

No. 22-_____

**In the
Supreme Court of the United States**

IN RE EX. REL. TERPSEHORE P. MARAS,
Petitioner.

**On Petition for an Extraordinary Writ of Mandamus
to the Supreme Court of Ohio**

**PETITION FOR
EXTRAORDINARY WRIT OF MANDAMUS**

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QUESTION PRESENTED

The question presented is whether Ohio law allowing for Republican and Democratic Parties' election observers in any Ohio precinct or board of elections while requiring that statewide Independent candidates obtain consent from four other candidates before being allowed to appoint election observers violates the Equal Protection Clause of the 14th Amendment of the Constitution of the United States.

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PARTIES TO THE PROCEEDINGS

Petitioner

- Terpsehore P. Maras, as Relator for the State of Ohio

Respondent

- Frank Larose, Ohio Secretary of State

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LIST OF PROCEEDINGS

Supreme Court of Ohio

Slip Opinion No. 2022-Ohio-3852

The State ex rel. Maras, v. LaRose, Secy. of State.

Date of Final Judgment: October 28, 2022

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Maras v. LaRose*, Slip Opinion No. 2022-Ohio-3852.]

Note: This was a direct petition to the Ohio Supreme Court. There are no lower court proceedings.

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
LIST OF PROCEEDINGS	iii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW	1
JURISDICTION.....	1
RULE 20 STATEMENT	1
STATUTORY PROVISION INVOLVED.....	2
STATEMENT OF THE CASE	7
A. Legal Background.....	7
1. Ohio Candidate’s Statutory Right to Appoint Election Observers.....	7
2. Important Question of Federal Law	8
B. Factual Background and Procedural History	9
REASONS FOR GRANTING THE PETITION	11
I. THE WRIT POSES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.....	11
II. THE FIVE CANDIDATE RULE VIOLATES THE EQUAL PROTECTION CLAUSE.	12
A. Ohio Electoral Law Treats Party Affiliated and Unaffiliated Candidates Ability to Appoint Election Observers Differently.....	13

TABLE OF CONTENTS – Continued

	Page
B. An Unaffiliated Candidate’s Inability to Appoint Their Own Election Observer Impacts the Fundamental Right to Vote. ..	14
C. The Five Candidate Rule Does Not Survive the Strict Scrutiny Test or the <i>Anderson-Burdick</i> Test.	18
CONCLUSION	22

APPENDIX TABLE OF CONTENTS

Slip Opinion of the Supreme Court of Ohio (October 28, 2022)	1a
---	----

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Page

CASES

<i>Am. Party of Texas v. White</i> , 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974)	17
<i>Anderson v. Celebrezze</i> , 460 U.S. 780, 103 S. Ct. 1564 (1983)	16
<i>Burdick v. Takushi</i> , 112 S.Ct. 2059 (1992)	13
<i>Burnett v. Motorists Mut. Ins. Co.</i> , 118 Ohio St. 3d 493 (2008)	13
<i>Bush v. Gore</i> , 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000)	14, 15, 17
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 493 F. Supp. 3d 331 (W.D. Pa. 2020)	11
<i>Dunn v. Blumstein</i> , 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)	15
<i>Fair Fight Action, Inc. v. Raffensperger</i> , 413 F. Supp. 3d 1251 (N.D. Ga. 2019)	11
<i>Harper v. Va. State Bd. of Elections</i> , 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)	14
<i>Illinois State Bd. of Elections v. Socialist Workers Party</i> , 440 U.S. 173, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979)	17
<i>League of Women Voters v. Brunner</i> , 548 F.3d 463 (6th Cir. 2008)	14

TABLE OF AUTHORITIES – Continued

	Page
<i>Massachusetts Bd. of Ret. v. Murgia</i> , 427 U.S. 307, 96 S. Ct. 2562 (1976).....	18
<i>McCrone v. Bank One Corp.</i> , 107 Ohio St. 3d 272 (2005).....	12, 13
<i>Ohio Republican Party v. Brunner</i> , 120 Ohio St.3d 250, 898 N.E.2d 23 (2008).....	8
<i>Storer v. Brown</i> , 415 U.S. 724, 94 S. Ct. 1274 (1974)	17
<i>Werme v. Merrill</i> , 84 F.3d 479 (1st Cir. 1996)	11, 12, 17, 20
<i>Wesberry v. Sanders</i> , 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)	14
<i>Williams v. Rhodes</i> , 393 U.S. 23, 89 S. Ct. 5 (1968)	15, 16
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)	14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.....	16
U.S. Const. amend. XIV	passim

STATUTES

28 U.S.C. § 1257	1
O.R.C. § 3501.01(H)	9
O.R.G. § 3501.01(N).....	10
O.R.C. § 3505.21	passim

TABLE OF AUTHORITIES – Continued

	Page
O.R.C. § 3513.257(A).....	18

JUDICIAL RULES

Sup. Ct. R. 20.....	1
---------------------	---

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (11th ed. 2019).....	21
---	----

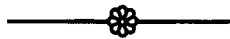
<i>Who Can Observe Elections? A State-by-State Breakdown of Policies Governing Partisan and Nonpartisan Observers,</i> The Carter Center, https://www.cartercenter.org/resources/pdfs/peace/ democracy/u.s.-observer-%20policies-2020. pdf , last accessed November 1, 2022	17
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OPINIONS BELOW

The Ohio Supreme Court's slip opinion (App.1a) is published at *State ex rel. Maras v. LaRose*, 2022-Ohio-3852. This was a direct petition for mandamus to the Ohio Supreme Court; there are no other lower court proceedings.



JURISDICTION

The Ohio Supreme Court entered judgment on October 28, 2022. App.1a. This Court has jurisdiction under 28 U.S.C. § 1651.



RULE 20 STATEMENT

Party to whom the Writ of Mandamus Should Issue: Frank LaRose, Secretary of State of Ohio

Relief Sought: An order directing the Ohio Secretary of State (or in the alternative, an order to the Ohio Supreme Court directing the Ohio Secretary of State) to:

- 1) allow certified non-party affiliated candidates, including Relator, to appoint election observers in the same manner afforded to party affiliate candidates under R.C. § 3505.21; and
- 2) allow election observers to observe and inspect the automatic tabulating machines.

Why Mandamus is Sought in This Court:
Petitioner has sought and been denied relief by the Ohio Supreme Court. Petitioner requires emergency relief given the impending November 8, 2022 election date.



STATUTORY PROVISION INVOLVED

O.R.C. 3505.21

(A) As used in this section:

(1) "During the casting of the ballots" includes any of the following:

- (a) Any time during which a board of elections permits an elector to vote an absent voter's ballot in person at the office of the board;
- (b) Any time ballots may be cast in a precinct polling place on the day of an election;
- (c) Any time during which a board of elections processes absent voter's ballots before the time for counting those ballots.

(2) "During the counting of the ballots" includes any time during which the election officials count and tally ballots, make the official canvass of election returns, or conduct an audit of the official results of an election.

(B) At any primary, special, or general election, any political party supporting candidates to be voted upon at such election and any group of five

or more candidates may appoint to the board of elections or to any of the precincts in the county or city one person, a qualified elector, who shall serve as observer for such party or such candidates during the casting of the ballots and during the counting of the ballots; provided that separate observers may be appointed to serve during the casting and during the counting of the ballots. No candidate, no uniformed peace officer as defined by section 2935.01 of the Revised Code, no uniformed state highway patrol trooper, no uniformed member of any fire department, no uniformed member of the armed services, no uniformed member of the organized militia, no person wearing any other uniform, and no person carrying a firearm or other deadly weapon shall serve as an observer, nor shall any candidate be represented by more than one observer at any one precinct or at the board of elections except that a candidate who is a member of a party controlling committee, as defined in section 3517.03 of the Revised Code, may serve as an observer.

(C) Any political party or group of candidates appointing observers shall notify the board of elections of the names and addresses of its appointees and the precincts at which they shall serve or that they will serve at the board of elections. Notification of observers appointed to serve on the day of an election shall take place not less than eleven days before the day of the election on forms prescribed by the secretary of state and may be amended by filing an amendment with the board of elections at any time until four p.m. of the day before the election. Notification of observers appointed to serve at the office of the board during the time absent

voter's ballots may be cast in person or during the time in which the board processes absent voter's ballots before the time for counting those ballots shall take place not less than eleven days before absent voter's ballots are required to be ready for use pursuant to section 3509.01 of the Revised Code on forms prescribed by the secretary of state and may be amended by filing an amendment with the board of elections at any time until four p.m. of the day before the observer is appointed to serve. The observer serving on behalf of a political party shall be appointed in writing by the chairperson and secretary of the respective controlling party committee. Observers serving for any five or more candidates shall have their certificates signed by those candidates. Observers appointed to a precinct may file their certificates of appointment with the voting location manager of the precinct at the meeting on the evening prior to the election, or with the voting location manager of the precinct on the day of the election. Observers appointed to the office of the board to observe the casting of absent voter's ballots in person prior to the day of the election or the processing of absent voter's ballots before the time for counting those ballots may file their certificates with the director of the board of elections the day before or on the day that the observers are scheduled to serve at the office of the board.

Upon the filing of a certificate, the person named as observer in the certificate shall be permitted to be in and about the applicable polling place during the casting of the ballots and shall be permitted to watch every proceeding of the precinct election

officials from the time of the opening until the closing of the polls. The observer also may inspect the counting of all ballots in the polling place or board of elections from the time of the closing of the polls until the counting is completed and the final returns are certified and signed. Observers appointed to serve at the board of elections on the day of an election under this section may observe at the board of elections and may observe at any precinct in the county. The precinct election officials shall protect such observers in all of the rights and privileges granted to them by Title XXXV of the Revised Code.

(D) No persons other than the precinct election officials, the observers, a police officer, other persons who are detailed to any precinct on request of the board of elections, or the secretary of state or the secretary of state's legal representative shall be admitted to the polling place, or any room in which a board of elections is counting ballots, after the closing of the polls until the counting, certifying, and signing of the final returns of each election have been completed.

(E) Not later than four p.m. of the twentieth day prior to an election at which questions are to be submitted to a vote of the people, any committee that in good faith advocates or opposes a measure may file a petition with the board of any county asking that the petitioners be recognized as the committee entitled to appoint observers to the count at the election. If more than one committee alleging themselves to advocate or oppose the same measure file such a petition, the board shall decide and announce by registered mail to each

committee not less than twelve days immediately preceding the election which committee is recognized as being entitled to appoint observers. The decision shall not be final, but any aggrieved party may institute mandamus proceedings in the court of common pleas of the county in which the board has jurisdiction to compel the precinct election officials to accept the appointees of such aggrieved party. Any such recognized committee may appoint an observer to the count in each precinct. Committees appointing observers shall notify the board of elections of the names and addresses of its appointees and the precincts at which they shall serve. Notification shall take place not less than eleven days before the election on forms prescribed by the secretary of state and may be amended by filing an amendment with the board of elections at any time until four p.m. on the day before the election. A person so appointed shall file the person's certificate of appointment with the voting location manager in the precinct in which the person has been appointed to serve. Observers shall file their certificates before the polls are closed. In no case shall more than six observers be appointed for any one election in any one precinct. If more than three questions are to be voted on, the committees which have appointed observers may agree upon not to exceed six observers, and the precinct election officials shall appoint such observers. If such committees fail to agree, the precinct election officials shall appoint six observers from the appointees so certified, in such manner that each side of the several questions shall be represented.

(F) No person shall serve as an observer at any precinct or at the board of elections unless the board of elections of the county in which such observer is to serve has first been notified of the name, address, and location at which such observer is to serve. Notification to the board of elections shall be given by the political party, group of candidates, or committee appointing such observer as prescribed in this section. No such observers shall receive any compensation from the county, municipal corporation, or township, and they shall take the following oath, to be administered by one of the precinct election officials:

"You do solemnly swear that you will faithfully and impartially discharge the duties as an official observer, assigned by law; that you will not cause any delay to persons offering to vote; and that you will not disclose or communicate to any person how any elector has voted at such election."



STATEMENT OF THE CASE

A. Legal Background

1. Ohio Candidate's Statutory Right to Appoint Election Observers

Ohio Revised Code ("O.R.C.") § 3505.21 provides a statutory process for appointing election observers. According to Ohio's Supreme Court, appointed election observers serve compelling state interests. *Ohio Republican Party v. Brunner*, 120 Ohio St.3d 250, 256,

898 N.E.2d 23 (2008) (“Poll observers play an important role in assuring the public that election processes are open and transparent, affecting public trust of the process, and thus, the potential for future participation in the democratic process.”) (citation omitted).

Under O.R.C. § 3505.21(B), at “any primary, special, or general election, any political party . . . may appoint to the board of elections or to any of the precincts in the county or city one person, a qualified elector, who shall serve as an observer for such party . . . during the casting of the ballots and during the counting of the ballots; provided that separate observers may be appointed to serve during the casting and during the counting of the ballots.” Alternatively, if an unaffiliated candidate wants to appoint an election observer, he or she must join with four other candidates. O.R.C. § 3505.21(B). Together, these five candidates must submit a Notice of Appointment form to the Ohio Secretary of State containing the signatures of all five candidates (the “Five Candidate Rule”). *Id.*

The Five Candidate Rule is an onerous restriction for unaffiliated candidates—especially statewide unaffiliated candidates. It requires unaffiliated candidates to recruit opposing party-affiliated candidates or other unaffiliated candidates. In contrast, party-affiliated candidates can automatically have election observers appointed on their behalf. Thus, on its face, this Ohio election law favors party-affiliated candidates over unaffiliated candidates.

2. Important Question of Federal Law

This Petition respectfully asks that the Court consider and answer whether a candidate’s statutory right to appoint election observers such as provided

under O.R.C. § 3505.21 impacts the fundamental right to vote as a matter of law. And, if so, whether statutes discriminating between a party affiliated and unaffiliated candidate's ability to appoint election observers would be subject to the strict scrutiny test (or at least the *Anderson-Burdick* test) under the Equal Protection Clause of the United States Constitution.

In the case *sub judice*, O.R.C. § 3505.21 provides party-affiliated candidates with the right to appoint election observers yet unaffiliated candidates must first find and then join with four other candidates to appoint election observers. As applied, this statute treats party-affiliated candidates differently than unaffiliated candidates. By discriminating against unaffiliated candidates when conferring the right to appoint election observers, Ohio law unintendedly also impacts supporters of that unaffiliated candidate and their right to vote. This Petition asks whether this disparate treatment should be subject to strict scrutiny (or at least the *Anderson-Burdick* test) because it impacts the fundamental right to vote.

Feeding into election integrity concerns prevalent in the United States, the appointment of election observers provides an historic mechanism to deter voter fraud, suppression, and intimidation and to ensure free and fair elections. Greater transparency for those outside the two-party system helps repair public mistrust in elections. Thus, now is an opportune time for this Court to settle an important and novel question of federal law.

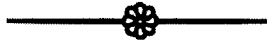
B. Factual Background and Procedural History

Petitioner Maras is a candidate, within the meaning of O.R.C. § 3501.01(H), in the Ohio 2022 General

Election for the position of Ohio Secretary of State. Petitioner Maras is also a qualified elector under R.C. § 3501.01(N). Petitioner Maras attempted to join with other candidates per the Five Candidate Rule to appoint election observers by contacting at least eight other candidates; however, she was unable to meet the requisite five candidates. Ver. Petition at ¶ 16.

On October 12, 2022, Petitioner Maras sought an expedited writ of mandamus from the Supreme Court of Ohio compelling Ohio Secretary of State LaRose to allow Petitioner Maras to appoint election observers without joining in the appointment of such observers with four additional candidates. In the application for writ, Petitioner Maras argued that the requirement to join with four additional candidates violated the Equal Protection Clause because it favored party-affiliated candidates over unaffiliated candidates such as herself.

On October 28, 2022, the Ohio Supreme Court found O.R.C. 3505.21(B) does not violate the Equal Protection Clause because the appointment of election observers does not impact the fundamental constitutional right to vote and therefore, O.R.C. 3505.21(B) is not subject to strict scrutiny or the *Anderson-Burdick* test. *State ex rel. Maras v. LaRose*, 2022-Ohio-3852. Instead, the Ohio Supreme Court applied the rational basis test and found O.R.C. 3505.21(B) rationally related to a legitimate government interest and therefore constitutional under the Equal Protection Clause. Petitioner Maras here seeks an expedited extraordinary writ of mandamus from the Supreme Court of the United States to review the Ohio Supreme Court's improper application of constitutional law.



REASONS FOR GRANTING THE PETITION

I. THE WRIT POSES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Whether a candidate's statutory right to appoint election observers impacts the fundamental right to vote is an important question of federal law that had not been, but should be, settled by this Court.

The First Circuit of Appeals has previously considered the right to appoint an election inspector a "relatively minor" election statutory right that does not impact the fundamental right to vote; therefore, subject to the rational basis test. *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996). The Ohio Supreme Court relied on this ruling in its similar finding that a candidate's statutory right to appoint election observers does not impact the right to vote. *State ex rel. Maras v. LaRose*, 2022-Ohio-3852, ¶ 19. The *Werme* decision was not appealed so this question remains unanswered on a national level.

This federal question is important—especially today—because it provides this Court an opportunity to shed the light afforded by transparency on party-dominated election processes throughout the Nation. Both political parties have impugned the electoral system for being beset by voter fraud and irregularities or voter suppression and intimidation. *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020). *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019). Absent from this debate, however, are unaffiliated

candidates and those voters who are shut out from not only running in elections, but observing them as well. Such independently minded candidates and voters could theoretically shine a non-partisan light on the electoral system to identify its shortcomings and dispel partisan fueled election myths without electoral gamesmanship in mind.

Yet, under the *Werme* and Ohio Supreme Court's recent ruling, these unaffiliated candidates are functionally precluded from appointing election observers relying on the low bar of the rational basis test. If strict scrutiny (or at least the *Anderson-Burdick* test) was the applicable test, then partisan dominated state legislatures would not be able to design high hurdles for unaffiliated candidates to clear. Instead they would have to narrowly tailor any discrimination between party-affiliated and unaffiliated candidates ability to appoint election observers to a compelling state interest. Such a ruling would give unaffiliated candidates and their supporters access to observe the electoral system in an independent and non-partisan manner without jeopardizing compelling state interests like election security and administrative efficiency. Therefore, this Writ represents an important opportunity for this Court to expand electoral transparency to unaffiliated candidates and their supporters.

II. THE FIVE CANDIDATE RULE VIOLATES THE EQUAL PROTECTION CLAUSE.

Applying the underlying Ohio law, if a statutory classification involves a fundamental right or a suspect class, then that classification is subject to the strict scrutiny test; if not, it is subject to the rational basis test. *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 274 (2005). If the classification involves a burden on

the right to vote, then the *Anderson-Burdick* test is applicable. *Burdick v. Takushi*, 112 S.Ct. 2059, 2063 (1992). Regardless, “the preliminary step in conducting an equal protection analysis regarding a particular statute is to examine the classifications created by the statute in question.” *Burnett v. Motorists Mut. Ins. Co.*, 118 Ohio St. 3d 493, 499 (2008). A classification occurs when governmental decision makers treat persons who are in all relevant respects alike differently—as was done here. *McCrone*, 107 Ohio St. 3d 272, at 274.

A. Ohio Electoral Law Treats Party Affiliated and Unaffiliated Candidates Ability to Appoint Election Observers Differently.

The Five Candidate Rule creates two classes of candidates: (a) party affiliated candidates who are automatically afforded election observers and (b) unaffiliated candidates who must satisfy the onerous Five Candidate Rule.

Party affiliated candidates benefit from their classification by their political parties being able to “appoint to the board of elections or to any of the precincts in the county or city one person, a qualified elector, who shall serve as observer for such party.” O.R.C. § 3505.21(B). Party affiliated candidates need not join with other candidates to appoint election observers and can rely on their political party to do so for them.

Conversely, unaffiliated candidates can only avail themselves of the Five Candidate Rule to appoint election observers to protect themselves and their supporter’s right to vote. They must assemble “any group

of five or more candidates” to appoint election observers. O.R.C. § 3505.21(B). This classification creates an advantage for party affiliated candidates and a disadvantage for non-party affiliated candidates. The former has an automatic mechanism for political parties to appoint election observers on their behalf, but the latter has an onerous mechanism to appoint election observers on their behalf, despite both sharing the same legal defined term (*i.e.*, candidates) under O.R.C. § 3505.21(B).

Since O.R.C. § 3505.21(B) legally defines all candidates to be alike, but functionally treats party affiliated candidates better than non-party affiliated candidates, it creates a classification subject to the Equal Protection Clause.

**B. An Unaffiliated Candidate’s Inability to
Appoint Their Own Election Observer
Impacts the Fundamental Right to Vote.**

The right to vote is a precious and fundamental right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). “Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). *See also Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (finding that the right to vote is “preservative of all rights”). “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quoting *Bush v. Gore*, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000)). “[A] citizen has a constitutionally

protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush*, 531 U.S. at 104–05, 121 S.Ct. 525.

Electoral laws designed to preclude unaffiliated candidates from appointing their own election observers does impact the fundamental right to vote. This Court has been asked and proceeded to intervene to invalidate laws that unfairly favor party-affiliated candidates over non-affiliated candidates because such discrimination necessarily also impacts the non-affiliated candidate’s supporters fundamental right to vote.

In *Williams v. Rhodes*, this Court invalidated an Ohio law which, in order to place candidates on the ballot, required a new political party to obtain petitions signed by qualified electors totaling fifteen percent (15%) of the number of ballots cast in the last preceding gubernatorial election. 393 U.S. 23, 25, 89 S. Ct. 5, 7 (1968). This same law required established political parties to only obtain ten percent (10%) of the number of votes in the prior gubernatorial election and did not require any signature petitions whatsoever. *Id.* at 25-26. This Court opined that “these restrictive provisions [made] it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties.” *Id.* at 25. It extended this logic to find this discrimination impacted the right to vote:

No extended discussion is required to establish that the Ohio laws before us give the two

old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. *Id.* at 31 (emphasis added).

Thus, this Court has recognized that discrimination between established parties and new parties impacts the right to vote.

In *Anderson v. Celebrezze*, this Court found the Equal Protection Clause applied to disparities in treatment of party-affiliated candidates and unaffiliated candidates in Ohio. *Anderson v. Celebrezze*, 460 U.S. 780, 783, 103 S. Ct. 1564 (1983). This case involved an Ohio law which required independent candidates to declare candidacy status well in advance of comparable action by the nominee of a political party. *Id.* In *Anderson*, this Court recognized that imposing disparate standards on independent candidates in comparison to party-affiliated candidates” may have a substantial impact on independent-minded voters.” *Id.* at 790, 792. This Court again recognized:

A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. *Id.* at 793–94.

Thus, this Court again recognized that discrimination between party-affiliated candidates and unaffiliated candidates impacts the right to vote. In both instances, the source of this friction was Ohio law.

In today's age of election denialism and voter mistrust, election observers serve an even greater state interest of deterring and detecting voter fraud, deterring voter intimidation, and safeguarding voter confidence. Not surprisingly, all states have some process for facilitating election observers.¹ The House of Representatives also appoints its own election observers through the Election Observer Program. The appellate court in *Werme v. Merrill* may have decided appointment of election inspectors was a "relatively minor" affair in 1996 but that was before the legally disputed 2000 Presidential election giving rise to *Bush v. Gore*, 531 U.S. 98 (2000); before the 2016 Presidential election allegations of Russian election interference, and before the 2020 Presidential election allegations of widespread voter fraud. Election observers are more important than ever to instill faith in our elections.

This case is about the level of scrutiny applied when discriminating against unaffiliated candidates via special privileges granted to party affiliated candidates. Unaffiliated candidates are not unique to Ohio, and neither is discrimination against them in other states. See *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274 (1974); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979); *Am. Party of Texas v. White*, 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974). When the increased importance of election observers

¹ *Who Can Observe Elections? A State-by-State Breakdown of Policies Governing Partisan and Nonpartisan Observers*, The Carter Center, <https://www.cartercenter.org/resources/pdfs/peace/democracy/u.s.-observer-%20policies-2020.pdf>, last accessed November 1, 2022.

is combined with this Court's prior precedent on discrimination between party-affiliated candidates and unaffiliated candidates as regards impacting the right to vote, it becomes apparent that laws designed to preclude unaffiliated candidates from appointing their own election observers does very much impact the fundamental right to vote.

C. The Five Candidate Rule Does Not Survive the Strict Scrutiny Test or the *Anderson-Burdick* Test.

Because election observers are important to the election process and discrimination between party-affiliated and unaffiliated candidates impacts the right to vote, the State of Ohio must narrowly tailor its electoral laws for appointing election observers to a compelling state interest under the strict scrutiny test. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566 (1976). The Five Candidate Rule does not promote a compelling state interest. Curtailing the ability of certified non-party unaffiliated candidates to appoint their own observers will not lead to a flood of appointed statewide observers given that under Ohio law, an independent candidate running for state-wide office must in the first place collect no less than five thousand signatures on his or her nominating petition to receive certification as a candidate. R.C. § 3513.257(A). This stringent prerequisite was only met this election cycle by Petitioner Marase. To appear on the ballot, Petitioner Maras put forth extraordinary effort and garnered the support of thousands of people across the State of Ohio. If she was allowed to appoint observers in the same manner that party-affiliated candidates are now able to do so, each county and precinct would have three observers

instead of two—a marginal increase in observers that will not disturb existing voting stations but one that provides important protections as set forth above.

Even if there were multiple statewide unaffiliated candidates, the Five Candidate Rule could have been narrowly tailored to require all unaffiliated statewide candidates to agree on the same election observers prior to appointment. This again would increase the number of observers from two to three. At the county or district level, the same requirement could be imposed at the respective levels. Instead, a statewide unaffiliated candidate like Petitioner Maras must gain the consent of four statewide candidates to appoint statewide election observers. Alternatively, Maras would have to gain consent of four local candidates per county to be able to appoint election observers statewide. These are effectively impossible tasks since party-affiliated candidates have no political incentive to appoint their own election observers and rarely are there enough unaffiliated candidates to make this second option feasible.

The Ohio Supreme Court suggested in its decision that Petitioner Maras could have sought the agreement of 210 unaffiliated candidates running in local elections throughout Ohio to appoint statewide observers. *State ex rel. Maras v. LaRose*, 2022-Ohio-3852, ¶ 25. O.R.C. § 3505.21(B), however, only states, “a group of five or more candidates may appoint to the board of elections or to any of the precincts in the county or city one person, a qualified elector, who shall serve as observer for such party or such candidates during the casting of the ballots and during the counting of the ballots.” This means appointing election observers is done at the county level. Even if a local candidate could legally

appoint an election observer outside of the county or precinct where they are running for election, under the Ohio Supreme Court's reading of the statute, they would have no political incentive to agree to do so. Thus, a statewide unaffiliated candidate would be limited to appointing election observers to the counties and precincts where they find a sufficient number of agreeable unaffiliated local candidates. Considering there are 88 counties in Ohio, this would require 352 of these candidates. This election only has 210 local unaffiliated local candidates, so these theoretical candidates simply do not exist notwithstanding what is stated by the Ohio Supreme Court.

Thus, the Five Candidate Rule like in *Williams* and *Celebreeze* puts up a near impossible barrier for unaffiliated candidates, especially unaffiliated candidates like Petitioner Maras, to compete with established political parties. This barrier invariably impacts the right to vote and necessitates a compelling interest standing behind it. A narrow tailoring of the Five Candidate Rule to allow unaffiliated candidates to group together and appoint on a statewide or local basis election observers would have addressed the *Werme* court's concern about appointing too many observers. See *Werme v. Merrill*, 84 F.3d 479, 486 (1st Cir. 1996). As it currently reads, however, the Five Candidate Rule violates the Equal Protection Clause of the United States Constitution. Petitioner Maras should respectfully be afforded the same right as affiliated candidates to appoint election observers who can meaningfully observe voting and inspect the counting of the votes as argued below. More importantly, Petitioner Maras' supporters deserve the same

Constitutional protections afforded to voters of affiliated candidates.

One of these protections is transparency in counting votes. Ohio Revised Code § 3505.21 provides that observers may “inspect the counting of all ballots in the polling place or board of elections from the time of the closing of the polls until the counting is completed and the final returns are certified and signed.” Black’s Law Dictionary defines an “inspection” as a “careful examination of something.” *Inspection*, BLACK’S LAW DICTIONARY (11th ed. 2019).

Gone are the days when an observer could meaningfully inspect the counting of votes by walking around and watching poll workers tally and mark. In Ohio, vote tabulations are done by computer. Watching the ballots go in a machine and then come back out is not a meaningful inspection process for certified observers. The situation is akin to a counting room with a locked door where workers from private companies take the ballots in, supposedly count them, and return to the onlookers outside with assurances that nothing untoward took place within the confines of the locked counting room. Maras wants to exercise her right to appoint observers who may inspect the vote counting process as provided by Ohio law.



CONCLUSION

Relator Terpsehore P. Maras seeks a reversal of the decision by the Ohio Supreme Court to deny her writ of mandamus ordering Secretary of State Frank LaRose to 1) allow certified non-party affiliated candidates, including Relator, to appoint election observers in the same manner afforded to party affiliate candidates under R.C. § 3505.21; and 2) allow election observers to observe and inspect the automatic tabulating machines.

Mandamus should respectfully be granted.

Respectfully submitted,

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