knowledgeable and none were "bamboozled".) Such naked speculation has been questioned in other courts:

> Now that voter qualifications are minimal, realism requires one to recognize that many people who vote are not well educated or well informed. The cost to them of obtaining the information they need in order to vote intelligently may be very high, and therefore

> their right to vote might be seriously impaired if they had no legal protection against attempts to mislead them, even though more alert and informed voters would not be misled.

Grimes v. Smith, 585 F. Supp. 1084, 1090 (N.D. Ind. 1984)(Posner, Circuit Judge, sitting by designation), aff'd, 776 F.2d 1359 (7th Cir. 1985),

The error of the court below extends even to the selection of a standard of proof. Under this Court's precedent, in selecting a standard the District Court was under a duty to articulate a legal standard that "must give the benefit of any doubt to protecting rather than stifling speech." *Federal Election Comm'n v. Wisconsin Right To Life, Inc.,* 551 U.S. 449, 469, 127 S. Ct. 2652, 2667, 168 L. Ed. 2d 329 (2007). The District Court went in the opposite direction, ruling that Petitioner had failed to adduce evidence that the defendants' fraud prevented the voters from "punishing Madigan at the ballot box", a most unusual burden that had no basis in law. App. 24. The District Court created an unconstitutional chilling effect on political speech by penalizing Petitioner for speaking out against deception on the ballot in the course of the campaign leading up to voting on that very ballot.

The analogy presented by the Court of Appeals in its Opinion affirming the judgment, in which the panel equated Petitioner to a party whose claim is disproven by his own speech, was wholly inapposite. In the campaign, neither the Petitioner or the press ever presented voters with proof of misconduct. While the District Court agreed that a jury could find misconduct from the evidence obtained in federal court discovery,

none of that evidence was available during the campaign. App. 24. Instead, during the campaign the press reported Defendants affirmative denials of misconduct. The flaw in the reasoning of the Court of Appeals is that it in effect makes the voters the "jury" by relying on the electoral result as the verdict, when the voters has no certain information on the actions of the Defendants, but only the conflicting allegations and denials of the candidates.

Such reliance, on election results to resolve a Section 1893 claim is itself an unusual and disturbing aspect of the decision case. In *Kozuszek v. Brewer*, 546 F.3d 485, 490 (7th Cir. 2008), the Seventh Circuit itself starkly rejected the principle. is Court rejected the idea that an electoral outcome could negate the misconduct of election officials in in validating ballots of the plaintiffs:

> In addition to finding that the defendants had not acted willfully, the district court noted that "[t]here is no evidence that any elected position in [the] election was decided by two or less votes. As such, there can be no real argument that the [spoliation] of these two votes either undermined the election or caused the election to be unfair." This holding implies that any level of election fraud is fine, so long as the fraud doesn't impact the final results of an election. But an election is more than just a sum total of votes. It is also about the act of voting—an individual's ability to express his or her political preferences at the ballot box. An official who willfully interferes with this act violates the Constitution,

regardless whether the vote would have affected the election outcome.

In the case at bar the constitutional deprivation – the placing of Hispanic sham candidates upon the face of the ballot – predated the first vote being cast. The election result could not cure it.

CONCLUSION

For all the foregoing reasons, Petitioner Jason Gonzales respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,

ANTHONY J. PERAICA
Counsel of Record
STEPHEN F. BOULTON*
JENNIFER M. HILL
ANTHONY J. PERAICA & ASSOCIATES, LTD.
5130 South Archer Avenue
Chicago, Illinois 60632
(773) 735-1700
support@peraica.com

Counsel for Petitioner