

IN THE
Supreme Court of the United States

MICHAEL J. POLELLE,

Petitioner,

v.

CORD BYRD, 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

**BRIEF OF *AMICI CURIAE*
INDEPENDENT VOTER PROJECT, OPEN
PRIMARIES, THE FORWARD PARTY
AND THE FLORIDA FORWARD PARTY,
IN SUPPORT OF THE PETITION**

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Independent Voter Project, Open Primaries, The Forward Party, and The Florida Forward Party are nonprofit organizations. They have no parent corporation, and no publicly held corporation owns 10% or more of any stock in either organization.

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INTEREST OF AMICI CURIAE

The Independent Voter Project (“IVP”) and Open Primaries are national nonpartisan organizations dedicated to ensuring that every voter, *regardless of political affiliation*, has an equal and meaningful vote in every stage of the publicly funded election process.¹

IVP has litigated this precise constitutional issue in multiple jurisdictions, including California (*Boydston v. Weber*, 90 Cal.App.5th 606 (2023), *cert. denied* 144 S.Ct. 496 (2023) and New Jersey (*Balsam v. Guadagno*, 607 Fed. Appx. 177 (2015), *cert. denied* 577 U.S. 870 (2015)), where petitions for writs of certiorari were brought before this Court. Both petitions present the same core question as this case: whether the right to vote and to meaningful representation in publicly funded elections derives from citizenship or from compelled association with a political party.

Open Primaries has supported similar challenges in *Bryson, et al. v. Moore, et al.*, No. C-02-CV-25-001586 (Md. App. Ct.); *Chavez v. Oliver*, No. S-1-SC-37371 (N.M. Sup. Ct. Nov. 13, 2018); *Porter, et al. v. Read, et al.*, No. 25cv38061 (Or. Cir. Ct.); *Smerconish, et al. v. Commonwealth of Pa., et al.*, No. 882 MDA 2014 (Penn. Sup. Ct.); and *Malcom, et al. v. Gray*, No. 2024-CV-0202658 (Wyo. Dist. Ct.), reflecting a nationwide movement of litigation aimed at ending the exclusion of independent voters from decisive elections. Open Primaries also represents 22,508 independent supporters

1. No counsel for a party authored this brief in whole or in part, and no person or entity other than Amicus Curiae and its counsel made a monetary contribution to its preparation or submission.

who are residents of Florida and directly impacted by the Court's decision.

The Forward Party is a national political action committee that is building a new political party to represent the plurality of Americans who don't identify as a Republican or Democrat; the tens of millions of voters who are, thus, left on the sidelines of many of our most fundamental political processes. The Florida Forward Party is one of its state-level affiliates and a recognized minor party in Florida. The national and state parties have both advocated for open primaries throughout their histories, with the issue serving as a key plank of the platform of both groups. As a recognized state party and an associated national organization that is building towards party recognition, both organizations have a vested interest in voter access, ballot access, and election laws within the state of Florida, especially as the numbers of Floridians and Americans overall who identify as independents are growing rapidly. Forward is a party that is adding independent voters into its ranks and decision-making processes and already counts many Florida independent voters as members and allies. Beyond the borders of Forward itself, the party views the rights of independent voters as a bedrock of evolving US democracy in the 21st century.

The growing number of cases and the fact that two are already before this Court highlight the urgency of review. Granting certiorari here would allow the Court to consolidate or coordinate these matters, resolve the issue on a national scale, and get ahead of an inevitable wave of litigation as states grapple with the constitutional implications of closed primaries in a politically polarized and increasingly gerrymandered landscape.

INTRODUCTION

Florida's Constitution guarantees that "all political power is inherent in the people." Yet Florida's closed primary system denies millions of voters the right to participate in the very stage of the election that often determines the winner, solely because they choose not to join a political party.

The lower courts upheld this exclusion by calling the burden on voters "minimal" because they may "simply" join a party to vote in the primary. This reasoning turns the First Amendment on its head. The right to vote is fundamental, and the right *not* to associate is equally protected. Conditioning one on surrendering the other is constitutionally impermissible.

Denying unaffiliated voters access to the primary stage of the election process if they do not affiliate with a political party makes them second-class citizens in the political process. In "safe" districts, the primary *is* the election where the winner is chosen. Partisan gerrymandering magnifies that harm to every voter, by transferring political power from individual citizens, to the major political parties.

This Court should grant review to clearly articulate that the right to vote is a nonpartisan fundamental right, and that representation derives from citizenship, not by virtue of joining a political party.

SUMMARY OF ARGUMENT

This case presents a simple but urgent question:

Does the right to vote at an integral stage of a publicly funded election derive from citizenship, or from membership in a political party?

Florida's closed primary system bars millions of independent and minor-party voters from participating in the stage of the election process; one that is often determinative of the outcome. Respondent justifies this exclusion by arguing that voters can "simply" join a party to exercise their full right to vote. But the Constitution protects not only the right to vote, it protects the right *not* to associate. Forcing citizens to surrender one fundamental right to exercise another fundamental right is unconstitutional.

Partisan gerrymandering magnifies the harm of closed primaries. In many districts, the primary is the only election that really matters. By closing primaries to party members only, Florida's system turns independent voters into spectators in their own democracy, while forcing them to fund the candidate selection process with their tax dollars.

The State's interests in protecting the rights of political parties can be achieved through less restrictive means, such as open primaries, nonpartisan primaries, or a number of other nomination processes that do not force voters to affiliate with a party they do not support. Without clear guidance from this Court, the lower

courts misapplied the *Anderson/Burdick* test, treating a consequential infringement on the right to vote as a “minimal” burden. This Court should grant review to clearly articulate an opinion on a question fundamental to our representative democracy: Does the right to vote in a public election derive from citizenship, or from association with a political party?

ARGUMENT

I. The Eleventh Circuit Misapplies *Anderson/Burdick*

The Eleventh Circuit held that the burdens imposed by Florida’s closed primary on Petitioner’s fundamental rights are “minimal” because “Polelle may not even have to wait until after a primary election to disaffiliate from the party of the primary in which he wishes to participate.” *Polelle v. Fla. Sec’y of State*, No. 22-14031, slip op. at 71 (11th Cir. Mar. 11, 2025)

That rationale was expressly rejected in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966):

“To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. **The degree of discrimination is irrelevant.**”
[Emphasis added]

Similarly, as this Court held in *Janus v. AFSCME*, Council 31, 585 U.S. 878 (2018), the First Amendment protects individuals against being forced to subsidize a private organization whose views they do not share. The degree to which a voter is forced to subsidize, associate,

or otherwise give imprimatur to a political party, against his strongly held political beliefs, is irrelevant.

Forcing an independent voter to join a private political organization whose platform and values they do not share as a condition of voting at an integral stage of the election process is itself a severe burden, *even if* the voter is permitted to later change their party registration. Under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the court must weigh this heightened burden against the state's interests and consider less restrictive alternatives.

The lower court failed to do so.

II. The Eleventh Circuit's Reliance on the "Democratic Process" Ignores the Expressed Will of Florida Voters

The Eleventh Circuit acknowledged that Florida's closed primary system forces independent voters to make a "hard choice," to either forfeit their right to vote in the most decisive stage of the election, or to "switch" their registration in violation of their strongly held political beliefs. *Polelle* at 78.

The lower court admitted that this regulatory scheme may subject voters to "indignity." Still, it dismissed the burden as constitutionally permissible, reasoning that dissatisfied voters may simply "convince [their] representatives or [their] fellow Floridians of the State's error." *Polelle* at 78-79.

But Floridians have already expressed their indignation with forced political association. In 2020, Florida voters considered Amendment 3, which would have replaced the closed primary with a nonpartisan, top-two primary for state offices. A significant majority of Floridians, 57% of the electorate, voted in favor of a nonpartisan primary². That is a higher percentage than either major party's Presidential candidate received that election year³. The measure failed only because Florida imposes a uniquely high 60% supermajority requirement for constitutional amendments⁴.

The majority of Floridians, therefore, have already “convinced their fellow citizens” that a nonpartisan system is preferable to the status quo. The State's continued defense of closed primaries is not the product of the democratic will of the majority.

By suggesting that the only recourse is to convince fellow Floridians, the Eleventh Circuit ignores the fact that Floridians already expressed their dissatisfaction with the State's error when 57% of the electorate voted in favor of nonpartisan primaries.

2. See Florida Div. of Elections, November 3, 2020 General Election, available at <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/3/2020&DATAMODE=> (last visited Sept. 4, 2025)

3. *Id.*

4. *Id.* Constitutional Amendments/Initiatives, available at <https://dos.fl.gov/elections/laws-rules/constitutional-amendmentsinitiatives/> (last visited Sept. 4, 2025)

III. The Decision Unconstitutionally Elevates Party Rights Over Individual Rights

Relying on *Nader v. Schaffer*, 417 F. Supp. 837, 848 (1976) and *Clingman v. Beaver*, 544 U.S. 581, 586 (2005), the Florida court stated:

“[C]losed primaries’ housekeeping function also enables parties to identify their voters and those voters’ interests and then promote candidates who will advance them in public office.” *Polelle* at 77.

But *Nader* and *Clingman* addressed whether a party could be forced to allow nonmembers into *their own* nomination process, not whether the state could force voters to become party members to participate in a *state-run, publicly funded* election. In this case, Petitioner’s desire to participate in the public election process free of forced association actually advances the state interest that *Nader* and *Clingman* sought to protect. By forcing nonmembers to join a political party as a condition of participation, the Respondent fills the voter rolls with partisan registrants who have little or no interest in advancing the agenda of the political parties. The state interest, more logically, would be to prevent the misidentification of independent voters as party members that results from forced association.

More related to a legitimate state interest in this case, and as this Court held in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) and *Clingman* at 586, is that party associational rights exist alongside, not above, the rights of voters. When the state funds

and administers the election, it cannot constitutionally structure that process so that the only path to voter participation is compelled association.

The associational rights of a political party, which can only be derived from the associational rights of individual voters themselves, cannot act as a state-administered barrier to an individual voter's right to participate at an integral stage of the public election process.

IV. Gerrymandering Magnifies the Constitutional Harm of Florida's Closed Primaries

In most Florida districts, due to partisan gerrymandering, the primary is the stage of the election where the *de facto* winner is chosen⁵. As this Court has held, excluding voters from an integral stage of the election process is tantamount to excluding them from the general election itself. *United States v. Classic*, 313 U.S. 299, 318-319 (1941)⁶. Yet in many voting districts, the general election is merely a formality⁷. The winners are determined in closed primaries, while millions of taxpayers are forced to watch idly from the sidelines.

5. See Unite America, *The Primary Problem*, available at <https://www.uniteamerica.org/primary-problem> (last visited Sept. 4, 2025)

6. “The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted[.] And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery[.]” *Classic*, 323 U.S. at 318.

7. *Id.*

The Appellate Court even recognized that a voter's inability to participate in the primary infringes on the full right to vote:

“And we’ll also ignore for the moment that voters’ inability to participate in a primary almost by definition hinders their ability to participate equally in a general election. *See Morse*, 517 U.S. at 205 (opinion of Stevens, J.); *Gray* at 380.” *Polelle* at 35.

As we watch a gerrymandering war unfold between the two major political parties,⁸ Democrats also lose their full right to vote in states controlled by Republicans. Republicans lose their full right to vote in states controlled by Democrats. And the power of every single voter who does not fully subscribe to the will of the political party in power, diminishes further.

The natural and predictable long-term consequence of this bipartisan transfer of power from voters to political parties is the complete erosion of the individual right to vote.

Voters now express their dissatisfaction with both political parties in record numbers⁹. At the same time, the

8. *See* The Wall Street Journal, *The Gerrymander Race to the Bottom*, available at <https://www.wsj.com/opinion/partisan-gerrymandering-texas-california-gop-democrats-donald-trump-gavin-newsom-7ee26118> (last visited Sept. 4, 2025)

9. *See* New York Times, *Discontent With Party Politics Reaches New Heights*, available at <https://www.nytimes.com/2023/09/21/us/politics/politics-discontent.html> (last visited Sept. 4, 2025)

will of individual voters is being increasingly subjected to a nationalized gerrymandering power struggle between both major political parties.

Therefore, it is timely for this Court to provide the lower courts with more clear guidance on a fundamental question: Does the right to vote at an integral stage of a publicly funded election derive from citizenship, or from membership in a political party?

V. The First and Fourteenth Amendment Implications of Nader Warrant Reconsideration of Precedent.

As the concurring opinion notes, the electorate of Florida and the country as a whole has changed dramatically since the Court's decision in *Nader*. At the time of that decision in 1976, there were 204,834 unaffiliated voters in Florida representing a modest 5% of the state's voting population¹⁰. Today, there are 3,850,826 non-major party voters in Florida representing 28% of registered voters.

By the numbers, these voters are at relative parity with voters of each major party. 36% of the Florida Latino voter population is independent, as well as 42% of its Asian-American population¹¹. The three youngest generations

10. Florida Div. of Elections, By Party Affiliation Archive, available at <https://dos.fl.gov/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-by-party-affiliation/by-party-affiliation-archive/> (last visited Sept. 4, 2025)

11. The James Madison Institute, Florida's Changing Electorate: More Racially/Ethnically and Age Diverse, available

of Floridians make up 52% of Florida’s registered voters¹² and a majority of these voters are registering independently (as they are across the country¹³).

Florida mirrors the country as a whole. 43% of Americans consider themselves independent voters¹⁴. That is not simply aspirational. In nine states—Alaska, Colorado, Connecticut, Nevada, New Hampshire, Massachusetts, North Carolina, Oregon, Rhode Island—registered independent voters are the largest group of voters in the state¹⁵. They are the second largest group of registered voters in a majority of the remaining states, outnumbering members of one major party¹⁶. Notably, 52%

<https://jamesmadison.org/floridas-changing-electorate-more-racially-ethnically-and-age-diverse/> (last visited Sept. 4, 2025)

12. *id.*

13. United America, Research Brief: Significant Share of Young Voters Are Independents, <https://www.uniteamerica.org/articles/research-brief-significant-share-of-young-voters-are-independents> (last visited Sept. 4, 2025))

14. Gallup, Party Affiliation, available at <https://news.gallup.com/poll/15370/party-affiliation.aspx> (last visited Sept. 4, 2025)

15. Independent Voter Project, State-By-State Voter Registration Statistics, available at <https://independentvoterproject.org/voter-registration-by-state> (last visited Sept. 4, 2025)

16. Open Primaries Education Fund, The Next Great Migration The Rise of Independent Voters, available at https://d3n8a8pro7vhmx.cloudfront.net/openprimaries/pages/4575/attachments/original/1637687269/ROI_Report_R1-1-compressed.pdf?1637687269 (last visited Sept. 4, 2025)

of Latino voters¹⁷ and 41% of Asian-American voters¹⁸ are now independent.

The rise of the unaffiliated voter and the assertion of his rights as such is an opportunity for the Court to apply long-standing principles in a manner that allows justice to prevail where historical circumstances have evolved. Thus, in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court in ruling that same sex marriages are constitutionally protected, looked at the historical expanse of the history of marriage in this nation and in the world and stated:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. *See ibid.* That process is guided by many of the same considerations relevant to

17. *See* Gallup, Hispanic Americans’ Party ID: Updated Analysis, available at <https://news.gallup.com/opinion/polling-matters/389093/hispanic-americans-party-updated-analysis.aspx> (last visited Sept. 4, 2025)

18. *See* Asian American Voices in the 2016 Election, Report on Registered Voters in the Fall 2016 National Asian American Survey, available at <https://nativenewsonline.net/currents/native-news-online-post-election-survey-shows-trump-harris-split-reservation-%20divide#:~:text=51%25%20of%20the%20participants%20were,Indian%20reservations%2C%20including%20these%20findings> (last visited Sept. 4, 2025)

analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. *See Lawrence, supra*, at 572, 123 S.Ct. 2472. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id., at 663-64. We submit that the time is ripe for the Court to revisit the holding in *Nader* in light of these significant changes in the American electorate and to better define the legal rights of independent voters to freedom of speech and association under the First Amendment, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

CONCLUSION

This case presents a simple but urgent question:

Does the right to vote at an integral stage of a publicly funded election derive from citizenship, or from membership in a political party?

Florida's closed primary system bars millions of independent and minor-party voters from participating in an important stage of the public election process. The State justifies this exclusion by saying these voters can "simply" join a party.

But the Constitution protects not only the right to vote, it protects the right *not* to associate. Forcing citizens to surrender one fundamental right to exercise another is unconstitutional.

The decision from the Appellate Court relies on precedent from a series of cases that ask a fundamentally different question than the question being asked in this case.

The violation of Petitioner's nonpartisan right to vote is not isolated. The ongoing harm infringes on the fundamental right to vote for more than a hundred million American citizens. Many of these citizens have, and will continue, to ask courts across the country to recognize that right, until this Court intervenes.

This case offers the Court an opportunity to provide timely guidance to the lower courts, avoid a patchwork of

conflicting rulings, and clearly articulate a standard for the nonpartisan right to vote.

Therefore, the Court should grant certiorari.

Respectfully submitted,

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