No. 20–612

In The

Supreme Court Of The United States

ROQUE "ROCKY" DE LA FUENTE
AND JAMES BERNARD MARTIN, JR.,
Petitioners,

v.

MINNESOTA SECRETARY OF STATE STEVE SIMON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

REPLY TO RESPONDENT'S OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the corporate disclosure statement made in the Petition for a Writ of Certiorari is incorporated herein and without amendment.

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The underlying issue of this case is *not* the vindication of a party's right to choose its candidates. Rather, it is about the denial of candidates chosen by a major political party, like De La Fuente, to be treated equally on the ballot and the right of Minnesota voters, like Martin, to be presented with a ballot that accurately identifies those candidates.[1]

I. The Secretary of State misrepresents the vindication of the party's right to political association.

It is one thing for a major political party to funnel information through its "private nominating process" as described by the Respondent Minnesota Secretary of State (Resp. Br. at 6), but it is very much another

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[1] The arguments presented can hardly be characterized as "absurd" as the Secretary of State repeatedly asserts. Resp. Br. at 5, 10. The statute at issue injects the state into the political party process by law "'to protect political parties' fundamental right to freedom of association." *Id.* at 3. But, the statute goes too far when it directs the suppression of the constitutional rights of candidates of the same party, namely those identified as bona fide party opposition candidates, and further impedes the rights of primary election voters to an accurate ballot. (Pet. App. B 17a, citing *Martin v. Dicklich*, 823 N.W. 2d. 336, 342 (Minn. 2012) ("noting that 'some prejudice' would result 'due to the expense incurred in reprinting ballots' but the 'paramount interest of voters who are entitled to a ballot that accurately identifies the candidates actually running for office,' outweighed that result.").

when a state election primary statute engages in and supports that suppression of information affecting the accuracy of the primary ballot to the voter when exercising the franchise. *U.S. v. Classic*, 313 U.S. 299, 318 (1941) ("Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery * * *."). Contrary to the Secretary of State's argument, De La Funete is not trying to "force the Republican Party to associate with them." (Resp. Br. at 3, 6). As De La Funete's petition points out, the Secretary of State's argument is contradicted by the record as the Minnesota Republican Party chose to allow party delegates supportive of the challenging party candidate, De La Fuente, to be elected, albeit with an inaccurate ballot as presented to the primary election voter. (Pet. at 13–15).

The ballot's inaccuracy occurred in four circumstances. First, neither the Party nor the Secretary of State informed the voters of a party opposition candidate—De La Fuente. Second, the Party's acceptance of De La Fuente as a write-in party-candidate occurred on the eve of the primary,

ensuring that as an opposition candidate to Trump, De La Fuente would be defeated. Third, absentee ballot voters who had already mailed their ballots were not informed of the party opposition candidate and therefore were not in a position to exercise a ballot choice for De La Fuente. Finally, even at the polling place on primary election day, neither the Party nor the Secretary of State ensured Republican Party primary voters knew of the opposition party candidate as a write-in vote for De La Fuente.

If the primary election statute exists, as the Secretary of State suggests, to "'protect political parties' fundamental right to freedom of association" and defines the advancement of this right as "granting each political party the authority to determine the list of candidates it agrees to associate with on its presidential nomination primary ballot," (Resp. Br. at 9), then when the Party chose to politically associate with De La Fuente and allowed Republican Party primary electors to determine party delegates supportive of De La Funete, it had to do so without suppressing the constitutional rights of the opposition candidate and primary voters. But here, it did so.

Despite what the Secretary of State represents to this Court, the statute at issue, Minnesota Statutes § 207A.13, implicated the State's legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe

what that process must be. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008) citing *California Democratic Party v. Jones*, 530 U.S. 567, 572–573 (2000). However, this Court has opined that "it to be 'too plain for argument' that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot," but "[t]hat prescriptive power is not without limits." *Id.,* quoting *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974). The Secretary of State asserts that "an individual has no unmitigated constitutional right to appear on a ballot in a partisan presidential nomination primary and…a voter has no unmitigated constitutional right to vote for a particular candidate in such a primary." (Resp. Br. at 5).

But when a party associates with multiple candidates seeking the same office in a state presidential primary, here, De La Funete as an opposition Republican Party candidate against the then incumbent Donald Trump, fairness to the candidate and to the voter necessarily becomes the obligation of the State in the election contest to preserve the integrity of the election process which is intertwined with the fundamental right to vote. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for

electing public officials."). "Safeguarding the integrity of the electoral process is a fundamental task of the Constitution, and [the courts] must be keenly sensitive to signs that its validity may be impaired." *Johnson v. FCC*, 829 F.2d 157, 163 (D.C. Cir. 1987). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

The State cannot be allowed, by law, to suppress a candidate from obtaining votes and a voter to choose a primary candidate to acquire party delegates for a future party convention decision. The burden on De La Fuente and Martin's rights is not *de minimis* as the Secretary of State asserts. (Resp. Br. at 5).

De La Fuente was denied access to his Republican Party's ballot beginning in October 2019, the date on which the Party informed the Secretary of State that Trump was the only candidate to appear on the March 2020 primary printed ballot. (Pet. at 23). However, the Party was affiliated with De La Fuente at that time as an opposition candidate, and continued this affiliation as evidenced by the Party's informing the Secretary of State seven days before the primary that it would count write-in votes for De La Fuente convention delegates (Resp. Br. at 4), as the primary election statute at issue allowed. Minn.

Stat. § 207A.13. *Contra Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996).

In *Duke v. Massey*, (*Duke III*), the Republican Party's committee decision to exclude Duke from the Georgia presidential primary ballot was a power derived from a state statute; thus, constituted a state action for the First and Fourteenth Amendment asserted interests. *Id*. at 1231. The court reiterated that Duke did not have a right to associate with an "unwilling partner." *Id*. at 1232. Unlike Duke, De La Fuente was a recognized party candidate opposing then President Trump.

Likewise, the court in *Duke III* found that Duke's identified constitutional interests did not trump the Republican Party's right to identify its membership based on political beliefs nor the state's interests in protecting the Republican Party's right to define itself. *Id*. 1232-33. This allowed the Party to exclude Duke from the ballot. *Id*. at 1233 (citation omitted). In contrast, the Republican Party purposefully *excluded* De La Fuente from the Party's notification to the Secretary of State to ensure his name would be concealed from the printed ballot. Yet, the Minnesota Republican Party would associate itself with De La Fuente as an opposition candidate, but announced the Party's association only on the eve of the primary by its acceptance of write-in votes for De La Fuente's convention delegates. While in *Duke III* the court opined that the Committee, acting as representatives

of the Republican Party under Georgia's statutory law, did not heavily burden Duke's First Amendment and Fourteenth Amendment rights when it excluded him from the Republican Party's presidential primary ballot, under Minnesota's statutory scheme under § 207A.12, did place a heavy burden on De La Fuente's constitutional rights. *Id*. at 1233.

Further, while the *Duke III* voters failed to offer any authority suggesting that they have a right to vote for their candidate of choice as a Republican in a nonbinding primary, under Minnesota law, the primary is *binding*. Minnesota Statutes § 207A.12(d). As previously, noted, absentee ballots were cast without Party notice of its association with De La Fuente as an opposition candidate to Trump. And, the Party's acceptance of write-in votes announced seven days prior to the actual election, did not give sufficient notice to the voters of their ballot option, not to mention, the discriminatory effect to De La Fuente to campaign for those votes. Therefore, in this respect, De La Fuente and Trump were similarly situated as candidates chosen by the Party, contrary to the Secretary's assertion,[2] since the Minnesota

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[2] In a footnote, the Secretary of State asserts that, "the notion that President Trump and De La Fuente were similarly situated—specifically, regarding the degree to which the Minnesota Republican Party desired to associate with each of them for the purposes of the 2020 presidential primary—is facially absurd." (Resp. Br. at 5 n.1). We respectfully disagree for the reasons set forth in the petition (see, for example, Pet.

Republican Party did *associate* itself with both candidates as previously noted. Again, this is evidenced by the Party's announcement and agreement to accept primary write-in ballots for De La Fuente only seven days before the primary.

Meanwhile, candidate De La Fuente's denial of access to the printed ballot and notice as the Party's opposition candidate to Trump denied voters—most notably absentee ballot voters—access to an accurate ballot with which to cast their respective vote. As a result, the Secretary of State would advertise to the public an inaccurate party ballot that would advance only one candidate and advance the election of delegates for the incumbent president ensuring De La Fuente and his supporters no opportunity to garner voters to elect delegates in the primary. Here, the Republican Party October communication to the Secretary of State announcing Trump as the "only" primary candidate was only to meet the objective of a printing deadline—which was not due until December 31st[3] for the March primary, the deadline date to allow enough time to distribute the primary ballot. Yet the Party was affiliating with De La Fuente, but concealed the association in October

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at 25–30, describing how De La Fuente and Trump were similarly situated).

[3] "Presidential Primary." Minnesota Secretary Of State. March 2, 2020. <https://www.sos.state.mn.us/elections-voting/how-elections-work/presidential-primary/>.

from the Secretary of State resulting in the distribution of an inaccurate ballot that the statute at issue allows. And, the Secretary of State was forewarned of the inaccuracy. (Pet. App. B 11a).

II. The Secretary of State minimizes the importance of the underlying issue of the ill effects upon the rights of candidates and voters to an accurate primary ballot by failing to recognize that presidential primaries in Minnesota are binding.

The Secretary of State suggests that Minnesota's "primary merely yields a particular variety of information—specifically, numbers of votes received by the respective candidates—that the major parties then use within their private nominating processes." (Resp. Br. at 6). However, Minnesota Statutes § 207A.12(d) binds the primary results as to delegates: "The results of the presidential nomination primary must bind the election of delegates in each party." (Pet. App. D 49a). The Minnesota Republican Party is not free to accept or ignore the results: the Party *must* send the slate of delegates supportive of the named candidate to its convention. (Whether the convention is bound to seat the delegates chosen by Minnesota voters, another slate of delegates, or no delegates at all is a separate matter unrelated to issues before this Court.)

Instead, the Secretary of State argues that, "By

necessity, the right to free association includes the right to decide *how*, if at all, the party will associate with the individual—whether as a * * * write-in candidate, an on-ballot candidate, or none of these." (Resp. Br. at 10). This is a misplaced application as the case relied upon, *Cousins v. Wigoda*, 419 U.S. 477, 488-89 (1975), considered a national convention's freedom to decide if the delegation sent by one of its member parties meets (or does not meet) its qualifications to be seated. Here, the Secretary of State's argument is not germane to considering a statutory scheme that denies a candidate chosen by his party the constitutional guarantee to be treated alike to his competition, *Anderson v. Celebrezze*, 460 U.S. 780, 799-801 (1983), and the constitutional right of voters to be presented with a ballot accurately identifying those candidates in a primary election. *Id*. (Pet. App. B 17a).

III. The conflict remains between a state preserving greater rights for parties and the rights of candidates and voters in primary elections.

The conflict before this Court involves the rights of voters and candidates under a statutory scheme that allows greater protections to the rights of political parties. If indeed this principle is dicta in *Republican Party of Arkansas v. Faulkner County, Ark.*, 49 F.3d 1289, 1297 (8th Cir. 1995) ("it would make little sense to afford greater protection to the

rights of political parties than to the rights of voters and candidates"), the case illustrates not only the need to review the statute at issue under a strict scrutiny analysis over the "sliding-scale standard of review articulated in *Burdick* [*v. Takushi*, 504 U.S. 428, 434 (1992)]," but also the contrast to *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996) holding, generally, that the rights of parties are to be afforded greater protection than those of voters and candidates. *Id*. (See Resp. Br. 5 n.1). As the appellate court in *Massey* opined, the party's "Committee acting in a representative capacity for the Republican Party did not have to accept Duke as a republican presidential candidate. Duke does not have the right to associate with an 'unwilling partner.'" *Id*. 87 F.3d at 1234.

Here, the Minnesota Republican Party *did* associate with De La Fuente as an opposition candidate to Trump. Yet, even in doing so, through the statutory scheme at issue, the State and the Party ensured De La Fuente as an alternative opposition candidate could not garner sufficient votes for convention delegates to put in effect the voters' rights who opposed Trump in a binding primary election.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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