NO. 25-_____

In the Supreme Court of the United States

MICHAEL J. POLELLE,

Petitioner,

v.

CORD BYRD, IN HIS OFFICIAL CAPACITY AS THE FLORIDA SECRETARY OF STATE, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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July 31, 2025

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QUESTIONS PRESENTED

In 1907 Florida instituted its closed-primary system now embodied in Fla. Stat. § 101.021. This was five years after the White Primary was fully established in Florida. Charles D. Farris, *The Re-Enfranchisement of Negroes in Florida*, 19 THE JOURNAL OF NEGRO HISTORY 2 62-63 (1954). The birth of the Florida closed-primary system was also eighteen years before this Court applied the protections of the First Amendment to the states in *Gitlow v. New York*, 268 U.S. 652 (1925)

The Questions Presented are:

1. Does the Petitioner have standing to sue the Florida Secretary of State in his official capacity as chief election officer of the state for any violation of Petitioner's rights under the First Amendment and Equal Protection Clause to vote in primary elections to determine candidates for political offices in general elections?

2. Does the Florida closed-primary system violate Petitioner's rights under the First Amendment and Equal Protection Clause to political free speech and association?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant

- MICHAEL J. POLELLE, in his individual capacity

Respondents and Defendants-Appellees

- CORD BYRD, in his official capacity as the Florida Secretary of State
- RON TURNER, in his official capacity as Supervisor of Elections for Sarasota County, Florida

LIST OF PROCEEDINGS

U.S. Court of Appeals, Eleventh Circuit

No. 22-14031

Michael J. Polelle, *Plaintiff-Appellant v.* Florida Secretary of State, Sarasota County Supervisor of Elections, *Defendants-Appellees.*

Final Judgment: March 11, 2025

Rehearing Denial: May 6, 2025

U.S. District Court, Middle District of Florida

No. 8:22-cv-1301-SDM-AAS

Michael J. Polelle, *Plaintiff-Appellant v.* Florida Secretary of State, Sarasota County Supervisor of Elections, *Defendants-Appellees.*

Final Judgment: November 3, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

OTHER DOCUMENT

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 131 F.4th 1201 and reproduced at App.1a The decision of the United States District Court for the Middle District of Florida has not yet been published in the Federal Reporter, but is at 2022WL17549962. It is also reproduced at App.109a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on March 11, 2025. App.1a. A petition for rehearing was denied on May 6, 2025. App.113a. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> "Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people peaceably to assemble. . . . "

U.S. Const. amend. XIV, § 1

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983

> Every person who under color of any statute . . . of any State . . . subjects or causes any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured. . . .

Fla. Stat. § 101.021

> In a primary election a qualified elector is entitled to vote the official primary election ballot of the political party designated in the elector's registration, and no other. It is unlawful for any elector to vote in a primary for any candidate running for nomination from a party other than that in which the elector is registered.

INTRODUCTION

In 2024 the number of American voters identified as independent increased to a new high of 43% at the expense of both major parties. Those who identified as Democrats constituted 30% of voters and those identifying as Republicans only 28%. The rise in political independence likely comes from "the high level of frustration with government and the political parties that control it." Jeffrey M. Jones, *In U.S., New Record 43% Are Political Independents*, Gallup Poll (Jan. 7, 2015) (last visited July 20, 2025) https://news.gallup.com/poll/180440/new-record-political-independents.aspx.

The concurring opinion by Judge Abudu notes that in Florida the number of independent voters has grown from 1.5 million in 2000 to 3.7 million in 2024. This represents about 40% of the growth in Florida's registered voters. This rising political independence has also occurred among Blacks and Hispanics. App.77a. Because they are required by law to declare under oath party affiliation or non-affiliation, Florida independents pay a price for their political convictions: loss of their right to vote in political primaries because Florida is a closed-primary state. Their claim to free speech and association is not "independent" lip service. Insistence on the right to not speak or not associate in support of Florida's preferred speech and association comes with a high price: loss of the right to vote.

The sweep of American law has been in the direction of expanding the right to vote. The key legal battle beginning in the days of Jim Crow was the dogged battle to secure the right of Blacks to vote in primary elections from which they were excluded because of race. That prolonged legal fight in the White Primary Cases for the most basic civil right of all . . . the right to vote . . . planted the seeds for this Closed Primary Case. Where before a fundamental right was denied because of race, it is now also denied because of sincere political conviction. Both forms of denial are anathema to the freedom American citizens have to speak or not speak, to associate or not associate in support of a state's preferred political choices.

In 1946, two years after the capstone White Primary Case of *Smith v. Allwright*, 321 U.S. 649 (1944), the Florida Attorney General gave his opinion that "316 negroes" registered to vote but without party affiliation were not entitled to vote under the pre-

decessor closed-primary statute that is almost identical to the closed-primary statute existing in Florida today. Fla. Stat. § 101.021 (2024). (App.113a). The right to vote free of racial barriers is kindred to the right to vote free of political barriers.

"We believe it is incumbent on the courts to address the issues discussed in this article with a view to continuing the more than two centuries effort to achieve full voting rights for all Americans. They will not be resolved until the U.S. Supreme Court takes them up." Jeremy Gruber, et al., *Let All Voters Vote: Independents and the Expansion of Voting Rights in the United States*, 35 TOURO L. REV. 649, 695 (2019)

STATEMENT OF THE CASE

A. The Origin of the Lawsuit

"The facts of this case are straightforward." App.3a.

The Petitioner, Michael J. Polelle, is an emeritus professor of law who filed this case pro se and was admitted to the bar of this Court on July 8, 1974. In 2011, after moving to the City of Sarasota in Sarasota County, he registered to vote with the Sarasota County Supervisor of Elections. He had to indicate on the voter registration form by oath his party affiliation or "No Party Affiliation." Under Florida's closed-primary law he thereby forfeited his right to vote in politically partisan primaries because his political convictions required him to register with 'No Party Affiliation. Fla. Stat. § 101.021 (2024). He later learned that his real estate taxes went into a General Fund operated

by Sarasota County. The fund was and is used to operate county-run and county-funded primary elections in which he could and cannot vote because of his political convictions.

1. District Court Proceedings

On June 6, 2022 Petitioner filed a 42 U.S.C. § 1983 action against the Florida Secretary of State, Cord Byrd, and the Sarasota County Supervisor of Elections, Ron Turner [hereinafter "Respondent Byrd" and "Respondent Turner"] in their official capacities for violation of his rights under the First Amendment and Equal Protection Clause by barring him from voting in political primaries which select candidates for general elections. He seeks only a declaratory judgment and injunctive relief.

The Respondents filed separate motions to dismiss the action for lack of standing and failure to state a claim. Petitioner responded to the motions by stating that he had standing either as a municipal taxpayer or as a voter injured by actions traceable and redressable by both Respondents and that he had valid claims under the First Amendment and the Equal Protection Clause.

On November 3, 2022 the District Court granted the motions to dismiss the action. (App.110a). The court held that Petitioner lacked standing and also failed to state a claim. Petitioner filed a timely notice of appeal to the Eleventh Circuit.

2. Eleventh Circuit Panel Proceedings

On July 26, 2023 a single motion judge of the Eleventh Circuit entered an order regarding respective

out-of-time motions by the Libertarian Party of Florida and the Coalition with a Purpose Party, both minor parties in Florida, to file separate amicus briefs in support of Petitioner's action. The order granted the motion of the Libertarian Party of Florida for leave to file but then in the same order denied the motion without requiring a response from Respondents. The order did not even grant leave for the Coalition with a Purpose Party to file its brief. (Docket No. 34).

On March 15, 2024 Petitioner filed a motion to supplement the record to show that voting officials representing Respondent Ron Turner had refused him permission to vote in person in the 2024 Florida Presidential Preference Primary because of his lack of political affiliation. On August 15, 2024 he filed another motion to further supplement the record to show the same officials had refused him permission to vote in the 2024 Florida Primary Elections for the same reason as before. (Docket Nos. 37 &48)

On March 11, 2025 the panel granted both motions to supplement the record and also issued a 112-page opinion and judgment which included the Opinion of the Court (panel majority), a concurring opinion of two judges, and a sole partial dissent. (Docket Nos 54-56)

3. Opinion and Judgment of the Panel Majority

The panel majority vacated the District Court judgment and remanded the case. It held that Petitioner lacked standing to sue Respondent Byrd and instructed the District Court to grant the motion of Respondent Byrd to dismiss the case against him without prejudice.

But having found Petitioner had traditional standing to sue Respondent Turner, the remand included an instruction to grant the motion of Respondent Turner to dismiss the action for failure to state a claim. App.75a. The panel did not address Petitioner's claim that he had standing as well to sue as a municipal taxpayer. App.9a, n.5. One judge partially dissented only insofar as he thought Petitioner did not have standing to sue Respondent Turner.

The panel majority decided against Petitioner on the merits by using what it called the "sliding scale" of "the *Anderson-Burdick* framework" to evaluate Petitioner's claims. App.54a. The panel majority truncated its individualized balancing analysis by finding that a "binding Supreme Court precedent has already addressed the very claims Polelle now asserts." App.55a. The precedent cited is *Nader v. Schaffer*, 417 F.Supp. 837 (D.Conn. 1976), *summarily aff'd*, 428 U.S. 989 (1976) (mem.). Although the panel majority acknowledged differences from Petitioner's claims, it did not consider the differences significant enough to distinguish what it considered the binding nature of *Nader*. App.56a.

4. Concurring Opinion

Judge Abudu, joined by Judge Rosenbaum stated:

> While *Nader*'s holding is still the applicable legal standard in these types of voter access cases, the electoral landscape is changing such that the First and Fourteenth Amendment implications of *Nader* warrant serious consideration.

App.76a.

They noted that with growing disapproval of both major political parties, an increasing number of Americans identify themselves as independent. In the last twenty-five years the number of voters registered as politically independent in Florida has grown from 1.5 million to 3.7 million. This growth has occurred significantly among Black and Hispanic voters. The concurring judges thought these politically unaffiliated voters were deprived of choice especially where primaries determined the outcome of general elections. App.80a.

"Unfortunately, today's decision, invisibly wrapped in cases which have refused to recognize certain partisan election schemes as unconstitutional, could leave this growing segment of the electorate without voice and without legal recourse." App.78a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant the Petition Because Eleventh Circuit Decisions Regarding Standing to Sue a Secretary of State are Contrary to Decisions in the Fifth and Third Circuits and in Conflict with the Decisions of this Court and Even a Decision Within the Eleventh Circuit

The panel majority found Petitioner had standing as to Respondent Turner, the Sarasota County Supervisor of Elections, but not as to Respondent Byrd, the Secretary of State. For this conclusion the panel majority relied on *Nader v. Schaffer*, 417 F.Supp. 837 (D.Conn. 1978), *summarily aff'd*, 429 U.S. 989 (1976), to bolster its finding that Petitioner had standing to sue Respondent Turner, App.18a. This conclusion is anomalous because the sole defendant in *Nader* was Schaffer—the Connecticut Secretary of State—in a case also involving plaintiffs suing for a violation of their constitutional rights because of Connecticut's closed-primary system.

The anomaly is compounded because Connecticut has an identical system with Florida in that Secretaries of State and local election officers called Registrar of Voters are separately elected with joint responsibility for administering elections in the state. Conn. Gen. Stat. § 0-190 (2024). Yet, neither the parties nor the *Nader* court saw lack of standing standing against the Secretary of State as an issue, nor did this Court when it affirmed summarily. In *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210 (1986) this Court

again noticed no standing problem when a political party sued the Connecticut Secretary of State as the sole defendant.

Had the Connecticut Secretary of State lacked standing, the three-judge district court in *Nader* or this Court would have said so. Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.*"). Adarant Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below.")

Despite this precedent, the panel majority found that any responsibility of the Florida Secretary of State had been "squarely rejected" in *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020) (Pryor, J. dissenting)("Supervisors are independent officials under Florida law who are not subject to the Secretary's control.") *Jacobson*, 974 F.3d at 1253.

The panel majority and *Jacobson* are in conflict with the Fifth Circuit's decision in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). An organization had standing to sue the Texas Secretary of State for a state statute illegally requiring interpreters who assisted voters to be county residents. The Secretary of State tried to shove all responsibility onto county officials for preventing the interpreter from assisting.

The Fifth Circuit rejected the argument. "The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and the Secretary of State who serves as the chief election officer of the state." *Id*. at 613.The dissenting judge in the Florida *Jacobson* case said the

decision was "directly contrary" to the Texas case and cited an amicus brief filed in the Texas case emphasizing the similarities of Florida and Texas electoral administration. *Jacobson*, 974 F.3d at 128485, n.11 (Pryor, J. dissenting).

The panel majority and *Jacobson* are also contrary to the Third Circuit case of *Mazo v. New Jersey Sec'y of State*, 54 F.4th 124 (3d Cir. 2022) where Congressional candidates sued the New Jersey Secretary of State and six county clerks for restricting the use of "slogans" on election ballots. The Sixth Circuit discussed extensively the doctrines of ripeness and mootness but assumed standing existed in this First Amendment case where the parties did not raise the issue.

Bastic v. Schaeffer, 760 F.3d 352 (4th Cir. 3014) is an analogous case supporting Petitioner. The Fourth Circuit permitted standing to sue a state registrar who developed marriage applications without a provision for same-sex marriages and distributed the form to county clerks, one of whom denied issue a marriage license to a same-sex couple. *Bastic*, 760 F.3d at 372 ("]Plaintiffs] can trace this injury to Rainey [registrar] due to her role in developing the marriage license application form in compliance with the Virginia Marriage Laws, and the relief they seek would redress their injuries.")

Another analogous case supporting Petitioner is *Calzone v. Hawley*, 866 F.3d 866 (8th Cir. 2017) from the Eighth Circuit. Plaintiff sued the Superintendent of the Missouri State Highway System, along with others, for the illegal stopping of a dump truck under a Missouri statute allowing roving stops of certain vehicles. The patrol office who stopped the truck was not sued. The Eight Circuit found standing to sue the

Superintendent who was authorized by the statute to promulgate rules and regulations to implement the statute. *Id.* at 870.

The panel majority and *Jacobson* created an intra-circuit split of authority as well by ignoring the decision of a different panel in *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014) which came to a different conclusion. In violation of the National Voter Registration Act, the Florida Secretary of State had compiled a list of suspected non-citizens and sent names to each county Supervisor of Elections, Each Supervisor was instructed to research the names and remove non-citizens from the voting rolls. No Supervisor of Election was sued but only the Florida Secretary of State.

The *Arcia* panel held plaintiffs improperly classified as non-citizens could sue the Secretary of State as chief elections officer not only for the past injury of being misclassified for the 2012 primary elections . . . even though they were ultimately allowed to vote in those primaries . . . but also for an injunction to stop future injuries.

II. Only this Court Can Resolve Lower-Court Perplexity About the Boundary Line in Voting Cases Between the Protection of Fundamental First Amendment Values with a Stricter Scrutiny and Those with the Lesser Scrutiny of *Anderson-Burdick*. But in Any Case Petitioner Deserves Stricter Protection of His First Amendment Rights Under this Court's Precedents

A. Lower-Court Perplexity

Since its inception this Court has protected core values of political speech and association found in the First Amendment with strict or exacting scrutiny that required compelling state reasons to offset burdens. *William v. Rhodes*, 393 U.S. 23, 30 (1964) (" . . . [T]he state laws placed burdens on two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." In *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995) the Court held that a state statute prohibiting the distribution of anonymous campaign literature failed to meet the exacting scrutiny required for pure-speech cases. It expressly refused to apply *Anderson-Burdick* because that test only was meant for "the mechanics of the electoral process." *Id.* at 345-46. Earlier in *Meyer v. Grant*, 486 U.S. 414, 420 (1998), the Court had ruled unconstitutional a Colorado prohibition against payment of money to those circulating ballot initiatives. ("We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny."

The Court did create an exception in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1993). Some mechanical aspects of the electoral system allow the states to regulate with a less rigorous balancing test that evaluates voter burdens against state interests. But at the same time it did not diminish the right to vote as a core value of the First Amendment subject to a higher level of scrutiny. In *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 the Court focused only on the proper interpretation and application of the *Anderson-Burdick* balancing test and not in what kinds of cases a higher level of scrutiny prevailed, except to note that irrational restrictions on voting rights are certainly invidious if not connected to voter qualifications.

Lower-court uncertainty has resulted concerning the boundary line between voting cases requiring higher protection and those requiring only lower protection. *Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 137 (3d Cir. 2022) ("The problem we confront today is that the Supreme Court has never laid out a clear rule or set of criteria to distinguish between these two categories of election laws, nor has any Court of Appeals to our knowledge."

Other Courts of Appeal have also noted the absence of guidance from this Court. *Republican Party of Ark. v. Faulkner Cnty.*, 49 F.3d 1289, 1296 (8th Cir. 1995) ("The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes.") and *Hatten v. Rains*, 854 F.2d 687, 693 (5th Cir. 1988) ("The Supreme Court has never stated the level of scrutiny applicable to ballot access restrictions with crystal clarity.").

Petitioner does not ask this Court to reconsider the interpretation and application of *Anderson-Burdick*. His only concern is that the vagueness and subjectivity of the text will gradually intrude on fundamental speech and association issues, such as in Petitioner's case, and erode basic First Amendment rights meriting exacting scrutiny. *Daunt v. Benson*, 999 F.3d 299, 323 (6th Cir. 2021) (Readler, J. concurring) ("*Anderson-Burdicks*'s hallmark is a dangerous tool in sensitive policy-oriented cases; it affords far too much discretion to judges in resolving the dispute before them."). Even the Montana Supreme Court has refused to adopt *Anderson-Burdick* to interpret its state constitution because after "four decades of federal precedent the test has devolved into an undue deference to state legislatures." *Montana Democratic Party v. Jacobsen*, 416 Mont. 44, 545 P.3d 1074, 1089 (Mont. 2024)

To Petitioner's knowledge, only *Mazo* has tried to create a boundary between the two kinds of voting cases. Based on its reading of Supreme Court cases it inferred that *Anderson-Burdick* must "primarily regulate the mechanics of the electoral process as opposed to core political speech and association." *Mazo*, 54 F.4th at 140. To determine the difference Mazo highlighted two factors: (1) the location of the regulated speech and (2) the nature and character of the regulated speech. When the speech location is at one extreme "on the ballot or within the electoral process" *Anderson-Burdick* would be typically triggered but where speech occurs, at the other extreme, "nowhere near the ballot or any other electoral mechanism" the speech receives the highest First Amendment protection. *Mazo*, 54 F.4th at 142-43.

If this is correct boundary line, then Petitioner's First Amendment rights satisfy the test. Voter registration takes place far away in time and place from election day and "slogans" marked on ballots, as in *Mazo*. When Petitioner was effectively compelled to declare for a party in order to vote in partisan primaries in violation of his First Amendment rights, the injury occurred at time of registration.

B. Petitioner's Speech and Association Rights Merit Exacting Scrutiny

Petitioner contends he has a First Amendment right as an American citizen not to speak in support of political parties, if he chooses not to, and likewise has a right not to associate with political parties, if he chooses, without losing his right to vote in primaries. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 64 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not occur to us.

Unconstitutional conditions are prohibited under this Court's opinion. *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). For at least a quarter century the Court has made it clear that even persons who have no right to a governmental benefit may not be denied that benefit by infringing on a constitutionally protected interest. *Rutan*, 497 U.S at 72. Government may no more indirectly extinguish a First Amendment right

of speech and association that it could do so directly. If the school children in *Barnette* had been told they could avoid saying the Pledge of Allegiance or saluting the American flag but only on condition that they forfeited their right to participate in extracurricular activities or other school benefits, it would still have been a derogation of First Amendment rights.

Florida has presented Petitioner, and others like him, with a Hobson's choice: Either declare for a party, regardless of your real political convictions, or lose the right to vote in primaries determining candidates for general elections. However, if you do betray your convictions and swear falsely that you are affiliated with political party in order to vote you can be prosecuted for your falsehood.

Fla. Stat. § 97.1031 (2024) proscribes that a person registering to vote must subscribe to the following oath: " . . . [A]ll information provided in this application is true." The voter application form states right above the signature line: "I understand that it is a 3rd degree felony under state and federal laws to falsely swear or affirm or otherwise submit false information."

> To date, OECS [Office of Election Crimes and Security operating as a division of the office of the Florida Secretary of State] has made thousands of criminal referrals to law enforcement, resulting in 25 felony election-related convictions; just this year more than a thousand referrals were made to law enforcement and other elections officials.

Letter from Respondent Byrd, Fla. Sec'y of State to Governor Ron Desantis (Jan.15, 2025), ANNUAL REPORT

ON WORK OF OECS, https://files.floridados.gov/media/708747/office_of_election_crimes_and_security_report_2024.pdf

Those unaffiliated politically who do yield and agree to parrot Florida's preferred political speech and association by affiliating with a political party just to vote in a primary election, despite their true political beliefs, not only register to vote falsely but they contribute false information to the public regarding the true strength of the two major political parties.

The recent decisions of this Court make it clear that Petitioner's case falls within the type of electoral speech that demands greater scrutiny than provided by *Anderson-Burdick* because of the Court's renewed concern about state compulsion to induce citizens to adopt the government's preferred social or political views. In *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018) the Court declared that the right to exercise or not exercise political speech or association is "a cardinal constitutional command." *Id.* at 892 It held that an Illinois law compelling non-union members to pay agency fees to a union violated the right not to speak or not to associate with views one does not espouse. Such a law could not withstand the exacting scrutiny required of alleged state interests. This was so even though Janus had the option of finding another job, just like Petitioner has the option of violating his political beliefs or moving to another state.

The Court went on to specifically note that forced subsidization of political views or associations with which one chooses not to support or associate with was an additional reason to strike down the Illinois law. *Id.* at 894 ("Because the compelled subsidization of

private speech seriously impinges on First Amendment rights, it cannot be casually allowed.").

Just as Mark Janus was required to subsidize the union with agency fees, so too Petitioner is compelled to pay real estate taxes used to subsidize primary elections in which he cannot vote because of his political convictions. Petitioner cannot even vote for the very Sarasota County Commission that sets and collects his real estate taxes because the primary elections for the Commission are deemed partisan. The panel majority tried to distinguish *Janus* on the basis Petitioner did not suffer a "monetary burden" like Mark Janus. App.66a. But this completely ignores the reality that Petitioner suffers the monetary burden of paying real estate taxes for primary elections in which he cannot vote because of political beliefs.

303 Creative LLC v. Elenis, 600 U.S. 570 (2023), though not referred to by the panel majority, also further expanded the protection afforded citizens by the First Amendment against state attempts to foist its preferred social views on them against their religious convictions. This Court held that Lorie Smith had a credible fear that if she chose to expand her graphic design business to include wedding websites, Colorado would compel her, under pain of penalty, to celebrate same-sex weddings against her religious beliefs. "In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." *Elenis*, 600 U.S. at 602-03.

Lorie Smith had a Hobson's choice similar to Petitioner's: Either celebrate same-sex marriages if you do expand your business, or don't expand if you want to avoid penalties for not celebrating same-sex

marriages. Even her credible fear was enough to prevail. Lorie Smith only feared a future injury if she expanded her business. Here, Petitioner, unlike Lorie Smith, has also suffered past violations of the First Amendment as well as the certain prospect of future repetitive election cycles with further loss of his First Amendment rights. Political and religious beliefs sincerely held are at the heart of First Amendment protection.

This Court in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 453 (2008) reconciled a political party's First Amendment rights to confine nomination of its candidates to party members while at the same time allowing the First Amendment rights of the politically unaffiliated to vote in political primaries. Distinguishing *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the Court noted:

> The flaw in this argument [alleged unconstitutionality of Washington's modified blanket primary] is that unlike the California primary, the 1-872 primary does not by its terms choose the parties' nominees. . . . Whether parties nominate their own candidates outside the state-run primary is simply irrelevant.

Id. at 453.

The constitutional rights of political parties and the politically unaffiliated do not have to be in conflict. In fact, two minor political parties, the Libertarian Party of Florida and the Coalition with a Purpose Party both tried to file amicus briefs in support of Petitioner's position but were not allowed. (Docket No. 34).

Petitioner's case affords this Court a way to further expand on the reach of the prohibition against speech effectively compelled by the imposition of either express or implied unconstitutional conditions.

III. This Petition Allows the Court to Assess What Relevance the White Primary Cases Have to Petitioner's Claim that Florida's Closed-Primary System Has Likewise Deprived Him of an Effective and Undiluted Vote in Violation of the Equal Protection Clause

It is bedrock law that modern primary elections and general elections are part and parcel of a single integrated electoral system administered by states and consisting of primaries and general elections with voters' constitutional rights equally protected in both by the Constitution. *United States v. Classic*, 313 U.S. 299, 318 (1941) ("And this right of participation [to vote in a primary] is protected just as is the right to vote at the [general] election where the primary is made by law an integral part of the election machinery.").

In support, this Court in *Smith v. Allwright*, 321 U.S. 649, 664 (1944), a capstone White Primary Case, stated: "When primaries become part of the machinery for choosing officials, state or federal, as we have here, the same tests to determine the character of the discrimination or abridgement should be applied in the primary as are applied in the general election." Even if this were not settled federal law under the Constitution, Florida itself has agreed with this relationship between primaries and general elections. *State ex rel. Merrill v. Gerow*, 85 So. 144, 146 (Fla. 1920) ("Primary elections and laws governing general

elections are so interwoven that together they comprise the election machinery of the state. . . . ").

A. Petitioner Does Not Have an Effective Vote in Florida General Elections

The panel majority thought that this was Petitioner's "strongest argument" because "'Republican primaries . . . have determined the outcome of most Sarasota County's partisan elections since 1968. "and because "'the last non-Republican candidate elected to the Sarasota County Commission was in 1966, almost 58 years ago.'", citing, Carrie Seidman, *In Sarasota County, Voters May Find It's Better to Switch Than Stick*, SARASOTA HERALD-TRIB. (May 10, 2024) App.4a. n.4.

The Sarasota County Commission allocates the annual real estate taxes collected from Petitioner and other taxpayers to fund, among other services, the operation of primary elections in which Petitioner cannot vote because of his political persuasion of non-party allegiance. The most egregious aspect of this is that Petitioner specifically cannot even vote in primary elections to determine candidates to the Sarasota County Commission because the primary is classified as partisan. The same article by Carrie Seidman also reported that no Democratic candidate has ever won in Sarasota County since FDR.

Since at least 2011, when Petitioner moved to Sarasota County, Republican candidates have also prevailed in elections to determine his County Supervisor of Elections, his state Senator, and state Representative. The net effect is that in most elections affecting him most directly his vote in the general election is

meaningless because the Republican primary is outcome determinative in almost all elections.

Substitute Democratic primaries for Petitioner's Republican primaries and you have an injury similar to the days of Jim Crow where the outcome of the general election was determined in the Democratic primary. It would have been an exercise in futility for Blacks to have voted in the general elections or even in any Republican primaries open to them because the Democratic candidate would prevail. It is almost always futile for Petitioner to vote in Democratic primaries, even if his political beliefs allowed him, because Republicans almost invariably win general elections in Sarasota County.

A broader perspective indicates the magnitude of ineffective voting throughout Florida. Bruce Armstrong, *Florida needs to become an open primary state / Opinion*, NEWS PRESS updated April 10, 2025, https://www.news-press.com/story/opinion/2025/04/06/florida-needs-to-become-an-open-primary-state-opinion/82786195007/, reported: "BallotPedia rated only 15 of Florida's 120 state legislative districts as competitive in 2024. In 87.5% of state legislative districts, the winner of the dominant party's primary was the certain winner of the general election."

What is happening to Petitioner in a Republican-dominated county happens to others in a Democratic-dominated county so that extreme partisan views on the political spectrum tend to prevail at the ballot box by excluding non-partisan voters from primaries. "[. . . A] survey of the modern political landscape and its decreasing number of truly competitive legislative districts demonstrates that the right [to a meaningful vote] can be impaired or even rendered meaningless,

if not protected at the primary level." *Utah Republican Party v. Cox*, 885 F.3d 1219, 136 (10th Cir. 2018).

Barring members of the armed services so as to make them second-class citizens was prohibited in *Carrington v. Rush*, 380 U.S. 68, 96 (1965) (. . . "States may not deprive a class of individuals of the vote because of some remote administrative benefit to the State (citation omitted,"). *Morse v. Republican Party of Va.*, 517 U.S. 186, 207 (1996) ("Exclusion from the earlier state [political convention or primary] does not merely curtail their voting power but abridges their right to vote."). Even without the exacting scrutiny of these cases, a restriction on voting, like a poll tax, can be struck down as simply not rationally related to a voter otherwise qualified. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

The concurring opinion in Petitioner's case quoted a passage from *United States v. Classic*, 313 U.S. 299, 319 (1941) noting that a primary election affects "profoundly" the choice at the general election. (Abudu, J. concurring and joined by Rosenbaum, J.) ("We, too, should not ignore this truth in Sarasota County."). App.80a.

What makes Florida's closed primary even worse than others, although seemingly ameliorative, is a "Universal Primary" provision in the state constitution that creates an exception to the normal rules of excluding those registered as politically unaffiliated from political primaries: "If in a primary election all candidates have the same party affiliation and the winner will have no opposition in the general election, all electors, regardless of party affiliation may vote in that primary." Fla. Const. art. VI, § 5(b) What distorts the effect of the provisions is an interpretation by the

Florida Supreme Court in *Brinkmann v. Francois*, 184 So.3d 504, 514 (Fla.2016) that "write-in candidates" are "opposition" so that the primary is closed again. App.3a-4a. (briefly noted by panel majority)

What the panel majority fails to spell out, however, is that this "write-in" exception to the Universal Primary rule means a closed primary with a vengeance. Not only are the politically unaffiliated excluded but also those registered to other parties. In effect, there is a one-party general election in the guise of a primary. This political skullduggery is characteristic of authoritarian sham elections abroad and makes Florida's closed primaries uniquely perverse.

In Florida both Democratic and Republican parties have often manipulated the system by putting up "write-in" candidates with no chance of winning just to keep the primary closed and thus, the general election, closed to everyone but party members. "Opinion: Florida's write-in provision is worse than you think," TALLAHASSEE DEMOCRAT (published Nov. 25, 2016) ("No write-in candidate has ever won a Florida election."). Tia Mitchell: "Using write-in candidates to close primaries is voter disenfranchisement". FLA. TIMES UNION (Jacksonville.com) (published May 12, 2016) ("[A]t least 900,000 Florida voters were shut out of voting in 15 House and Senate races because of write-in candidates that year [2016]."

This political gamesmanship to warp the voice of the whole electorate impacted Petitioner in 2012 when the daughter of a Republican fundraiser became a "write-in" candidate for Sarasota County Supervisor of Elections, thereby excluding registered independent and Democratic voters from voting in the primary that literally became the general election. Only 7.8% of

registered Sarasota County voters voted in the primary that determined Kathy Dent would automatically be the next Sarasota County Supervisor of Elections. Cooper Levey-Baker, *How Victoria Brill kept 150,000 Sarasotans from voting this year,* Town Hall: Nov. 2012, SARASOTA MAGAZINE (published Nov. 1, 2012) https://www.sarasotamagazine.com/news-and-profiles/2012/11/town-hall-november-2012.

B. Plaintiff Does Not Have an Undiluted Vote in Florida General Elections

Even in general elections where primaries may determine the outcome of general elections, Florida's closed primaries dilute and diminish the voting influence of those registered as not politically affiliated. If they adhere to their principles and do not change registration to affiliate with a party, they will have zero say in picking the final candidates for a general election. The general election only presents them with a take-it-or-leave-it option outside a Don Quixote vote for write-in candidates who never win Florida elections. Such a diminution of voting power would not go unexamined in cases of legislative reapportionment.

In *Baker v. Carr* (citation omitted), we held that a claim asserted under The Equal Protection Clause challenging the constitutionality of a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy subject to adjudication by the federal courts. *Reynolds v. Sims*, 377 U.S. 533, 556 (1964)

Montana Green Party v. Jacobsen, 17 F.4th 919, 928 (9th Cir. 2021) ("one person, one vote" principle invoked). The right to be free of a diluted or diminished vote extends to primary elections. *Gray v. Sanders*, 372 U.S. 368 (1963). Distinctions between populous and less populous counties were invalid as an attempt to give one group greater voting power than another. *Moore v. Ogilvie*, 394 U.S. 814, 818-19 (196). In *Hill v. Stone*, 421 U.S. 289, 295 (1975) the Court ruled that the Texas Constitution, the Texas Election Code, and City Charter of Fort Worth denied equal protection to non-propertied taxpayers by denying them the right to vote on bond issues of general interest along with propertied taxpayers because Texas showed no "compelling interest."

In declaring unconstitutional disproportionate congressional districts, the Court in *Westbury v. Sanders*, 376 U.S. 1, 17-18 (9164):

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

C. Relevance of White Primaries to Petitioner's Action

The panel majority ruled that "They [Petitioner's First and Fourteenth Amendment interests] are not like those in *Classic,* or the other White Primary Cases that Polelle cites, where the barriers to an effective vote

were substantially higher, if not categorical." App.67a-68a.

But the facts are analogous though not identical. African American voters were barred from voting because of race; Petitioner and others like him are barred because of their political convictions. The form of discrimination is invidious in both cases. *Classic* indicates as much because it was not a case based narrowly on racial discrimination but on unacceptable discrimination in the way a primary election had been corrupted by fraud and vote manipulation so as to affect the general election for all citizens. *Classic* was, literally, not a White Primary Case, but t provided the legal scaffolding for the ultimate White Primary Case of *Smith v. Allwright*, 321 U.S. 649 (1944), decided three years after *Classic*, by holding that modern primary elections are integrated with general elections to such an extent that in both cases voters are equally protected by the Constitution.

The irony of the panel majority's position is that in 1946, during the days of Jim Crow in Florida, 316 "negroes" were barred from voting in a Florida primary because they did not indicate a party affiliation under an earlier version of Florida's current closed-primary statute. App.113a. Yet any descendants of theirs now registered as politically unaffiliated in Florida because of their political beliefs are similarly excluded from primaries, not because of race but because of their political opinions. Whether an American citizen is barred from voting in a state-run and state-funded primary because of race or political beliefs, the constitutional harm inflicted is fundamentally repugnant in both cases

The panel majority's attempted distinction also strays from the issue because this Court has never required that an injured plaintiff bringing a § 1983 voting-rights action had to meet some predetermined degree of injury before liability attached. On the contrary, even nominal damages will suffice in § 1983 actions. *Carey v. Piphus*, 435 U.S. 247 (1978). A requirement that a plaintiff must bear a constitutional burden at least equal to that of plaintiffs in the White Primary Cases puts the cart of damages before the horse of liability in an unprecedented way.

The White Primary Cases and their legacy are not sui generis of no relevance to other voting rights cases. Under the Voting Rights Act of 1965 this Court has protected Black voters from ineffective votes. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). It has also protected these same voters from diluted votes. *Thornburg v. Gingles*, 478 U.S. 30 (1986). But nothing in these cases nor our law indicates the same safeguards implicit in our Constitution do not apply to other voters.

Petitioner asks this Court to intervene to clarify the relevance, or lack of relevance, of the White Primary Cases to the Closed Primary Cases. One scholar has thought that the White Primary Cases, in fact, support the rights of voters in other kinds of voting cases but that this connection has been overlooked because of the Court's focus on the First Amendment rights of political parties." *California Democratic Party v. Jones* built a precedent celebrating the associational rights of political parties to identify an associational interest and, more broadly, a conception of political participation that sacrifices the core empowerment of

the White Primary Cases." Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L REV. 325, 390 (2004).

IV. Even If *Anderson-Burdick* Applies, the Court Has Reason to Review the Panel Majority's Substitution for Its Own *Anderson-Burdick* Analysis a Rational-Basis District Court Opinion It Considered Binding, Even Though Only Summarily Affirmed By This Court and Decided Years Before the *Anderson-Burdick* Framework Was Adopted

A. Nader Did Not Apply *Anderson-Burdick* But Instead a Rationality Test

The panel majority *cited Nader v. Schaffer*, 417 F.Supp. 837 (D.C. Conn. 1976), *summarily affirmed*, 428 U.S. 989 (1976) (mem.) throughout its opinion, some twenty-eight times, as implicitly applying the *Anderson-Burdick* balancing test and even called the opinion "canonical." App.31a, n.14. But, without powers of prognostication, the Connecticut three-judge district court is most unlikely to have anticipated and applied a three-part framework announced seven years later in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and sixteen years later in *Burdick v. Takushi*, 504 U.S. 428 (1992).

Nothing in *Nader* indicates the carefully calibrated balancing of *Anderson-Burdick* which assumes application to a contemporary context. On the contrary, the district court stated clearly it was using the less rigorous rational-basis test to evaluate Connecticut's closed primaries forty-nine years ago.

"We, therefore, conclude that § 9-431 [Connecticut's closed-primary statute] is reasonably related [emphasis

supplied] to the accomplishment of legitimate state goals (citation omitted)." App.63a.

This rationality test is the most lenient scrutiny of a state's interests and certainly not *Anderson-Burdick*'s more rigorous analysis. As the concurring opinion notes, the "legal landscape" has recently changed significantly with the rapid increase in the number of independent voters and certainly even more when compared to forty-nine years ago. App.79a.

B. Nader Is Not Binding Precedent in Any Event

Nonetheless, the panel majority felt bound by *Nader* and its reasoning in applying *Anderson-Burdick*. "So we have no trouble concluding that Nader binds us and that we must follow its reasoning to the extent it applies to the facts of Polelle's case." App.57a. But Petitioner suggests the panel overlooked what would have troubled it, namely this Court's opinions in *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 433-34, n. 18 ("Our summary affirmance . . . is not binding precedent on the hospitalization issue.") and in *Hooper v. Bernalillo County Cnty. Assessor*, 472 U.S. 612, 621 n.11 ("The Court's summary affirmance in *August v. Bronstein* may not be read as an adoption of the reasoning of the judgment under review (citations omitted)." *See Bush v. Vera*, 517 U.S. 952, 996 ("We do not endorse the reasoning of the district court when we order summary affirmance of a judgment.).

In *Mandel v. Bradley*, 412 U.S. 173 (1977) the Court vacated decision of a three-judge district court which had struck down Maryland's early-filing as an unconstitutional burden on an independent candidate. The district court was seen to have erroneously relied

on a prior summary affirmance by this Court in another case ["*Salera*" case) as "controlling precedent." *Id.* at 175. "Because of its preoccupation with *Salera* the District Court failed to undertake an independent examination of the merits.") *Id.* at 177. Likewise, in the case at bar, the panel majority allowed an undue "preoccupation" with *Nader* to substitute for its own analysis based on changed political circumstances, which it freely acknowledged in the concurring opinion. App.77a-78a.

Even this Court in "*Anderson*, 460 U.S. at 784, n.5," cited by the panel majority in defense of *Nader*'s precedential value, explained later in the same note five that the lower court had also made an independent evaluation of the issue. App.55a.

C. Nader Is Unpersuasive and Does Not Preclude Supreme Court Review

Even aside from the rise of independent voters and the increasing polarization between both major parties, the legal landscape has also significantly changed after forty-nine years. The Court's First Amendment concern about compelled political speech clearly evident in *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018), and in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2923) did not exist at the time of the *Nader* opinion.

The court in *Nader* also did not have the benefit of *Washington State Grange v. Washington Republican Party*, 552 U. 442 (2008) where the Court initiated a jurisprudence that reconciles both the First Amendment rights of political parties but also of politically unaffiliated voters without viewing the relational as a zero-sum conflict. As long as a political party retains

the freedom to nominate its candidates free of outside interference, a number of possibilities open up for replacement of closed primaries by the Florida legislature.

Petitioner's action gives the Court the opening to clarify further the re-emerging prohibition against compelled speech but at the same time expand on the constitutional relationship between political parties and those politically unaffiliated because of political belief. The distinguishable and inadequately reasoned *Nader* district court opinion does not prevent this Court from reviewing the weight of to be given its summary affirmance in light of the massive social and legal changes since 1976.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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