State of Minnesota
In Supreme Court
A19-1994

Roque "Rocky" De La Fuente, and
James Bernard Martin, Jr.

Petitioners,

v.

Steve Simon, Minnesota Secretary of State,

Respondent.

BRIEF OF PETITIONERS

Erick G. Kaardal, 229647
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074
Facsimile: 612-341-1076
Email: kaardal@mklaw.com
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

The Petitioners Roque "Rocky" De La Fuente and James Bernard Martin, Jr. petitioned the Supreme Court under Minnesota Statutes § 204B.44 to correct an error, omission, or wrongful act by the Respondent Steve Simon, Secretary of State, which has occurred and is about to occur. The Petition asserted that the Secretary will be omitting certain presidential candidates, including De La Fuente, from being on the statewide presidential primary ballot on the March 3, 2020. The Petition asserted that Minnesota Statutes § 207A.13, subdivision 2(a), provides that candidates seeking the 2020 Republican presidential nomination may only appear on Minnesota's primary election ballot when the Minnesota major political party determines which candidate will appear on the ballot through the chair of each party. Moreover, once submitted, it cannot be changed.

The only possible exception is as a *possible* write-in, if and only if, the party chair submits to the Secretary names of write-in candidates "no later than the seventh day before the presidential nomination primary." Minn. Stat. 207A.13, subd. 2(b). In Minnesota, that date would be February 25, 2020.[1] Petitioner De La Fuente is a qualified alternative Republican Party candidate; yet, he has been excluded from the ballot under 207A.13, subdivision 2(a). Even, if identified as a write-in candidate, he is denied the right to associate with supporters who desire to vote via absentee ballot under § 207A.13, subdivision 2(b).

[1] 2020 is a leap year.

Petitioner Martin, who only recently recognized that he will not be in Minnesota on March 3, 2020, will have no notice of alternative candidates until the party chair and the Secretary announces alternative write-in candidates sometime between the delivered unamendable party chair notice to the Secretary (no less than 63 days before the primary date, here, October 29, 2019) and February 25th. Meanwhile, because the Secretary allows for presidential primary absentee balloting to begin on January 17, 2020, which for Republican Party voter Martin, who does not wish to vote for a Donald J. Trump delegate, is effectively and intentionally denied a right to exercise the right to participate in the March 3rd presidential primary.

Meanwhile, the offending statute, Minnesota Statutes § 207A.13, subdivision. 2(a) further imposes a state qualification on De La Fuente, as an otherwise qualified federal presidential candidate, to first receive the permission of his political party to appear on a taxpayer funded presidential primary election ballot or as a write in candidate, for which the party can decline either, to the constitutional detriment of De La Fuente and Martin.

The statute at issue, Minnesota Statutes §207A.13, violates the Minnesota Constitution Article XII, section 1, which bans the state legislature from granting any special or exclusive privilege to private corporations, associations or individuals. It also violates the protected First and Fourteenth Amendment rights of the U.S. Constitution of the presidential candidate De La Fuente and voter Martin regarding the right of association, equal protection, and due process.

ISSUES PRESENTED

I.

Minnesota's Constitution Article XII, section 1, prohibits special legislation. Whether Minnesota Statutes § 207A.13, subdivision 2, which grants a major political party the right to exclude qualified presidential candidates from being named on a presidential primary ballot in a state taxpayer funded primary election, violates Article XII, section 1.

Issue raised: Errors and Omissions Petition.
Applicable constitutional provisions, statutes, and case law:
Minn. Cont. Art. XII, § 1; Minn. Stat. § 207A.13; *California Democratic Party,* 530 U.S. 567 (2000); *Am. Party of Texas v. White,* 415 U.S. 767 (1974); *In re Tveten,* 402 N.W.2d 551 (Minn. 1987).

II.

Primary elections are part of the electoral process in choosing candidates for the general election ballot. Presidential qualifications are set by the U.S. Constitution. A state may not impose any other qualification on presidential candidates seeking that elected office. Whether Minnesota Statutes § 207A.13, subdivision 2, unconstitutionally imposes an additional qualification on a presidential candidate when it requires the candidate to receive permission of the major political party to appear on the primary ballot in a state taxpayer funded primary election contest.

Issue raised: Errors and Omissions Petition.
Applicable constitutional provisions, statutes, and case law:
Minn. Cont. Art. XII, § 1; Minn. Stat. § 207A.13; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Storer v. Brown,* 415 U.S. 724 (1974).

III.

The rights of a Minnesota registered eligible voter is inextricably intertwined with the rights of a candidate. Whether Minnesota Statutes § 207A.13, subdivision 2(a) and 2(b) violate the First and Fourteenth Amendments of the U.S. Constitution when, in a taxpayer funded primary, it prevents a voter from exercising his right to vote and, with

the candidate, the right to associate in a presidential primary election contest.

Issue raised: Errors and Omissions Petition.
Applicable constitutional provisions, statutes, and case law:
U. S. Const. Amend. I, Amend. XIV; Minn. Stat. § 207A.13; *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984); *In re GlaxoSmithKline plc,* 732 N.W.2d 257 (Minn. 2007); *Metro. Rehab. Servs., Inc. v. Westberg,* 386 N.W.2d 698 (Minn.1986).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U. S. Constitution, First Amendment:

> Congress shall make no law…prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble….

U.S. Constitution, Fourteenth Amendment, Due Process and Equal Protection Clauses:

> Section 1… nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Constitution Article XII, section 1:

> The legislature shall pass no local or special law … granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever or authorizing public taxation for a private purpose.

Minnesota Statutes § 207A.13, subdivisions 2(a) and 2(b):

> (a) Each party must determine which candidates are to be placed on the presidential nomination primary ballot for that party. The chair of each party must submit to the secretary of state the names of the candidates to appear on the ballot for that party no later than 63 days before the

> presidential nomination primary. Once submitted, changes must not be made to the candidates that will appear on the ballot.
>
> (b) No later than the seventh day before the presidential nomination primary, the chair of each party must submit to the secretary of state the names of write-in candidates, if any, to be counted for that party.

FACTUAL BACKGROUND

I. Petitioner De La Fuente is a legitimate qualified presidential candidate running against President Trump for nomination at the National Republican Party convention.

De La Fuente seeks to challenge Mr. Trump for convention delegates in Minnesota's March presidential primary.

Minnesota has authorized a state taxpayer funded presidential primary scheduled for March 3, 2020.[2] The legislative purpose of the presidential primary contest is to provide Minnesota voters an opportunity to advance the nomination of a qualified candidate to be elected President of the United States.[3] The intent was to have more than one party presidential candidate name on a primary ballot; as one legislator commented, "If you haven't noticed, there's …a new populous movement going on…the people are less interested in parties and more interested in the people…."[4]

---

[2] Minn. Laws 2016, Ch. 162. Pet. ¶¶42–43.
[3] *Id.* ¶44. *See also* n.2: "This is a constitutional right, [for Minnesotans to] have the freedom of association…."
[4] *Id.* ¶45; *See also* n.3.

The Petitioner Roque "Rocky" De La Fuente satisfies all of the qualifications enumerated under the Presidential Qualification Clause of Article II, section 1, clause 5 of the United States Constitution:

> No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.[5]

De La Fuente is over 35, a natural born citizen, residing in San Diego County, California, and a resident of the United States for over 35 years.[6] He is an eligible voter and a member of the National Republican Party. De La Fuente declared his candidacy for President and is seeking the 2020 presidential nomination of the Republican National Convention.[7] He registered as a Republican Party presidential candidate with the Federal Elections Commission on May 16, 2019.[8]

Notably, De La Fuente is one of only three candidates challenging President Donald Trump for the 2020 Republican presidential nomination.[9]

As a candidate for the 2020 Republican Party presidential nomination, De La Fuente intends to secure ballot access to Minnesota's 2020 Republican presidential primary election to compete against Mr. Trump for Minnesota's 39 delegates and 39

---

[5] *Id.* ¶9. *See also* ¶¶8, 10–12.
[6] *Id.* ¶4.
[7] *Id.* ¶3.
[8] *Id.* De La Fuente's FEC presidential identification number is P60016342. *Id.*
[9] *Id.* ¶13.

alternate delegates to the 2020 Republican National Convention.[10] Hence, it is in De La Fuente's interest, as a presidential candidate, to ensure that he can associate with the Republican Party voters and that in turn the voters, have an opportunity to participate in a primary process to elect delegates and alternative delegates that would nominate him as an alternative presidential candidate other than Mr. Trump.[11]

II. Petitioner Martin will vote absentee in the Republican Party due to his absence out of state on March 3, 2020, and seeks to vote for an alternative candidate other than Mr. Trump.

The Petitioner James Martin is a Minnesota resident, taxpayer, and an eligible voter.[12] Recently, because of his profession and his ownership of a business, Martin found that he would not be in Minnesota to vote in the presidential election primary on March 3, 2020.[13] As a result, he recognized that he must vote by absentee ballot for the 2020 presidential primary election.[14] Martin is certain that he does *not* wish to give any vote that would support Mr. Trump and seeks to advance the nomination of the candidate omitted from the Republican chair's notice to the Secretary: De La Fuente.[15]

---

[10] *Id.* ¶3.
[11] *Id.* ¶31.
[12] *Id.* ¶6.
[13] *Id.* ¶86.
[14] *Id.* ¶87.
[15] *Id.* ¶¶56; 85.

III. The Secretary of State enforces the state's election laws including the presidential primary election, and rules or policies governing absentee ballots for the primary election.

The Secretary of States is the chief election official in the state.[16] The Secretary is responsible for the oversight of Minnesota's 87 counties and their auditors regarding the presidential primary election as governed under Minnesota Chapter 207A and Minnesota Rules Chapter 8215. Under Rule 8215.0400, subp. 1, absentee balloting will be allowed for the presidential primary. Absentee balloting is to begin on January 17, 2020.

IV. The Minnesota Republican Party names Mr. Trump as the sole candidate for Minnesota's March 2020 presidential primary election.

There are 39 delegates and alternates at stake in the Republican Party primary contest for the national Republican Party convention.[17] With full knowledge of De La Fuente's candidacy, having filed with the Federal Elections Commission in May of 2019, on October 24, 2019, the Republican Party filed with the Secretary under Minnesota Statutes § 207A.13, subdivision 2(a) the sole name to appear on the Republican primary ballot: Donald J. Trump.[18] The notice cannot be amended.[19] No write-in candidate has been named to date. If the Party is to identify any write-in

[16] *See Clark v. Pawlenty,* 755 N.W.2d 293, 299 (Minn. 2008).
[17] Pet. ¶3. Under Minnesota law, each major political party who has a national convention, will have separate primary ballots.
[18] Pet. ¶18; Ex. A. *See also* Minn. Stat. § 207A.13, subd. 2(a).
[19] *Id.*

candidate, if it so desires, it may do so but no later than seven days before the March 3, 2020 primary date, which is February 25, 2020:[20]

> No later than the seventh day before the presidential nomination primary, the chair of each party must submit to the secretary of state the names of write-in candidates, if any, to be counted for that party.

Because the statute allowed the Republican Party to wait until December 31, 2019 to file with the Secretary its notice,[21] just 17 days before the primary ballots would have been printed and ready to be sent for absentee balloting, both De La Fuente and Martin believed time was sufficient for the Party to declare write-in candidates to give Minnesota Republican voters notice of alternative party candidates.[22] But, the Party did not.

De La Fuente and Martin filed their petition under Minnesota Statutes § 204B.44 to this Court on December 13, 2019.

ARGUMENT

Minnesota Statutes § 207A.13, subdivision 2(a) is unconstitutional. The statutory scheme places a restriction on qualified presidential candidates for primary elections which is constitutionally prohibited. The statute violates Article XII's prohibition of special legislation when it provides power to the major political parties

[20] Minn. Stat. § 207A.13, subd. 2(b).
[21] Minn. Stat. § 207A.13, subd. 2(a) ("The chair of each party must submit to the secretary of state the names of the candidates to appear on the ballot for that party no later than 63 days before the presidential nomination primary.").
[22] *See generally,* Pet. ¶¶31, 52, 54, 56, 80, and 81.

in Minnesota to prevent otherwise qualified presidential candidates to be placed on the primary ballot. It denies the right of a candidate—such as Petitioner De La Fuente—to associate with Minnesota primary election voters. It denies voters such as Petitioner Martin, as an absentee voter, the right to vote for De La Fuente. Whether De La Fuente is named a write-in candidate at this stage of the proceedings is immaterial. The harm to the candidate and to the absentee voter is complete.

The Republican Party and the Secretary have authorized an unfair advantage to Mr. Trump to attain the 39 delegates and alternates to the national convention by keeping De La Fuente from appearing on the ballot. In a state taxpayer funded primary, this statute in light of the errors and omission of the Secretary make the electoral process unfair to the candidates and the voters. The statutory scheme runs afoul of the First and Fourteenth Amendments of the U.S. Constitution.

Unless permanent injunctive relief is granted to prevent the Secretary from enforcing § 207A.13 and not require the Secretary to place De La Fuente's name on the presidential primary election ballot, no primary should be held. But, this would be an extreme remedy and not the desire of the Legislature. The remedy is to place De La Fuente's name on the March 3, 2020 primary ballot and to bar application of the unconstitutional statute in the future.

I. Because the Secretary will be omitting at least one Minnesota Republican Party presidential candidate from the March 2020 primary election ballot, the Petition under § 204B.44 is proper.

Minnesota Statutes § 204B.44 allows a person to seek correction of any error or omission committed by a "county auditor, canvassing board, ...the secretary of state, or any other individual charged with any duty concerning an election." Minn. Stat. § 204B.44 (d) (2010). The petition must "describe the error, omission, or wrongful act," and be served "on the officer, board or individual charged with the error, omission, or wrongful act." *Id.* The proceeding authorized by section 204B.44 thus allows potential candidates, among others, to seek relief from the errors and omissions "of those enumerated persons charged with properly completing the procedural and mechanical duties attendant to the election process." *Martin v. Dicklich*, 823 N.W.2d 336, 339 (Minn. 2012) *quoting Schroeder v. Johnson,* 311 Minn. 144, 145, 252 N.W.2d 851, 852 (1976).

Roque "Rocky" De La Fuente and James Martin filed their errors, omission and wrongful act petition against the Secretary of State because he is the proper party. As the chief election official for the state, the Secretary is "responsible for the administration of elections," "issues rules" regarding election administration, and "provides guidance to [ ] local officials" for election administration. *Martin,* 823 N.W.2d at 339. Given the Secretary's role in ballot preparation for the upcoming presidential primary election in March 2020, it can hardly be said the Secretary is not a proper party.

Further, there should be little doubt about the Petitioners. De La Fuente is a qualified Republican Party presidential candidate seeking the Republican national convention nomination. With the Party's October 24, 2019 submission and acceptance by the Secretary of the notice as to who would be placed on the primary ballot under Minnesota Statutes § 207A.13, subdivision 2(a), he is permanently precluded from appearing on the printed ballot:

> The chair of each party must submit to the secretary of state the names of the candidates to appear on the ballot for that party no later than 63 days before the presidential nomination primary. *Once submitted, changes must not be made to the candidates that will appear on the ballot.*[23]

Despite the fact De La Fuente qualified as a presidential candidate, running under the Republican Party banner in opposition to Mr. Trump, the error of omitting De La Fuente from the printed ballot as described in his Petition, meets the prerequisites of § 204B.44. Notably, De La Fuente has not been named as a write-in candidate—nor has the public received notice he is. It is particularly disconcerting considering the offending statute, under § 207A.13, subdivision 2(b) allows the party to wait up to seven days prior to the March 3, 2020 primary date—here, February 25, 2020.

Thus, De La Fuente is faced with several harms including an additional qualification he must reach in order to be placed on the primary ballot—by obtaining the "right" from the Republican Party. This is something that is not constitutionally

[23] Emphasis added.

allowed. As illustrated in this case, the Republican Party was able to prevent De La Fuente to appear on the printed primary ballot as a qualified presidential alternative to Mr. Trump. Here, the Secretary accepted that notice.

Meanwhile, Martin, who recently found that he cannot be present for the March 3, 2020 primary, will seek to vote by absentee ballot. First, Martin does not wish to support Mr. Trump and desires the alternative candidate De La Fuente instead. Second, De La Fuente, under Minnesota Statutes § 207A.13, subdivision 2(a), Martin's preferred candidate will not appear on the printed primary Republican Party ballot.

Third, because the same statutory scheme allows the Party to wait until seven days before the primary date to identify write-in candidates, "if any," and De La Fuente's name is not currently identified, Martin's absentee ballot vote for De La Fuente will not be counted. In other words, Martian would be forfeiting a right to vote in the primary election because of the Secretary's omission, as accepted from the Republican Party, of De La Fuente's name from the presidential primary election. As this Court knows, generally, as part of the electoral process, a primary election has the same protections associated with it as does a general election. *See e.g., Nixon v. Herndon,* 273 U.S. 536, 540 (1927).

In this case, the rights of Martin as a voter are inextricably intertwined with the rights of De La Fuente as a candidate. But, § 207A.13, subdivisions 2(a) and 2(b) work to eviscerate those protected constitutional rights.

A petition under § 204B.44 is the proper course of action to correct the identified wrongs.

II. Minnesota Statutes § 207A.13, subdivision 2, which grants a major political party the right to exclude qualified presidential candidates from being named on a presidential primary ballot in a state taxpayer funded primary election, violates Article XII, section 1 of the Minnesota Constitution.

The U.S. Supreme Court has recognized that States play a major role in structuring and monitoring the election process, including primaries. *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) *citing Burdick v. Takushi,* 504 U.S. 428, 433 (1992); *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217 (1986). Notably, the Court has considered it "'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that *intraparty competition* is resolved in a *democratic fashion*." *California Democratic Party,* 530 U.S. at 572 *quoting Am. Party of Texas v. White,* 415 U.S. 767, 781 (1974); *see also Tashjian,* 504 U.S.*,* at 237 (SCALIA, J., dissenting).[24] Thus, a state "may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by a primary election or by party convention." *Am. Party of Texas v. White,* 415 U.S. at 781. *See also Storer v. Brown,* 415 U.S. 724, 733–736 (1974).

Minnesota has directed the major political parties to hold an intraparty competition through a presidential primary on March 3, 2020. However, by the

[24] Emphasis added.

authority granted under § 207A.13, subdivision 2, the Republican Party has thwarted the intraparty competition and so doing, undermined the democratic process.

Article 12, section 1 generally prohibits special legislation when a general law can be made applicable:

> The legislature shall pass no local or special law … granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever or authorizing public taxation for a private purpose.

"While the constitutional prohibition against special legislation does not deprive the legislature of the power to create classes and apply different rules to different classes, it must adopt a proper classification basis. That classification must be based upon substantial distinctions, which make one class substantially different, in a real sense, from another….A law will be considered to be general if the class to which it applies justifies a statute peculiar to the class in the matters addressed in the law, but if the classification is so patently arbitrary as to demonstrate constitutional evasion, the courts will void the enactment." *In re Tveten,* 402 N.W.2d 551, 558 (Minn. 1987) (citations omitted).

Minnesota Statutes § 207A.13, subdivision 2(a) and 2(b) apply to major political parties who hold national conventions. The language of the statute, anticipates "candidates" to be announced for a presidential election primary. *See* Minn. Stat. § 207A.13, subd. 2(a) ("Each party must determine which candidates are to be placed on the presidential nomination primary ballot for that party.") Despite the plural

"candidates," the language of the statute allows *the political parties* to determine the class, not the legislature, as to who is on the printed primary ballot. The statute allows the political parties to exclude presidential candidates—even for those who are "write-in" candidates. Thus, it is the government-authorized political party notice that determines the class. It allows the party to undermine the intraparty competition envisioned as part of the electoral process to determine a possible presidential candidate for the general election. The statutory classification is patently arbitrary as demonstrated in this case.

In this case, Minnesota insisted upon an intraparty competition to be settled before the general election by a presidential primary election, paid for by taxpayers. *Am. Party of Texas v. White,* 415 U.S. at 781. But, the state law allows for major political parties to thwart the intraparty competition through a primary election by noticing only some of the candidates running for the office. In this case, the Republican Party has identified only one candidate for the office. The Legislature has provided, by special legislation, to political parties, as associations, the right to create classes of primary presidential candidates in an arbitrary manner that affects the right to vote of primary voters by eliminating intraparty competition. Here, the statutory right to vote in a presidential primary is memorialized under Minnesota Statutes § 207A.12(b):

> An individual seeking to vote at the presidential nomination primary must be registered to vote pursuant to section 201.054, subdivision 1.[25]

In Minnesota, before a person may exercise the right to vote, the person must first register.

What constitutes a class or a proper basis of classification that will meet the constitutional prohibition against special legislation is determined by employing a three point "rational basis" test. The classification will be deemed constitutionally proper:

> [I]f (a) the classification applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation; (b) the distinctions are not manifestly arbitrary or fanciful but are genuine and substantial so as to provide a natural and reasonable basis justifying the distinction; and (c) there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide.

Wichelman v. Messner, 83 N.W.2d 800, 824 (1957).

However, in this case, because the statute directly affects the statutory right to vote in a presidential primary election, the rational basis test does not apply. Hence, the purportedly unconstitutional special legislation is under a higher threshold of strict scrutiny instead of "rational basis." "Public grants which tend to disrupt traditional

[25] Minn. Stat. § 201.18, subd. 2: "An eligible voter must register in a manner specified by section 201.054, in order to vote in any primary, special primary, general, school district, or special election held in the county." Minnesota Statutes § 201.054, subdivision 1 refers to when a person may register to vote.

and long established common law or statutory rights of property, contract, or personal liberty, usually are given a strict interpretation to safeguard the rights of the individual or class adversely affected, as well as the public." 3 Sutherland Statutory Construction § 63:9 (7th ed.).

To be sure, the Supreme Court seems to question whether the right to vote in a primary is as fundamental as exercising that right in a general election. *See California Democratic Party v. Jones,* 530 U.S. 567, 573 n.5 (2000) ("*Selecting* a candidate [to be nominated] is quite different from voting for the candidate of one's choice [who could take office].") (emphasis added). But, the Supreme Court has never held that *no* fundamental right to vote in a primary exists. *See Jones,* 530 U.S. at 601 (Stevens, J., dissenting) ("I would also give some weight ... to the fundamental right of such nonmembers to cast a meaningful vote for the candidate of their choice.").

In this case, the statute doesn't meet either the strict scrutiny test or rational basis test if it applies. Considering the statute's effect on eligible registered primary voters, Minnesota Statutes § 207A.13, subdivision 2(a) is not designed to avoid presidential primary election ballot "clutter" or promote a more manageable primary ballot because the challenged statute does not place a limit on the number of candidates placed on Minnesota's presidential primary election ballot.[26] The statute is

[26] Pet. ¶24.

not designed to force, or even permit, a candidate to show any threshold of public support to secure access to the ballot.[27]

The Republican Party created a class of one: Mr. Trump. The Republican Party excluded all others from the printed ballot even though there are qualified candidates that oppose him but carry the Republican Party banner—De La Fuente. There is no second class as of yet. If a second class happened, it would be "write-in" candidates. But, the statute allows the Party to prevent a candidate from participating in the primary process:

> [T]he chair of each party must submit to the secretary of state the names of write-in candidates, *if any*, to be counted for that party.

Minn. Stat. § 207A.13, subd. 2(b).[28]

Meanwhile, because the period for the party to decide who will be a write-in candidate is so long, as soon as the primary ballot notice is provided by the party to the Secretary, the primary election process is effectively closed for all omitted candidates. Here, the Republican Party has purposefully omitted De La Fuente in favor of Mr. Trump giving voters literally no choice in the democratic process of intraparty competition which the Secretary has accepted and is enforcing.

Minnesota Statutes § 207A.13. subdivision 2(a) violates Article XII of the Minnesota Constitution and this Court should void its enactment.

---

[27] *Id.* ¶25.
[28] Emphasis added.

III. Minnesota Statutes § 207A.13, subdivision 2, unconstitutionally imposes an additional qualification on a presidential candidate when it requires the candidate to receive permission of the major political party to appear on the primary ballot in a state taxpayer funded primary election contest.

The Qualifications Clause lays down the sole qualifying criteria for the office of President of the United States. U.S. Const., art. II, § 1, cl. 5. Set out in full, the text reads:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

Id.

As the Supreme Court explained, "the Qualifications Clauses were intended to ... fix as exclusive the qualifications in the Constitution." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995). Hence, states do not "possess the power to supplement the exclusive qualifications set forth in the text of the Constitution." *Id.* at 827.

In a guiding circuit court decision, *Cartwright v. Barnes*, 304 F.3d 1138, 1143 (11th Cir. 2002), the U.S. Court of Appeals for the Eleventh Circuit came to the principle that "certain types of ballot access restrictions that are election procedures" do not impose unconstitutional qualifications for office." *Id. See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995) ("The provisions at issue in *Storer* [*Storer v. Brown,*

415 U.S. 724 (1974)] and our other Elections Clause cases were thus constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position.") (emphasis in original); *accord Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 777 (7th Cir. 1997) ("[W]here requirements are procedural in nature and do not add substantive qualifications, they do not violate the Qualifications Clause.") (*citing Term Limits*, 514 U.S. at 835).

Here, § 207A.13, subdivision 2(a), requires a major political party qualified presidential candidate to secure state party approval to appear on Minnesota's taxpayer funded primary election ballot. This type of legislation, wherein the party creates the class and can omit candidates' names from appearing on the taxpayer funded ballot, is not procedural but a substantive qualification. It affects every alternative Presidential candidate of the same party, who might be disfavored by the Minnesota political party. Here, the Republican Party has prevented De La Fuente from appearing on the printed primary ballot. And, he cannot be a write-in candidate either without authorization by the Republican Party.

As noted above, Minnesota Statute § 207A.13, subdivision 2(a), is not designed to avoid presidential primary election ballot "clutter" or promote a more manageable primary ballot because the challenged statute does not place a limit on the number of

candidates placed on Minnesota's presidential primary election ballot.[29] The statute is not designed to force, or even permit, a candidate to show any threshold of public support to secure access to the ballot.[30] The effect of the created class is a substantive qualification which prevents the qualified candidate access to the ballot and right to associate with Republican Party primary voters.

IV. Minnesota Statutes § 207A.13, subdivision 2(a) and 2(b) violates the First and Fourteenth Amendments of the U.S. Constitution because it prevents a voter from exercising his or her right to vote and, with the candidate, the right to associate in a presidential primary election contest.

A. Minnesota has no identifiable interest to so severely burden and restrict the protected rights of Martin and De La Fuente, that the statute is unconstitutional as applied.

As previously referenced, Minnesota has chosen to conduct a presidential primary election. Minn. Ch. 207A. The primary elections are state taxpayer funded. Thus, the primary elections are state actions subject to the same constitutional constraints as general elections. *See Smith v. Allwright,* 321 U.S 649, 661–62 (1944). And while primaries and general elections have a strong interconnection as "a single instrumentality for choice of officers," there is a difference between the effect of a primary and that of the general election. *Id.* 321 U.S. at 660. As the Supreme Court has recognized, the right to vote in a primary election for the nomination of candidates without discrimination by the state is, like the right to vote in a general

[29] Pet. ¶24.
[30] *Id.* ¶25.

election, a right secured by the Constitution so that the same tests to determine the character of the discrimination or abridgement should be applied to a primary election as are applied to a general election. *Id.; Terry v. Adams,* 345 U.S. 461 (1953).

The First Amendment of the U.S. Constitution protects the right of association for both the voter and the candidate, here, Martin and De La Fuente:

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

As this Court has stated, that while "[t]he freedom of association is not enumerated in the U.S. Constitution but is a derivative right, recognized as necessary to make meaningful the enumerated First Amendment rights of speech, press, petition, and assembly. *In re GlaxoSmithKline plc,* 732 N.W.2d 257, 267–68 (Minn. 2007) *citing Metro. Rehab. Servs., Inc. v. Westberg,* 386 N.W.2d 698, 700 (Minn.1986) (*citing NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958)). "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Patterson,* 357 U.S. at 460. The Supreme Court also concluded that "'implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *In re GlaxoSmithKline plc,* 732 N.W.2d at 268 *quoting Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984).

In Minnesota, the Legislature has granted the statutory right to vote to eligible registered voters in the presidential primary election as memorialized under Minnesota Statutes § 207A.12(b):

> An individual seeking to vote at the presidential nomination primary must be registered to vote pursuant to section 201.054, subdivision 1.[31]

In Minnesota, before a person may exercise the right to vote, the person must first register.

And, when a party chooses to hold a primary operated and funded by the state, it must allow all voters to participate. *Miller v. Brown,* 503 F.3d 360, 368 (4th Cir. 2007). Under § 207A.13, subdivisions 2(a) and 2(b) Republican Party voters, such as Petitioner Martin, an announced absentee ballot voter for the March 3, 2020 presidential election, are not allowed to participate in the primary election for the qualified presidential candidate who has been omitted from the primary election ballot. When Martin casts his absentee ballot, he has no idea if his ballot will ever count or be counted and will be treated differently than other primary election voters who seek to support Mr. Trump.

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process

[31] Minn. Stat. § 201.18, subd. 2: "An eligible voter must register in a manner specified by section 201.054, in order to vote in any primary, special primary, general, school district, or special election held in the county." Minnesota Statutes § 201.054, subdivision 1 refers to when a person may register to vote.

Clause of the Fourteenth Amendment, which embraces freedom of speech." *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). The "strands of 'liberty'" are interwoven through questions of ballot access:

> In the present situation the state laws place 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. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.

Williams v. Rhodes, 393 U.S. 23, 30–31 (1968).

Candidates who appear on the ballot are crucial to the voters' exercise of those First and Fourteenth Amendment rights. "[V]oters can assert their preferences only through candidates or parties or both." *Anderson v. Celebrezze,* 460 U.S. 780, 787 (1983). "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish,* 415 U.S. 709, 716 (1974). Likewise, candidates such as De La Fuente have a First and Fourteenth Amendment right to associate with the voter, here, his supporter Martin.

"The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a

place on the ballot.'" *Anderson,* 460 U.S. at 787, (*citing Lubin,* 415 U.S. at 716 (1974). Indeed, De La Fuente is a qualified Republican Party presidential candidate who should have been on the Minnesota printed primary ballot. Instead, he was omitted. "The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Id.*

Here, Minnesota Statutes § 207A.13, subdivision 2(a), allowed the omission of a qualified presidential candidate who presented himself as an alternative to Mr. Trump. Hence, De La Fuente's omission severely burdens Martin, the voter, and his candidate's freedom of association. Martin is deprived of a candidate to serve as a rallying point against the incumbent Mr. Trump. This is no minor restriction; but, it is a severe restriction imposed upon Martin and De La Fuente in which the state cannot justify any interest for the burden imposed by the statute as applied. *See Burdick v. Takushi,* 504 U.S. 428, 433 (1992).

When a court considers a challenge to a state election law, it must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick,* 504 U.S. 434; *Tashjian,* 479 U.S., at 213–214. When those rights are subjected to "severe" restrictions, the regulation must be

"narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed,* 502 U.S. 279, 289 (1992).

Minnesota Statutes § 207A.13, subdivision 2(a) is not a provision which tests whether a candidate has a level of support with the electorate sufficient to deny access to Minnesota's presidential primary election ballot.[32] The statutory provision is not designed to avoid presidential primary election ballot "clutter" or promote a more manageable primary ballot. The challenged statute does not even place a limit on the number of candidates placed on Minnesota's presidential primary election ballot.[33] Moreover, § 207A.13, subdivision 2(a) is not designed to force, or even permit, a candidate to show any threshold of public support to secure access to the ballot.[34]

Notably, Minnesota has a diminished interest in regulating the presidential primary election ballot because the presidential primary election is the only election conducted within Minnesota which is ultimately determined beyond the state's borders at national political party conventions. Nevertheless, the election laws considered here are fundamentally unfair. It was certainly not what the Legislature had intended:

> If you haven't noticed, there's…a new populous movement going on…the people are less interested in parties and more interested in the people…[35]

[32] Pet. ¶22.
[33] *Id.* ¶24.
[34] *Id.* ¶25.
[35] *Id.* ¶45 n.3.

Instead of expanding the election contest, Minnesota Statutes § 207A.13, subdivision 2(a), allowed the Republican Party to restrict the printed ballot to one candidate disregarding the one other qualified candidate, De La Feunte. Mr. Trump, as the sole candidate on a primary ballot that envisioned "candidates" is far from a primary election for 2020 that the state legislature expected. No one knows if a write-in candidate will be allowed by the Republican Party or when, since subdivision 2(b) allows for the Secretary's notice to be delivered seven days prior to the primary date of March 3, 2020, if there is any candidate to be put forward..

B. Absentee ballot rules are illusory to Martin because De La Fuente is not on the printed ballot and not identified as a write-in candidate.

Meanwhile, the Secretary has promulgated rules that allow for absentee balloting for Martin. He will be out-of-state on March 3, 2020, and will not be able to be physically present to cast a primary ballot. Minn. R. 8215.0400. Absentee balloting is to begin on January 17, 2020. Martin, under Minnesota law, has the right to cast his vote effectively, equally to that of all other eligible registered voters who seek to cast a ballot in the Republican Party presidential primary.

State ballot access restrictions, though not always unconstitutional, burden two 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." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). As the Supreme Court has explained, these rights "rank among our most precious freedoms." *Id.*

Indeed, "[n]o 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 ... we must live." *Id.* (*quoting Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

We begin with a simple premise; when a party chooses to hold a primary operated and funded by the state that it must allow all voters to participate. *Miller v. Brown,* 503 F.3d 360, 368 (4th Cir. 2007). A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434. *Tashjian,* 479 U.S. at 213–214.

The effect of Minnesota Statutes § 207A.13, subdivision 2(a) and 2(b), is to give Martin no vote. The application of the election law for the March 3, 2020 presidential election treats Martin unequally to all other primary voters severely burdening his protected rights of association, due process and equal protection. The statute and absentee balloting rules are not "narrowly drawn to advance a state interest of compelling importance." *Norman,* 502 U.S. 279, 289.

Martin will not be in Minnesota on March 3, 2020. Yet, because De La Fuente's name is not on the printed primary ballot, Martin cannot vote for De La Fuente as a qualified alternative Republican presidential candidate. Likewise, the

application of § 207A.13, subdivision 2(b), provides even less comfort for Martin. If Martin writes in De La Fuente's name, he does so without notice that the Republican Party has exercised 2(b) and announced De La Fuente's name as a write-in candidate for whom votes would be counted. Further, if he does vote for De La Fuente and he is not a write-in vote, Martin's vote is not counted. It is a risk other primary voters voting on March 3, 2020, will not experience. Meanwhile, the party is not obligated to identify De La Fuente despite his status as a Republican presidential candidate.

Further, the language of the statute precludes Martin's write-in vote for De La Fuente, if unnamed, yet qualified as a presidential candidate. Here, not only is Martin's right of association severely burdened, as is De La Fuente's, but, De La Fuente's right to due process and equal protection are burdened and violated.

Section 207A.13, subdivision 2(b) states that "the chair of each party must submit to the secretary of state the names of write-in candidates, *if any,* to be counted for that party."[36] The statute allows the party to exclude De La Fuente from the primary process and ensure Mr. Trump of all 39 delegates and alternates for the Republican Party national convention. The statutory consequences damage De La Fuente as he continues to seek delegates throughout the United States for the Republican Party National Convention.[37]

[36] Emphasis added.
[37] *See e.g.,* Pet. ¶56.

Moreover, the disparate treatment of De La Fuente to Mr. Trump violates the Equal Protection Clause of the Fourteenth Amendment. Both are qualified presidential candidates; yet, Minnesota Statutes 207A.13, subdivision 2(a) and 2(b) allows for the disparate treatment—one qualified candidate is on the primary ballot and one qualified candidate is off the primary ballot—and there is no compelling state interest to discriminate among these candidates.

The same is true for Martin. The absentee ballot choice Martin must make should not allow his ballot to be treated differently than the ballot of the person voting on March 3, 2020 at the polling place. The interaction between § 207A.13 and Minnesota Rules 8215.0400 as applied cause an unconstitutional disparate treatment discriminating against certain presidential primary election voters.

Likewise, without De La Fuente's name on the printed primary ballot, Martin will not be able to campaign in a comprehensive and complete way as he anticipated. Martin believes the lack of a printed name on the primary ballot will make campaigning more difficult and cause confusion among potential primary voters when they fail to see De La Fuente's name on the ballot.[38]

[38] *Id.*

V. Laches does not apply since there was no delay in prosecuting the constitutional rights afforded to De La Fuente and Martin, based upon the Republican Party's and Secretary's acts and omissions under § 207A.13.

Laches is an equitable doctrine applied to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008) *quoting Winters v. Kiffmeyer,* 650 N.W.2d 167, 169 (Minn.2002). With respect to laches, "'[t]he practical question in each case is whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.' " *Id.* at 170 (quoting *Fetsch v. Holm,* 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952)).

De La Fuente's standing to bring his claim was not dependent upon the Republican Party's October 24, 2019 notice to the Secretary.[39] By operation of law, the statute precluded any amendment to the notice—the only presidential candidate on the primary ballot was to be Mr. Trump. Meanwhile, under Minnesota Statutes § 207A.13, subdivision 2(b), the party chair has until seven days *before* the March 3, 2020, primary date to submit names as "write-in" candidates. As of the date of this brief's filing, the Republican Party has not given a notice under 2(b):

> No later than the seventh day before the presidential nomination primary, the chair of each party must submit to

[39] Pet. ¶ 18 and Ex. A.

> the secretary of state the names of write-in candidates, *if any,* to be counted for that party.[40]

The statute gives the party wide discretion as to who is to be a write-in, if it so desires to make such a submission. Meanwhile, for De La Fuente to wait until the Party takes action under 2(b) to name him, if it ever does so, would render his claim moot because there would be no time to adjudicate his claim seven days before the primary. This Court will "generally dismiss a matter as moot when 'an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible....'" *Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011) *quoting Application of Minnegasco,* 565 N.W.2d 706, 710 (Minn.1997). Moreover, if his name did appear as a write-in prior to January 17, 2020, his claims could have been moot. *Id.*

The same is true for Martin. He has standing to bring his claims. Like De La Fuente, the triggering event is not the October 2019 notice, but the write-in notification to the Secretary. That has not occurred and may never. But, if De La Fuente was identified as a "write-in" candidate prior to January 17, 2020, Martin could exercise his right to vote in the primary through the absentee ballot process. *See id.*

In short, laches does not apply. Instead, the party has until seven days prior to the primary election date to name "write in" candidates for which any vote for an identified party "write-in" will be counted toward a potential delegate to the party's national convention. However, from the moment of the initial filing to February 25,

[40] Emphasis added.

2020, seven days prior to the primary election, no voter knows who will be the acceptable write-in candidate(s) to the party, if any. For the absentee ballot voter Martin, not knowing alternative candidates for whom write-in votes will be counted effectively makes Martin's vote meaningless, depriving him of the privilege to participate in the primary process provided by the state and his statutory right to cast his vote for a presidential primary candidate. As noted, this is not a party-paid primary or straw poll at the precinct caucuses. It is a state funded. As such, people have the right to fully participate in a presidential primary on March 3, 2020 with a full slate of candidates.

The conundrum the Secretary presently faces is caused by a misstep of the Legislature with the passage of Minnesota Statutes § 207A.13, and the Secretary's acceptance of a Republican Party notice that prevents a qualified presidential candidate, or candidates, of that party from being placed on the primary ballot. The action of the Republican Party was intentional as is the Secretary's action to enforce the statute by omitting De La Fuente's name from the ballot. This was to ensure Mr. Trump succeeded in the primary election contest and obtained most, if not all, of the 39 Minnesota Republican delegates and alternative delegates for the national convention. The current situation violates the U.S. Constitution, Minnesota Constitution and common sense.

CONCLUSION

The Petitioners Roque "Rocky" De La Fuente and James Martin are entitled to relief under their § 204B.44 error, omission, and wrongful act petition against the Secretary of State, Steve Simon. The statutory provisions § 207A.13, subdivision 2(a) and 2(b), facially, and as applied to De La Fuente and Martin, are unconstitutional. The application of the statutes used to exclude De La Fuente from the March 3, 2020 printed presidential primary ballot violates his First and Fourteenth Amendment rights. And, because these rights are intertwined with the voter Martin who seeks to support De La Fuente instead of the favored incumbent Donald Trump, that statute has effectively impeded Martin's right to vote in the primary election as an absentee voter. The relief requested is as expressed in the Petition:

(A) declare Minnesota Statutes § 207A.13, subdivision. 2(a) unconstitutional under Minnesota Constitution Article XII, section 1;

(B) declare Minnesota Statutes § 207A.13, subdivision. 2(a) unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution;

(C) enter permanent injunctive relief against the Respondent Minnesota Secretary of State from enforcing Minnesota Statutes § 207A.13, subdivisions 2(a) and (b) in the 2020 presidential primary election;

(D) require Respondent Minnesota Secretary of State to print the name of the Petitioner De La Fuente and other Republican Party of Minnesota presidential candidates on the 2020 presidential primary election ballot;

(E) enter injunctive relief against the Respondent Secretary of State from enforcing Minnesota Statutes § 207A.13, subd. 2(a) in future presidential primary elections;

(F) award Petitioners De La Fuente and Martin the costs of this action;

(G) enter an order that this Court shall retain jurisdiction of this action regarding and through the March 3, 2020 presidential primary; and

(H) grant Petitioners De La Fuente and Martin such other relief which in the determination of this Honorable Court to be necessary and proper.

Dated: December 31, 2019.

/s/Erick G. Kaardal

Erick G. Kaardal, 229647
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074
Facsimile: 612-341-1076
Email: kaardal@mklaw.com
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 8,744 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional space font size of 14 pt. The word count is stated in reliance on Microsoft Word 2013, the word processing system used to prepare this Brief.

Dated: December 31, 2019

/s/ Erick G. Kaardal
Erick G. Kaardal