No. 20-

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,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ERICK G. KAARDAL
Counsel of Record
MOHRMAN, KAARDAL,
& ERICKSON, P.A.
150 S. Fifth Street
Suite 3100
Minneapolis, MN 55402
Telephone: (612) 341-1074
Email: kaardal@mklaw.com

Counsel for Petitioners

QUESTION PRESENTED

In the context of Minnesota's taxpayer-funded, state-administered, and binding presidential nomination primary election, are Minnesota Statues repugnant to the First and Fourteenth Amendments when their operation fails to present all party-chosen candidates from appearing on the ballot in the same manner?

LIST OF PARTIES

Petitioners are Roque "Rocky" De La Fuente and James Bernard Martin, Jr. and were the petitioners in the Minnesota Supreme Court proceedings below (original jurisdiction).

The Respondent is Steve Simon in his official capacity of Minnesota Secretary Of State and was the respondent in the Minnesota Supreme Court proceedings below (original jurisdiction).

CORPORATE DISCLOSURE STATEMENT

The Petitioners are not a nongovernmental corporation and do not represent a nongovernmental corporation.

STATEMENT OF RELATED CASES

The related case is: *De La Fuente, et. al. v. Simon*, No. A19-1994, Minnesota Supreme Court. Judgment entered June 1, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

UNITED STATES CODE

STATE STATUTES

CASES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Roque "Rocky" De La Fuente and James Bernard Martin, Jr., respectfully petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

OPINIONS BELOW

The order of the Minnesota Supreme Court denying the Petitioners petition under Minnesota Statutes § 204B.44(a) (2018) to direct Respondent Steve Simon, Minnesota Secretary of State, to include De La Fuente's name as a candidate for the Republican Party's nomination for United States President on the ballot for Minnesota's March 3, 2020, presidential nomination primary election is reported at 937 N.W.2d 145 (Minn. 2020), and reprinted in Appendix A (1a–4a). The related opinion of the Minnesota Supreme Court denying the Petitioners' petition to direct Respondent Steve Simon, Minnesota Secretary of State, to include De La Fuente's name as a candidate for the Republican Party's nomination for United States President on the ballot for Minnesota's March 3, 2020, presidential nomination primary election is reported at 940 N.W.2d 477 (Minn. 2020), in Appendix B (5a–45a). The judgment related to the same is not reported (App.C. 46a–47a).

JURISDICTION

The Minnesota Supreme Court entered judgment on June 1, 2020.

This petition is timely pursuant to the order of this Court dated March 19, 2020, extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment, that date being October 29, 2020.

This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment as incorporated against the states by the Fourteenth Amendment.

Minnesota Statutes Chapters 203B, 204D, and 207A are reproduced in Appendix D. (48a–50a).

STATEMENT OF THE CASE

The underlying issue concerns the concealment of party-chosen candidates from the voting public at the primary election by way of state action that discriminates against the candidates that are excluded during the election directly affecting the right of voters who wish to support them.

This case presents the familiar question of ballot access, but in the context of a political party's right to

choose its nominee for election to the office of President of the United States. Yet, while it might be possible for a presidential candidate to be put forward as a candidate in the general election without a major political party a nomination, the likelihood of that occurring is unlikely if not highly improbable. In nearly a quarter millennium of this nation's long history, not one candidate has ever been elected to the office of President without first being nominated by a major political party[1]. As this Court recently discussed at length in Chiafalo v. Washington, 140 S.Ct. 2316 (2020), presidential electors can be bound to vote as their appointing State directs. As the history of our nation demonstrates, just as this Court so eloquently demonstrated in *Chiafalo*, a vast majority of the States require their electors to vote for their party's presidential nominees under threat of removal from office as well as monetary fines. *Id*., 140 S.Ct. at 2321–22. Notably, the nominee these presidential electors are bound by law to vote for is procured, in pertinent part, by the party delegates chosen by these state-administered and taxpayer-funded primary processes. In other words, the States have integrated their primary processes into the fabric of their republican forms of government so much so

1 Excluding, of course, the first election of President George Washington which was done at a time in this Nation's infancy when the term "political party" was not yet defined in law.

that these primary processes are inseparable from, and in thereby integral to, the presidential electors' exercise of their constitutional duties in casting ballots for the President (and Vice-President).

In the context of such a binding taxpayer-funded and state-administered primary election, it is therefore imperative the voters who are obligated by law to adhere to the major political parties primary processes as controlled by the state be protected by the Constitution. The failure of constitutional protections will deny voters: (1) the ability of party-chosen candidates to have equal access to the ballots; (2) the ability of a voter to cast an effective ballot in a primary election; (3) the effective protection of the rights related to the same; and (4) ultimately, an effective Electoral College.

A. Factual Background

Minnesota Statutes Chapter 207A establishes a presidential nomination primary election, which is funded by Minnesota taxpayers. A major political party holding a national convention participates in this primary election, each having its own ballot. Minnesota Statutes §§ 207A.02, .12, .13 (App.B. 9a, 35a; App.D. 49a).

For the primary election, voters request the ballot of the major political party associated with the candidate of their choosing to cast their vote. Minnesota Statutes § 207A.12(b) (App.D. 49a). The ballots are then canvassed by the Secretary of State

and the number of votes cast for each candidate is reported to that candidate's party; the results bind the party to send delegates supportive of the named candidate to that party's respective national convention. Minnesota Statutes § 207A.12 (c)–(d) (App.B. 10a; App.D. 49a). At that convention, the delegates join with others around the country in deciding their party's nominee for President, the name of which appears on Minnesota's general election ballot. Minnesota Statutes §§208.03–.04 (App.B. 10a). If that nominee acquires a plurality of votes in Minnesota's general election, the Minnesota electors are bound to vote for the election of that nominee for President. *Chiafalo*, 140 S.Ct. at 2332, citing Minnesota Statutes § 208.43.

The statue at issue, Minnesota Statutes § 207A.13, subdivisions 2(a) and (b), direct the participating parties to determine the pool of candidates from which voters may choose (App.B. 32a–33a; App.D. 50a). The statute empowers each party chair to notify the Secretary of State what names are to be printed on its party's primary ballot and which names must be written-in. (App.A. 1a–2a; App.B. 10a; App.D. 50a). However, the statute does not require all the names eligible to be voted for, as a party candidate, to be disclosed to the Secretary until seven days before the date of the primary election. Minnesota Statutes § 207A.13, subdivision 2(b) (App.B. 12a, App.D. 50a). Yet, under Minnesota

Statutes § 203B.081, subdivision 1, governing absentee ballots—allowed for in primary elections—provides voters the opportunity to cast their ballots up to 46 days before the primary election date (App.D. 48a). Notably, governing Minnesota statutes require the Secretary to publish the names of the candidate eligible to receive votes on sample ballots during the entire 46 day period during which time ballots are cast. Minnesota Statutes § 204D.09, subdivision 2 (App.D. 48a-49a).

B. Facts and Procedural History

De La Fuente is eligible to seek the nomination of the Republican Party at its national convention for election to the office of President (App.B. 11a; App.E. 51a–52a). The Republican Party of Minnesota permitted the election of its delegates who support De La Fuente (App.B. 43a n.20; App.E. 51a–52a).

However, under Minnesota Statutes § 207A.13, subdivision 2, the Republican Party of Minnesota chairwoman denied De La Fuente from being printed on her party's ballot (App.B. 11a). In short, the Minnesota Republican Party left party challengers to the current President off the presidential ballot (App.F. 53a–56a).

With the Minnesota Republican Party's actions effectively denying De La Fuente access to his party's ballot to advance the election of delegates who support De La Fuente, he and Martin filed a petition to the Minnesota Supreme Court under Minnesota

Statutes § 204B.44(a) (original jurisdiction governing election challenges). (App.A. 1a). The petition cited violations of the First and Fourteenth Amendments. (App.A. 1a; App.B. 7a, 38a n.16; App.G. 57a–59a). If the petition was granted, Martin could effectively cast a vote for De La Fuente as a Republican Party candidate to advance the election of delegates to the national convention thereby rectifying the alleged constitutional violations. (App.B. 38a).

The Minnesota Supreme Court immediately denied De La Fuente and Martin's petition. (App.A. 1a–4a). The state supreme court later issued the opinion below (App.B. 5a–45a).

The state court determined De La Fuente had no right to be on the ballot because he is not a party-chosen candidate (App.B. 41a). Meanwhile, the Secretary of State would advertise to the public his intention to only advance the election of delegates supportive of the current incumbent president, (App.F. 53a–56a)[2].

---

2 Oral argument at 38:30-40:50. <http://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1356>. See also: *Early voting starts in Minnesota's presidential primaries*, Kelly Mena (CNN), Jan. 17, 2020, <https://www.cnn.com/2020/01/17/politics/minnesota-primary-early-voting/index.html>; and *Trump's name will be the only one on Republican primary ballot, MN Supreme Court rules*, David Orrick (Pioneer Press, St. Paul Minn.), Jan. 9, 2020, <https://www.twincities.com/2020/01/09/trumps-name-will-

Minnesota absentee ballot voters, such as Martin, would not see De La Fuente's name on the ballot nor know that he would later become an identified Minnesota Republican Party supported write-in candidate until seven days before the actual primary election date. During the 46 day period absentee ballots were cast, the Minnesota Republican Party's chair revealed to the Secretary of State that De La Fuente was indeed a candidate of the Republican Party Of Minnesota (App.E. 51a–52a). The Secretary, in turn on February 25, 2020, five business days before the actual in-person primary election, published notice that a voter's ballot cast for De La Fuente would advance the election of delegates supportive of him if a voter wrote the specific phrase "Rocky De La Fuente" on their ballot.

A day later, De La Fuente and Martin wrote to the Minnesota Supreme Court the actions of the Minnesota Secretary of State, recognizing De La Fuente as a Minnesota Republican Party candidate in which the party had chosen to associate. The letter was to no avail. (App.E. 51a–52a). The primary election took place on March 3, 2020, and ballots canvassed.

Hence, only as of February 25, 2020, five days before the primary, was the public made aware of the Minnesota Republican Party's association with and

---

be-the-only-one-on-republican-primary-ballot-mn-supreme-court-rules/>.

endorsement of a party competitor of an incumbent president but only as a write-in candidate. This occurred after absentee ballots had been cast.

Two weeks after the primary election, the Minnesota Supreme Court issued its opinion. (App.B. 5a–45a). The supreme court opined that political parties alone have the right to determine with whom they may associate (App.B. 43a–44a), and the Minnesota Republican Party chose not to associate with De La Fuente (App.B. 41a, relying on *Belluso v. Poythress*, 485 F. Supp. 904, 912 (N.D.Ga. 1980) (a candidate cannot force an association with an unwilling party).[3]

REASONS FOR GRANTING THE PETITION

This case presents considerations that have extraordinary importance and a profound effect on all taxpayer-funded and state-administered nomination processes: whether or not party-chosen

3 It is worth noting the Minnesota Supreme Court issued its order while the Minnesota Republican Party chair was exercising her statutorily granted authority to conceal the fact De La Fuente was chosen by the party as one of its candidates. Oddly, the Minnesota Supreme Court acknowledged the Minnesota Republican Party chose De La Fuente as one of its candidates (App.B. 43 n. 20). Since the court relied upon such a relationship not existing, why the state court did not reverse its order when it was made known that De La Fuente was, in fact, a party-chosen candidate is puzzling and inconsistent with the court's reasoning.

candidates are to be given equal access to the party's primary ballot; whether or not party adherents should be given the ability to cast an effective vote that binds the election of delegates supportive of such a candidate; and the extent to which party leaders can control access to the ballots of the same. As similar occurrences have manifested in other States, such as in Georgia[4], North Carolina[5], Ohio[6], Washington[7], and Wisconsin[8] the question presented

4 *Why Trump will be the only name on GOP prez ballot in Georgia*. Greg Bluestein (Atlanta Journal-Constitution, GA). Dec. 3, 2019. <https://www.ajc.com/blog/politics/why-trump-will-the-only-name-gop-prez-ballot-georgia/X4nhCVkPt7EwxrTu5AXreI/>.

5 *NC GOP wants its primary voters to have only one choice: Trump*. Colin Cambell (The News Observer, NC). Dec. 4, 2019. <https://www.newsobserver.com/news/politics-government/election/article238050649.html>.

6 *Trump won't have any competition in Ohio GOP primary after all*. Jackie Borchardt (Cincinnati Enquirer, OH). Jan. 7, 2020. <https://www.cincinnati.com/story/news/politics/2020/01/07/trump-11-democrats-to-appear-on-ohio-2020-presidential-primary-ballot/2833798001/>.

7 *Guide to Washington's presidential primary ballot: Partisan oaths, 13 Democrats and Donald Trump*. Jim Brunner (Seattle Times, WA). Feb. 23, 2020. <https://www.seattletimes.com/seattle-news/politics/partisan-oaths-13-democrats-and-donald-trump-a-guide-to-washingtons-presidential-primary-ballot/>.

8 *Wisconsin Republicans block Trump's primary opponents from the ballot*. Patrick Marley (Milwaukee Journal

is not just a Minnesota issue. The decision below should not stand.

Petitioners are unaware of any case in which a presidential candidate affiliated with a state major political party to appear in a state primary election is initially concealed from voters wherein election officials also announce that votes for that concealed candidate will not advance the election of delegates supporting that candidate, and later advertise the same candidate as associated with the major political party, after absentee ballots have been cast. Unless reversed, the Minnesota Supreme Court's decision upholding a statutory scheme that prevents major political parties from accurately presenting its candidates to eligible voters identifying with the party and to the detriment of those voters' right to vote. This encourages political party leaders throughout the nation to suppress voter turnout by allowing state election officials to inform voters that their ballot will not advance the election of delegates supportive of the party-chosen candidate of that voter's liking. The ultimate result of which is not only the suppression of voter turnout, but also the production of frivolous and fraudulent nominees. *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289, 1301 (8th Cir. 1995) ("By effectively

---

Sentinel, WI). Jan. 7, 2020. <https://www.jsonline.com/story/news/politics/2020/01/07/wisconsin-republicans-try-keep-trumps-primary-opponents-off-ballot/2828023001/>.

depressing the number of individuals casting votes in the Republican primary, [the State] has likely increased, not decreased, the risk that a frivolous or fraudulent candidate could win that party's nomination").

At the same time, the statutory scheme insulates political party officials from any accountability to the voters. The statutory scheme legalizes concealment of party candidates associated with that political party to procure a result satisfactory to the party leaders' own liking and not necessarily that of the party itself or its adherents.

This case is an exceptional situation that is capable of repetition, yet evading review because of the short time-frame that a candidate is concealed from the ballots of a primary election. And, the Petitioners may be subject to the same action again because of the existing offending statute. See *Kingdomware Techs., Inc. v. United States*, 136 S.Ct. 1969, 1976 (2016) ("This Court's precedents recognize an exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review. * * * That exception applies only in exceptional situations, where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." (citations and internal quotation marks omitted)).

A. As this scheme has been and can continue to be replicated in every state, a decision of this Court will have a profound impact primary elections. De La Fuente was a candidate of the Minnesota Republican Party.

The Minnesota Supreme Court erred in denying a fully qualified candidate chosen by its party access to its party's primary ballot thereby preventing voters the ability to effectively cast a ballot for that candidate. This is because the Minnesota Supreme Court relied upon the falsehood that the Minnesota Republican Party chose not to politically associate with De La Fuente as one of its candidates eligible to secure its delegates (App.B. 41a, relying on *Belluso*, 485 F. Supp. at 912, in that a candidate has no right to force an association with an unwilling party). This erroneous finding was initially at no fault of the state supreme court as the Minnesota statutory scheme allowed the chair to conceal the candidates chosen by her party from the court at the time the order was issued.

In other words, the Minnesota Supreme Court found itself, unknowingly, in the same position as primary voters; the political party concealed which candidates were associated with the Republican Party for which voters could have cast their ballots. De La Fuente was always associated with the Republican Party, but not revealed to the public of

that association and as an opponent to the presidential incumbent until five-days before the in-person primary election, and not during the 46 day absentee ballot period before the primary. State law, under Minnesota Statutes § 207A.13, subdivision 2, allowed for the concealment (App.D. 50a). Here, the state supreme court's reliance on *Belluso* is not applicable because an associational relationship existed. (App.E. 51a–52a).

Additionally, the Minnesota Supreme Court implied that Martin could not vote for De La Fuente because he was not a candidate chosen by the party (App.B. 37a, relying on *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) in that "elections are not understood 'to provide a means of giving vent' to political disputes"). Unlike the facts of *Burdick*, Martin did not want to cast a "'protest vote' for Donald Duck." See *Id*., 504 U.S. at 438. Instead, Martin sought to cast an effective vote for the Minnesota Republican Party candidate of his liking, namely De La Fuente. *Id*. *Burdick* is not applicable because the vote sought to be cast was for a legitimate party-chosen candidate as the facts reveal.

Meanwhile, De La Fuente was denied access, that is denied his appearance on the ballot, although associated with the Minnesota Republican Party as an alternative candidate to the incumbent for most of the primary election. Absentee balloting began 46 days before the actual primary date. Likewise,

Martin seeking to support De La Fuente as a Republican Party alternative, and as an absentee ballot voter, was denied the ability to cast an effective vote for De La Fuente because of the Party's concealment of the Party's association with the candidate and what a Minnesota voter needed to write-in on the ballot—that being revealed only days before the actual primary election date and after Martin cast his ballot. While De La Fuente sought an association with the Minnesota Republican Party as a primary contender to the incumbent, the Party concealed that association from absentee ballot voters which was later revealed as per Minnesota Statutes § 207A.13, subdivision 2(b), (App.D. 50a) just days before the in-person primary election vote, depriving Martin with notice of the Party's association and his right to vote for De La Fuente in the Republican primary as an absentee voter.

B. The statutory scheme not only allows for the public political party deception to primary voters, but also misrepresentations to the courts.

Disclosure of the party's association with a candidate is legally concealed until after the election has commenced, but only days before the in-person primary vote. Minnesota Statutes §§ 207A.13, subdivision 2; 204D.09, subdivision 2. (App.D. 48A; App.E. 49a–50a). Minnesota Statutes allow political parties to conceal party associated candidates to the

voting public. Minnesota Statues § 207A.13, subdivision 2(a), directs each political party participating in the presidential nomination primary to "determine which candidates are to be placed on the presidential nomination ballot for that party" and for the chair of those parties to submit to your Respondent "the names of the candidates to appear on the ballot for that party" (App.D. 50a). As the Minnesota Supreme Court opined, "the party must determine which candidates are to be placed" on its ballot (App.A. 1a; App.B. 9a–10a). Under the same statute, a primary candidate can appear on the ballot either by way of being printed directly on the ballot or as a write-in by the voter casting the ballot.

The Minnesota Supreme Court opined that it is the party who decided which names are printed and which are written-in (App.A. 1a; App.B. 9a–10a, 35a–36a). Contrary to a plain reading of the statute, the state court's opinion that the chair is bound to act as the party directs ultimately rests on an appeal to internal party policy and not the policy of the Legislature. There is nothing in the Minnesota Statues that binds the chair to act as the party directs.

Instead, under Minnesota Statutes § 207A.13, subdivision 2(a), the party "chair" is empowered with the authority to direct every aspect of the primary ballot preparation independent of any decision made by the "party." The Legislature also empowered the

chair (not the party) to determine if a blank line is to be printed, which of the party-chosen candidates' names are to be "placed" on the ballot by way of being printed, which are to be placed by way of write-in, as well as every other aspect of ballot preparation. (App.B. 35a, 36a; App.D. 50a). The Legislature could have used the word "party" in any of these instances, but instead made the decision to use the word "chair" in the vesting of these powers and authorities. And, as previously noted, the Legislature made no attempt to require the "chair" to act as the "party" directs. The Minnesota Supreme Court read into the statute words that are not there: the non-existent law that the "chair" act as the "party" directs.

The Minnesota Legislature knows how to enact laws. If the Legislature intended to bind the chair to act as the party directed, namely to "place" specific names by printing and others by write-in, the Legislature would have done so. But, it did not.

As this Court recently reiterated in *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S.Ct. 1492, 1495 (2020), a court usually does not "read into statutes words that aren't there. It's a temptation we are doubly careful to avoid when [policymakers have] (as here) included the term in question elsewhere in the very same statutory provision." Indeed, the terms "chair" and "party" appear elsewhere in the same subdivision and section (as well as the same chapter) indicating exactly what duties the Legislature

intended to separate between the party and its chair, namely: (1) the party is to decide which candidates' names are eligible to appear in the election; and (2) the chair is to decide how those names are to appear —namely which are printed and which are written-in.

In *Romag*, 140 S.Ct. at 1497, this Court reiterated that "the place for reconciling competing and incommensurable policy goals * * * is before policymakers. [A court's] limited role is to read and apply the law those policymakers have ordained." Here, the Minnesota Supreme Court read into the statute words that are not there. In so doing, it concluded the policymakers' intent was not to separate the authorities, but instead that the "party" decides which names are printed and which are written-in. Yet, as was later revealed, although De La Fuente as being part of the pool of candidates "to be placed" on the Republican Party primary ballots, he remained concealed from voters through the chair's declaration to the Secretary to keep De La Fuente's name from appearing on the ballot in print against that of the incumbent. Only later, did the chair declare to the Secretary that De La Fuente could be "placed" and votes counted for delegates by way of requiring voters to write-in his name on their ballot.

Thus, the party chair is empowered to act independently of the will of its party, and hence, the

party is stripped of its ability to effectively present the pool of candidates to voters of the primary election, which the Minnesota Supreme Court opined is a violation of the Constitution (App.B. 43a–44a).

Even if the Minnesota Supreme Court is correct in that the decision to "place" names differently on the ballot is an authority the policymakers chose to vest in the "party" and not the "chair," the party's concealment of party affiliated candidates runs afoul of the ability to cast ballots to advance the election of delegates supportive of a party-chosen candidate, namely De La Fuente, at the time Martin and other Minnesotans were casting their ballots.

Through the severing of the relationship between the party and its candidates, voters supporting those candidates are stripped of their ability to choose from the pool of party-chosen candidates at the primary election, which is exactly what happened to Martin as it interfered with his right to associate with his candidate of choice. (App.B. 43a–44a).

C. Access to the general election ballot is not related to Equal Protection of the primary.

The Minnesota Supreme Court opined that the Minnesota Statutes "poses no bar to De La Fuente's right to be a presidential candidate on the general election ballot, as a party's nominee or a write-in candidate. (App.B. 43a; *N.Y. State Bd. Of Elections v. López Torres*, 552 U.S. 196, 207–08 (2008) (recognizing that candidates' and voters'

associational rights are "well enough protected" if there is "an adequate opportunity to appear on the general-election ballot").

While Minnesota Statutes § 204B.09, subdivision 3[9], might provide a presidential candidate who lost its major party's primary election a method to access the general election ballot by way of being a write-in candidate, Minnesota Statutes § 204B.04, subdivision 2[10], is a "sore loser statute." It is narrowly focused on the State's interest in prohibiting a candidate who appeared in a primary election and lost from later appearing on the general election ballot: a candidate is nominated as such by way of nominating petition pursuant to Minnesota Statutes § 204B.033[11]. However, this does not excuse

9 "(a) A candidate for * * * federal office who wants write-in votes for the candidate to be counted must file a written request with the filing office for the office sought * * * no later than the seventh day before the general election. * * * (b) A candidate for president of the United States who files a request under this subdivision must include the name of a candidate for vice president of the United States. The request must also include the name of at least one candidate for presidential elector. The total number of names of candidates for presidential elector on the request may not exceed the total number of electoral votes to be cast by Minnesota in the presidential election. * * *"

10 "No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition."

11 "* * * Candidates for any partisan office who do not seek the nomination of a major political party shall be nominated by

the violation of the alleged right to equal protection. Though the First Amendment right to politically associate might very well be vindicated by a primary candidate's appearance in the related general election, that appearance only vindicates the right to politically associate, not the requirement of a State to fairly administer taxpayer-funded state primary election laws.

The disparate treatment of De La Fuente to the incumbent presidential candidate 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 as found by the Minnesota Supreme Court (App.B. 40a–41a, stating "Nothing in section 207A.13 suggests that the State intends to ensure the fairness of [the ballot access] process").

The same is true for Martin. The absentee ballot choice Martin must make should not allow his absentee ballot to be treated differently than the ballot of the person voting on March 3, 2020, at the polling place as well as every voter supportive of a

---

nominating petition as provided in sections 204B.07 and 204B.08, and, except for presidential elector candidates, shall file an affidavit of candidacy as provided in section 204B.06."

competing party-chosen candidate. Unlike every voter supportive of the incumbent candidate, Martin was given no instruction or direction as to what he needed to do in order to advance the election of delegates supportive of the party-chosen candidate of his liking. The interaction between Minnesota Statutes §§ 207A.13 and 203B.081, subdivision 1, as applied, causes an unconstitutional disparate treatment discriminating against certain presidential primary election voters. (App.D. 48a, 50a).

Likewise, without De La Fuente's name appearing in the primary election until five days before the in-person voting took place, including De La Fuente's name not being printed on the primary ballot, Martin was not able to campaign in as comprehensive or complete of a way as he anticipated. Martin believed the lack of a printed name on the primary ballot made campaigning more difficult and caused confusion among potential primary voters when they failed to see De La Fuente's name on the ballot.

D. The decision below conflicts with the decision of the 8th Circuit Court of Appeals.

1. The decision relied upon non-binding federal case law in contrast with existing law.

As taught by the Eighth Circuit in *Faulkner*

County at 1294:

> *"[W]here a statutory burden * * * operates to exclude a given candidate from the ballot, an alternative means of access must be provided absent a sufficiently strong state interest."*

There is no question that the Petitioners were denied access to the primary ballot; the denial is what gave rise to invoking the jurisdiction of the Minnesota Supreme Court. From the time this exclusion to the ballot was first imposed upon De La Fuente in October 2019, Martin had no way to cast a ballot for De La Fuente in the primary election to be able to associate with him as a presidential Republican candidate. The interests of neither Petitioner were protected—as a candidate nor as a voter. Yet, the underlying statute protected, as the Minnesota Supreme Court found, the Minnesota Republican Party's right to not associate with De La Fuente. (App.B. 43a–44a).

But, an associational relationship existed between De La Fuente and the Minnesota Republican Party as the party had finally declared just days before the primary election. As such, there is no State interest advanced that is sufficiently strong enough to warrant barring a party-chosen candidate from the party's primary ballot nor to prevent a voter from effectively casting her vote for the party-chosen candidate of her own liking such that the election of delegates supportive of that party-chosen candidate

will be advanced. Contrary to the Minnesota Supreme Court's opinion, it is well established in the Eighth Circuit that voters' rights to associate are superior to those of any political party. *Faulkner County*, 49 F.3d at 1297 ("[I]t would make little sense to afford greater protection to the rights of political parties than to the rights of voters and candidates"). The Minnesota Supreme Court, however, relied upon *Duke v. Massey*, 87 F.3d 1226, 1233 (11th Cir. 1996), and a Georgia federal district court case, *Belluso*, to reach a different rationale and failed to adhere to federal law of its own federal circuit. (App.B. 41a–45a). Notably, the Minnesota primary election *is binding* (App.D. 49a) (*emphasis added*), something which the state court initially recognized (App.B. 10a), but later ignored in its reliance upon *Duke* (App.B. 42a–43a). The Minnesota Supreme Court's reliance upon the case was misplaced as the application of that test requires the primary to be nonbinding and for the party to have not chosen the candidate, both facts of which are missing from the immediate case.

2. There is conflict within the Circuits.

There is conflict within the Circuits. In the Eighth Circuit, the rights between candidates and voters are superior to those of the party. *Faulkner County*, 49 F.3d at 1297. But, in other circuits, an opposite interpretation of the Constitution exists (see, in example, *Duke*, 87 F.3d at 1233 (noting the lack of

authority suggesting that voters "have a right to vote for their candidate of choice * * * in a nonbinding primary") and at 1232 (in that "the Republican Party has a right to 'identify the people who constitute the association and to limit the association to those people only'"), on which the state court relied (App.B. 42a)).

Just as the general election binds the election of electors supportive of the balloted nominee, the primary election in question binds the election of delegates supportive of the party-chosen primary candidate. But, the Circuits are divided over the of priority of rights between voters and candidates which directly gives rise to a conflict in the ability of candidates to access the ballots of the supporters in their own party.

E. The decision below found that Equal Protection was not advanced, but failed to protect the right.

De La Fuente and Martin asserted the primary statutory scheme, namely Minnesota Statues § 207A.13, violated the Equal Protection Clause (App.G. 57a–59a). The Minnesota Supreme Court recognized the claim (App.B. 38a n.16). The court opined that when the State gives a political party a role in the election process, the party's rights are circumscribed and the State's interest in ensuring the fairness of the party's nominating process is elevated (App.B. 40a–41a, relying on *López Torres*,

552 U.S. at 203). The court dismissed the claim finding that candidates are not constitutionally afforded the "right to have a 'fair-shot' at winning the party's nomination." *Id*. However, this is not what De La Fuente or Martin argued. The issue was not that a candidate must be given a "fair shot" at winning in a state-administered and tax-payer funded election, but that the statutory scheme failed to treat party-chosen candidates and their supporters equally when it comes to accessing the primary ballots (App.G. 57a–59a).

Additionally, the state court found the statutory scheme did not burden Martin's right to cast a vote for the party-chosen candidate of his liking because the write-in option was available to him on the primary ballot and a vote for De La Fuente would advance the election of delegates supportive of the same (App.B. 43a). But, the exact opposite happened. When the party concealed De La Fuente's association with the Minnesota Republican Party under Minnesota Statutes § 207A.13, subdivision 2(a), any voter, including Martin, casting an absentee ballot, had no idea what to write-in so that the voter could rest assured that it would advance the election of the intended delegates. While at the same time, party affiliated voters supportive of the incumbent competitor of De La Fuente could cast a vote with absolute certainty that their vote would advance the competing delegates.

As previously stated, at the time the Minnesota Supreme Court issued its opinion, De La Fuente was concealed as a candidate of the Minnesota Republican Party. At the same time, the Minnesota Secretary of State represented to the state supreme court that he would not categorize ballots cast for De La Fuente as a vote that advances the election of delegates supportive of him; instead, such ballots would be categorized as a "write-in".

De La Fuente was treated wholly different as other party-chosen candidates: he was not printed on the ballot; he was concealed as a party-chosen and affiliated candidate; and the Secretary of State advertised he would not categorize a ballot as being a vote that advances the election of delegates supportive of him. Meanwhile, De La Fuente's competition was printed on the ballot, not concealed as a party-chosen candidate at the time ballots were cast, and the Secretary of State advertised a ballot cast for De La Fuente's competition would advance the election of delegates supportive of the same.

Further, Martin had no idea what to write-in on his ballot to advance the election of delegates supportive of his chosen candidate, De La Fuente. However, voters supportive of De La Fuente's competition–who was printed on the ballot–had ample knowledge of what to do to advance the election of delegates supportive of said competition. And, news media reported to the voting public that

no vote for De La Fuente would advance the election of delegates supportive of him while at the same time reporting that votes for his competition would advance the election of delegates supportive of the competition (App.F. 53a–56a). This is not equal treatment: it is a violation of the Constitution that occurred due to the fact that De La Fuente was denied access to Martin's ballot at the time it was being cast.

All similarly situated party-chosen candidates must be given the same access to the ballot. Both De La Fuente and his competition were allowed to seek the convention's nomination and sought to do so before any printing deadlines determined by the State, but only De La Fuente's competition was granted access to the primary ballot while De La Fuente was concealed as a candidate. As a consequence, Martin and other primary voters were prevented a ballot that accurately identified the party's pool of candidates for which a vote could have been cast. While the Minnesota Supreme Court has expressed that a "[v]oters interest in a ballot that accurately identifies the candidates for whom a vote can be cast in the presidential nomination primary" is an interest that must be advanced (App.B. 17a), it concluded that "nothing in section 207A.13 suggests that the State intends to ensure the fairness of that process." (App.B. 41a). This is antithetical to constitutional protections under both the First and

Fourteenth Amendments.

Primary elections are "state action" for purposes of the Fourteenth Amendment, and must be consistent with its Equal Protection Clause (*Bullock v. Carter*, 405 U.S. 134, 140–141 (1972)). States therefore have "important regulatory interests" to conduct fair, honest, and orderly primary elections (*Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The Minnesota Supreme Court decision has not advanced the protections of the Fourteenth Amendment. Instead, the court chose not to reach the Equal Protection argument based on the grounds that no associational relationship between De La Fuente and the Minnesota Republican Party existed. (App.B. 41a–42a).

If the Minnesota Supreme Court is correct in its opinion that the statutes at issue do nothing to ensure the fairness of the process by which party-chosen candidates appear on primary ballots, the statute inherently violates the Fourteenth Amendment's requirement that Minnesota's presidential nomination primary election be conducted fairly. Hence, the Petitioners claims succeed on the face of the statutes at issue and the Minnesota Supreme Courts own admissions. A violation of Equal Protection is primarily responsible for giving rise to the violation of the other constitutional rights, not the other way around (*Faulkner County*, 49 F.3d at 1293, fn.2).

Had De La Fuente been treated equally in terms of ballot access, Martin (and other similarly situated voters) would have known how to cast a ballot to advance the election of delegates supportive of De La Fuente, and he would have been able to associate within the party. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (The right to associate with others in advancement of political viewpoints is protected by the First Amendment); *Bullock*, 405 U.S. at 143 (explaining that the associational rights and interests of voters, candidates, and political parties are often intertwined).

F. The decision below decided an important question of federal law that conflicts with relevant decisions of this Court.

States cannot keep candidates off the election ballot, effectively denying them an equal opportunity to win votes and the right to vote may be burdened unreasonably if candidate choice is restricted (*Williams*; *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (noting that the right to vote may be burdened if a vote "may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot"); App.B. 38a–39a). When the State gives a political party a role in the election process, the party's rights are circumscribed and the State's interest in ensuring the fairness of the party's nomination process is elevated. *López Torres*, 522 U.S. at 203. (App.B. 40a–

41a).

Hence, the State must ensure that party adherents are given an opportunity to cast their vote for the party-chosen candidate of their desire. See e.g., *Tashjian v. Republican Party Of Conn.*, 479 U.S. 208, 216 (1986) (The State may not limit "associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community," during the primary process.). In this case, De La Fuente was kept off Martin's primary ballot, thereby denying Martin the right to cast an effective vote, one that is among the "most precious freedoms." *Williams*, 393 U.S. at 30. (See App.B. 41a–42a). Instead of protecting Martin's right to cast an effective vote, the Minnesota Supreme Court incorrectly determined that Martin's right to vote for the party-chosen candidate of his own liking is de minimis in direct conflict of the cited opinions of this Court (App.B. 43a).

G. The decision below decided important questions of federal law that has not been, but should be, settled by this Court.

As contended by the Minnesota Supreme Court, the Equal Protection claims made are not supported by any case law (App.B. 38a, n.16). If this is true, the state court decided questions of federal law that has not been, but should be, settled by this Court.

The Minnesota Supreme Court opinion determined that it is constitutional for a State to allow a party-chosen candidate to be concealed from the voting public then casting their ballots while at the same time advertising to them that it will not categorize a ballot cast for such a concealed candidate as one that advances the election of delegates supportive of the same.

In addition, the opinion determined that it is constitutional for a State to treat similarly situated party-chosen candidates differently, namely to deny the printing of a candidate's name on the primary ballot and requiring it to be written-in while at the same time allowing said candidate's competition to be printed thereon.

Ultimately, the consequence is untenable. The Minnesota Supreme Court has determined that it is permissible to instruct some voters how to cast a ballot so that it will advance the election of delegates supportive of the party-chosen candidate of that voter's liking while at the same time denying instructions to other voters who wish to advance the election of delegates supportive of a competing party-chosen candidate; and in so doing, permits the casting of ballots that do not accurately reflect the party-chosen pool of candidates. What is lost is the right to cast an effective ballot. The right to cast an effective ballot is one that is derived from and encompasses multiple rights (*Faulkner County*,

49 F.3d at 1293, fn.2) and is the most precious freedom voters can and ever will exercise (*Williams*, 393 U.S. at 30); it is these intertwined rights that the Petitioners complain will continue to be violated in each and every presidential nomination primary election Minnesota holds in the future.

CONCLUSION

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

Dated: October 28, 2020.

Respectfully submitted,

ERICK G. KAARDAL
Counsel of Record
MOHRMAN, KAARDAL, & ERICKSON, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
Telephone: (612) 341-1074
Email: kaardal@mklaw.com
Counsel for Petitioners