

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

DAVID G. CRUM,

Plaintiff-Appellant,

v.

No. 34,586
Bernalillo County
D-202-CV-2014-03730

DIANNA J. DURAN, New Mexico Secretary
of State, MAGGIE TOUSOUSE OLIVER,
Bernalillo County Clerk, REPUBLICAN
PARTY OF NEW MEXICO and
DEMOCRATIC PARTY OF NEW MEXICO,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JAN 13 2016

Mark B. H.

Defendants-Appellees,

and

STATE OF NEW MEXICO *ex rel.*
HECTOR BALDERAS,

Intervenor-Appellee.

APPELLANT'S BRIEF IN CHIEF

Appeal from the Second Judicial District Court
Honorable Denise Barela Shepherd, District Judge

J. Edward Hollington, Esq.
J. Edward Hollington & Associates, P.A.
708 Marquette Ave., NW
Albuquerque, N.M. 87102
(505) 843-9171; (505) 843-7027 (fax)

Attorney for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

CERTIFICATE OF COMPLIANCE

As required by Rule 12-213[G], I certify that this Brief in Chief complies with the type-volume limitation of Rule 12-213[F][3]. According to Microsoft Office Word, the body of this Brief in Chief, as defined by Rule 12-213[F][1], contains 10,547 words.

DATED this 13th day of January, 2016.

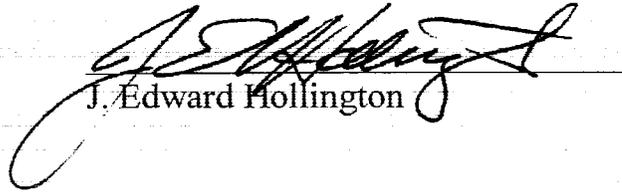

J. Edward Hollington

TABLE OF CONTENTS

	Page
CERTIFICATE OF COMPLIANCE.....	i
TABLE OF AUTHORITIES.....	iv
SUMMARY OF PROCEEDINGS.....	1
The lawsuit.....	2
Procedure.....	3
STANDARD OF REVIEW – DE NOVO.....	4
OVERVIEW OF STATE CONSTITUTIONAL ISSUES.....	5
ARGUMENT.....	9
I. THE BILL OF RIGHTS OF THE NEW MEXICO CONSTITUTION PROTECTS THE RIGHT TO VOTE AGAINST LEGISLATION THAT INTERFERES WITH THE FREE EXERCISE OF THAT FUNDAMENTAL RIGHT AND STRICT SCRUTINY APPLIES TO LEGISLATION THAT INTERFERES TO PREVENT THE FREE EXERCISE OF THE RIGHT TO VOTE.....	9
A. Any legislation that prevents the free exercise of the right to vote violates art. II §8, whether the legislation is described as a “requirement,” “condition” or “not severe” burden on the right to vote.....	11
B. The district court failed to interpret and apply the protections of art. II, §8 to Mr. Crum’s right to vote.....	12
C. The district court’s failure to apply strict scrutiny to determine the constitutionality of Section 1-12-7[B] and [C] is not supported by New Mexico law.....	14
D. <i>Montaño v Los Alamos County</i> does not support applying a rational basis analysis in this case.....	18

II. APPLYING PRINCIPLES OF CONSTITUTIONAL AND STATUTORY INTERPRETATION TO ART. II §8, ART. VII §1 AND SECTION 1-12-7[B] AND [C] REVEALS IRRECONCILABLE CONFLICTS, AND INTERFERENCE WITH THE RIGHT TO VOTE BY SECTION 1-12-7[B] AND [C] VIOLATES THE NEW MEXICO CONSTITUTION.....	20
A. Standards for interpreting the Constitution and laws affecting the fundamental right to vote.....	21
B. Art. II §8 and art. VII §1 must be liberally construed in favor of the right to vote.....	23
III. THE LEGISLATURE CAN NOT FORCE QUALIFIED ELECTORS TO BECOME MEMBERS OF A POLITICAL PARTY TO VOTE BECAUSE PARTY MEMBERSHIP IS NOT A REQUIREMENT TO BECOME A QUALIFIED ELECTOR PURSUANT TO ART. VII §1.....	25
IV. A POLITICAL PARTY'S ASSOCIATIONAL RIGHTS DO NOT TRUMP AN INDIVIDUAL'S CONSTITUTIONAL RIGHT TO VOTE.....	29
A. The United States Constitution grants states broad powers to regulate elections.....	31
B. No U.S. Supreme Court case has held that the right to vote is subordinate to a political party's associational rights.....	33
C. The dissents in <i>Jones</i> and <i>Clingman</i> support New Mexico's constitutional right to vote as a superior right to a political party's associational right.....	39
VIII. CONCLUSION.....	41
A. Relief requested.....	43
B. Oral argument requested.....	43

TABLE OF AUTHORITIES

<u>New Mexico Cases</u>	Page
<i>Bardacke v. Dunigan</i> , 1982-NMSC-93, 98 N.M. 473, 649 P.2d	23
<i>Breen v Carlsbad Mun. Sch.</i> , 2005-NMSC-028, 138 N.M. 331, 120 P.3d 413	8, 10
<i>Bounds v State ex rel. D'Antonio</i> , 2013-NMSC-037, 306 P.3d 457	10
<i>Calkins v. Stearley</i> , 2006-NMCA-153, 140 N.M. 802, 149 P.3d 118	6
<i>Chase v. Lujan</i> , 1944-NMSC-027, 48 N.M. 261, 149 P.2d 1003	22-23, 25-28
<i>City of Las Cruces v. Sanchez</i> , 2007-NMSC-042, 142 N.M. 243, 164 P.3d 942	13
<i>Delfino v. Griffo</i> , 2011-NMSC-015, 150 N.M. 97, 257 P.3d 917	37
<i>Einer v. Rivera</i> , 2015-NMCA-045,	8
<i>Galetti v Reeve</i> , 2014-NMCA-079, 331 P.3d 997	4
<i>Griego v Oliver</i> , 2014-NMSC-003, 316 P.3d 865	7, 12, 20
<i>Gunaji v Macias</i> , 2001-NMSC-28, 170 N.M. 734, 31 P.3d 1008	23-24, 28
<i>Kane v City of Albuquerque</i> , 2015-NMSC-027,	15

<i>League of Women Voters v Herrera,</i> 2009-NMSC-003, 145 N.M. 563, 203, P.3d 94	10
<i>Lopez v. Kase,</i> 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346	29
<i>Marrujo v New Mexico State Highway Department,</i> 1994-NMSC-116, 118 N.M. 753, 887 P.2d 747	10
<i>Montaño v Los Alamos County,</i> 1996-NMCA-108, 122 N.M. 454, 926 P.2d 307	18
<i>NARAL v Johnson,</i> 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841	7-8, 12, 14, 30
<i>People's Constitutional Party v Evans,</i> 1971-NMSC-116, 83 N.M. 303, 491 P.2d 520	14-17, 29
<i>Richardson v Carnegie Library Restaurant,</i> 1998-NMSC-84, 107 NM 688, 763 P.2d 1153	19
<i>State v Barber,</i> 1989-NMCA-058, 108 N.M. 709, 778 P.2d 456	13
<i>State v. Crane,</i> 2014-NMSC-026, 329 P.3d 687	30, 39
<i>State v. Lynch,</i> 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73	30
<i>State v Nuñez,</i> 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264	13
<i>State ex rel. NM Press Assn. v Kauffman,</i> 1982-NMSC-060, 98 N.M. 261, 265 P.2d 300	38-39
<i>State ex rel. NM Voices for Children v Denko,</i> 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458	13

<i>State ex rel Read v. Crist</i> , 1919-NMSC-005, 25 N.M. 175, 179 P.629	23
<i>State ex rel. Walker v Bridges</i> , 1921-NMSC-041, 27 N.M. 169, 199 P. 370	5, 21
<i>State ex rel. Witt v State Canvassing Board</i> , 1968-NMSC-017, 78 N.M. 682, 437 P.2d 143	21
<i>Tri-State v D'Antonio</i> , 2012-NMSC-039, 149 N.M. 394, 249 P.3d 932	4
<i>Trujillo v City of Albuquerque</i> , 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305	28
<i>Zhao v Montoya</i> , 2014-NMSC-025, 329 P.3d 676	14

Other Cases

<i>Anderson v Mills</i> , 664 F.2d 600 [6 th Cir. 1981]	16
<i>Az. St. Legis. v. Az. Indep. Redst. Com.</i> , ___ U.S. ___, 135 S. Ct. 2652, 2673, 2675, 192 L. Ed. 2d, 704 [2015]	19, 32
<i>Burdick v Takushi</i> , 504 U.S. 428, 434 [1992]	33
<i>Burson v Freeman</i> , 504 U.S. 191 [1992]	6
<i>California v. Greenwood</i> , 486 US 35 [1988]	39
<i>California Democratic Party v Jones</i> , 530 U.S. 567 [2000]	33-37, 39

<i>Clingman v Beaver</i> , 544 U.S. 581.....	17, 38-40
<i>Democratic Party v Nago</i> , 982 F.Supp. 2d 1166 [D. HI. 2013].....	17, 21
<i>Democrat Party of the United States v Wisconsin, ex rel. La Follette</i> , 450 U.S. 107, 121, 101 S. Ct. 1010, 57 L. Ed. 2d 82 [1981].....	41
<i>In re Contested Election Fifth Ward</i> , 281 Pa. 131, 126 A. 199 [1924].....	27
<i>Jenness v Fortson</i> , 403 U.S. 431 [1971].....	16
<i>Norman v Reed</i> , 502 U.S. 279 [1992].....	18-19
<i>O'Callaghan v State</i> , 914 P.2d 1250, 1262 [AK. 1996].....	41
<i>Republican Party v Faulkner County</i> , 49 F. 3d 1289, 1297 [8 th Cir. 1994].....	33
<i>Rodriguez v. Popular Democratic Party</i> , 457 U.S. 1 [1982].....	30
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 [1973].....	5, 36
<i>Shelby County v Holder</i> , ___ U.S. ___, 133 S. Ct. 2612, 2637, [2013].....	31
<i>Smith v Allwright</i> , 321 U.S. 649 [1944].....	5
<i>Tashjian v Republican Party</i> , 479 U.S. 208, 214 [1986].....	30, 40

<i>Wallbrecht v Ingram</i> , 164 Ky. 463, 175 S.W. 1022 [1915]	23-24
<i>Washington State Grange v Washington State Republican Party</i> , 552 U.S. 442 [2008]	37-38
<i>Wesberry v Sanders</i> , 376 U.S. 1 [1964]	6, 31
<i>W. Va. State Board Bd. of Educ. v. Barnette</i> , 319 U.S. 624 [1943]	7
<i>Workers World Party v Vigil-Giron</i> , 693 F.Supp. 989 [D.NM. 1988]	16
<i>Yick Wo v Hopkins</i> , 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 [1886]	31
<u>New Mexico Constitution</u>	
Art. II, §2	41
Art. II, §6	13
Art. II, §8	1, 4, 6-13, 15, 17-25, 27-29, 31-34, 39, 42
Art. II, §18	12
Art. VII, §1	1-2, 4-5, 7, 9, 12-13, 17-29, 31-32, 34, 40
Art. VII, §5	15
<u>State Statutes</u>	
NMSA 1978 §1-1-4 [2011]	25
NMSA 1978 §1-4-2 [2011]	25
NMSA 1978 §1-4-15[C]	1

NMSA 1978 §1-7-2[A] [1990].....16

NMSA 1978 §1-12-7[B] and [C].....2-14, 17, 19-20, 22-26, 28, 34, 38, 42

New Mexico Rules of Civil Procedure

Rule 1-012[B][6] [NMRA 2015].....3, 36-37

Other Authority

The Right to Vote Under State Constitutions,
Joshua A. Douglas, 67 Vand. L. Rev. 89, 103, 136 [2014].....27-28

www.merriam-webster/open.....22

www.merriam-webster/requisite.....26

SUMMARY OF PROCEEDINGS

Article VII §1 of the New Mexico Constitution [N.M. Constitution] grants to all citizens who meet the requirements of age, residency, mental capacity, and have no felonious convictions, and are registered to vote, the right to vote in all elections for public officers. The N.M. Constitution's Bill of Rights guaranties and protects the constitutional right to vote with article II §8:

*"All elections shall be free and **open**, and **no power**, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."*

[emphasis added]

Appellant, Mr. Crum, is a qualified elector who meets the requirements of article VII §1. On May 21, 2014, Mr. Crum attempted to cast his vote during the early voting period for the 2014 primary election. He was denied the right to vote because when he registered to vote, he chose not to designate a party affiliation and pursuant to NMSA 1978 §1-4-15[C], he is "*considered to have declined to designate a party affiliation.*" Election officials refer to voters who decline to state a party affiliation as DTS voters. [RP 2-5] Mr. Crum and almost 240,000 other DTS voters were denied the right to vote in the 2014 primary election and had no say in the election of over 199 public officers who were elected in that primary because of no opposition in the general election. Those public officers included legislators, county

commissioners, sheriffs, and judges. Almost 60% of the public officers on primary ballots were elected without any input from DTS voters. [RP 28]¹

The two sentences from the Election Code that election officials rely on to deny Mr. Crum the right to vote in primary elections are NMSA 1978 §1-12-7[B] and [C] that declare “*a person whose major party affiliation is not designated on his original Certificate of Registration shall not vote in a primary election*” [emphasis added] [B], and “*a person at a primary election shall not be permitted to vote for the candidate of any party other than the party designated on his current Certificate of Registration*” [emphasis added] [C]. Article VII §1 does not require affiliation with a political party as a qualification to vote.

The lawsuit

On June 3, 2014, Mr. Crum filed his Verified Complaint for Declaratory Judgment and Injunctive Relief asking the court to declare NMSA 1978 §1-12-7[B] and [C] unconstitutional because those provisions prohibit Mr. Crum from exercising his constitutional right to vote in all elections for public officers, which includes primary elections. Mr. Crum requested injunctive relief and restoration of his right to vote by enjoining elections officials from preventing him and other DTS voters the right to request a major party primary ballot and cast his vote for that

¹ Numbers of uncontested races determined from a list of all offices and candidates for the 2014 primary compiled by the Secretary of State to determine offices that had only one party's candidates on the primary ballot.

party's candidates. [RP 5-6] The only change Mr. Crum seeks to the current primary election system is that he be given the right to vote in those elections. Democrat and Republican registered voters will still only be allowed to vote on their respective party's ballots.

Procedure

The Secretary of State refused to defend the constitutionality of Section 1-12-7[B] and the New Mexico Attorney General [AG] intervened. [RP 26] On July 21, 2014, Mr. Crum filed a Motion for Summary Judgment [MSJ] [RP 27], and at the hearing on October 27, 2014, the district court only heard the issue of failure to join indispensable parties raised by the Bernalillo County Clerk [Clerk] and ordered the Democratic and Republican Parties be joined as defendants. [RP 114-115] Only the Republican Party of New Mexico [RPNM] joined and on December 19, 2014, filed a Rule 1-012[B][6] Motion to Dismiss [MTD]. [RP 132] RPNM argued that allowing Mr. Crum and other DTS registered voters the right to vote in primary elections violates RPNM's right of association guaranteed by the United States Constitution [U.S. Constitution]. [RP 133 and 138-140] On February 10, 2015, the district court heard Mr. Crum's MSJ and RPNM's MTD. On March 18, 2015, the district court entered its Memorandum Opinion and Order granting RPNM's Rule 12[B][6] MTD without deciding the MSJ. [RP 175]

The district court erroneously used the rational basis standard instead of strict scrutiny, which is required for evaluating a prohibition of the fundamental right to vote. [RP 181-182] The district court did not analyze articles VII §1 and II §8 utilizing the principles of constitutional and statutory interpretation to determine whether Section 1-12-7[B] and [C] violate the N.M. Constitution. Finally, the Court concluded, without any facts or evidence, that the State could prohibit Mr. Crum and other DTS voters from casting votes in primary elections to preserve political parties as viable and identifiable interest groups, to enhance parties' electioneering and party building efforts; to minimize voter confusion and to prevent party raiding. [RP 180-181] None of the Appellees presented any facts or evidence to support a compelling interest of the State in prohibiting citizens like Mr. Crum, who meet the constitutional qualifications to vote, from voting in primary elections.

STANDARD OF REVIEW – DE NOVO

This case involves interpretations of constitutional provisions, article II §8 and article VII §1, and sub-sections of a statute, NMSA 1978 §1-12-7[B] and [C]. Questions of constitutional and statutory interpretations are reviewed de novo. *Tri-State v D'Antonio*, 2012-NMSC-039, ¶11. An appeal of a dismissal pursuant to 12[B][6] is also reviewed de novo and all facts well pled in the complaint are deemed true. *Galetti v Reeve*, 2014-NMCA-079, ¶¶2, 9.

OVERVIEW OF STATE CONSTITUTIONAL ISSUES

Would anyone argue that Mr. Crum and 240,000 other DTS registered voters could be denied the right to vote in a general election because they are not members of a major political party? Of course not. The N.M. Constitution. makes no distinction between primary and general elections in granting and protecting the right to vote in all elections. The right to vote includes the right to vote in primary elections. *Smith v Allwright*, 321 U.S. 649, 661-62 [1944]. The same constitutional test of the right to vote that applies in general elections also applies to primary elections. *Id.* at 664. Voting in a primary election is as protected against state encroachment as is voting in a general election. *Rosario v. Rockefeller*, 410 U.S. 752, 768 [1973] [Powell, J. dissent].

Art. VII, §1 of the N.M. Constitution lists qualifications to vote and grants to all qualified electors the right to vote in all elections for public officers. There is no requirement of membership in any political party to become a qualified elector under the N.M. Constitution. [RP 178] NMSA 1978 §1-12-7[B] and [C] prohibit Mr. Crum, a qualified elector, from voting in primary elections because he is not a member of a major political party.

The right of a citizen to vote at public elections is the supreme right guaranteed by the Constitution of the State of New Mexico. *State ex rel. Walker v Bridges*, 1921-NMSC-041, ¶8. The right to vote is the foundation of our democratic system and it

deserves the most robust protection, and all other rights are illusory if the right to vote is undermined. *Wesberry v Sanders*, 376 U.S. 1, 17 [1964], *Burson v Freeman*, 504 U.S. 191, 198 [1992]. The fundamental principle of democracy is animated into life by the vote of free citizens because the very essence of democracy lies in the free exercise of the constitutional right to vote. No 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, as good citizens, we must live. *Calkins v. Stearley*, 2006-NMCA-153, ¶ 34. [concurring in part, dissenting in part, Vigil, Judge.]

The New Mexico Bill of Rights enshrines strong, robust, and inviolable protections for the right to vote in art. II, §8. The plain ordinary meaning of that provision is the Legislature shall make no law prohibiting the free exercise of the right to vote. Prohibiting qualified electors from voting in primary elections interferes to prevent the free exercise of the right to vote. Art. II, §8 protects the right to vote at all elections and Section 1-12-7 [B] and [C], as applied to Mr. Crum, interferes to prevent the free exercise of his right to vote and are unconstitutional.

The district court did not answer the question: does prohibiting a qualified elector from voting in a primary election because he or she is not a member of the Democrat or Republican Party interfere with the free exercise of their right to vote?

[RP 179-182]

The right to vote and the guaranties and protections of the right to vote of art. II, §8 are inherent rights found in the Bill of Rights. When government is alleged to have violated any inherent rights – it is the responsibility of courts to interpret and apply the protections of the Bill of Rights. The very purpose of the Bill of Rights is to remove certain rights from the political [legislative] process and put them beyond the reach of majorities and officials and to establish them as legal principles to be applied by courts. Rights protected by the Bill of Rights may not be infringed and violated by legislation. *Griego v Oliver*, 2014-NMSC-003, ¶1, citing and quoting *W. Va. State Board Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 [1943].

The legal principle from art. II §8 that the district court was required to apply, and that this Court should apply is: A citizen who meets the voter qualifications of art. VII, §1 has the right to vote in all elections and the legislature shall not interfere to prevent the free exercise of that right to vote. NMSA 1978 §1-12-7[B] and [C] prohibited the free exercise of Mr. Crum's right to vote. Members of the Democrat and Republican parties have no greater constitutional right to vote than Mr. Crum and other DTS qualified electors.

It is the function of the judiciary to measure Section 1-12-7[B] and [C] solely by the yardstick of the Constitution and using any standard other than **strict scrutiny** negates the purpose of the guaranties and protections of art. II, §8 and the intention of the people of this state who adopted the Bill of Rights. *NARAL v Johnson*, 1999-

NMSC-005, ¶¶36-37, 59 [applying strict scrutiny because the Equal Rights Amendment is part of the New Mexico Bill of Rights.]

The district court did not measure Section 1-12-7[B] and [C]'s prohibition of Mr. Crum's right to vote in primary elections by the "yardstick" of art. II, §8, "*all elections shall be free and open, and no power [Legislature] shall at any time interfere to prevent the free exercise of the right of suffrage.*" [emphasis added.] The district court's decision contains no analysis of art. II, §8 and the court did not follow principles of constitutional and statutory interpretations in its conclusion that Section 1-12-7[B] and [C] do not violate the N.M. Constitution.

The district court correctly described the right to vote as a fundamental right, but incorrectly applied a rational basis for review. [RP 181-182] Rational basis only applies to general social and economic legislation that does not affect fundamental or important constitutional rights. *Breen v Carlsbad Municipal Schools*, 2003-NMCA-058, ¶11. Fundamental rights, such as the right to vote, must be protected from governmental actions taken under the guise of rational reasons that violate inherent rights.

This case involves a fundamental right to vote protected by the Bill of Rights and strict scrutiny must apply. *NARAL v Johnson*, 1999-NMSC-045, ¶¶36-37 and *Einer v. Rivera*, 2015-NMCA-045, ¶¶29, 33.

ARGUMENT

I

THE BILL OF RIGHTS OF THE NEW MEXICO CONSTITUTION PROTECTS THE RIGHT TO VOTE AGAINST LEGISLATION THAT INTERFERES WITH THE FREE EXERCISE OF THAT FUNDAMENTAL RIGHT AND STRICT SCRUTINY APPLIES TO LEGISLATION THAT INTERFERES TO PREVENT THE FREE EXERCISE OF THE RIGHT TO VOTE

On May 21, 2014, Mr. Crum tried to vote in the 2014 primary election; but was not allowed to cast his vote because of Section 1-12-7[B] and [C]. [RP 2-5] He met all of the qualifications to vote as set out in art. VII, §1, which mandates that he shall “be qualified to vote at all elections for public officers.” Primary elections are elections for public officers.

Section 1-12-7[B] and [C] prohibited Mr. Crum from voting because he was not registered to vote as a member of the Democrat or Republican party. The only reason Mr. Crum did not vote at the 2014 primary election is the application of Section 1-12-7[B] and [C] to him, and, but for that statute, Mr. Crum would have voted.

Mr. Crum brings this lawsuit to declare Section 1-12-7[B] and [C] an unconstitutional prohibition of the right to vote granted him by art. VII, §1 and guaranteed and protected by art. II, §8. This case affects not only Mr. Crum but 240,000 other qualified independent voters’ fundamental right to vote.

Mr. Crum brings his challenge to the subject statute, not as a facial challenge; but as an “as applied” challenge and his injury was the denial of his right to vote on May 21, 2014. *Bounds v State ex rel. D’Antonio*, 2013-NMSC-037, ¶14 [describing the difference between facial and “as applied” challenge]. In an “as applied” challenge courts consider facts of the case to determine whether the statute, even if facially valid, deprives one of a protected right. *Id.* The facts are undisputed that Section 1-12-7[B] and [C] deprived Mr. Crum of his right to vote.² Mr. Crum met all the constitutional qualifications to vote and he was prohibited from voting in the 2014 primary by the application of Section 1-12-7[B] and [C] to him. Membership with a political party is not a requirement for exercising the right to vote.

The right to vote is a fundamental right guaranteed and protected by art. II., §8. *Marrujo v New Mexico State Highway Department*, 1994-NMSC-116, ¶10. The standard for reviewing Section 1-12-7[B] and [C] is strict scrutiny because, as applied to Mr. Crum, that statute prevents the free exercise of his right to vote.

The district court incorrectly used a rational basis standard which is the standard applied to general social and economic legislation that does not affect a fundamental constitutional right. *Breen v Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶11. In *League of Women Voters v Herrera*, 2009-NMSC-003, ¶18, the Supreme

² This case was decided on a Motion to Dismiss [MTD] and all well-pled facts are accepted as true. See Verified Complaint [RP 1-6].

Court held that “the long standing and fundamental principle of the right to vote is of paramount importance.”

Section 1-12-7[B] and [C] is not part of a general social or economic statute. The statute affects the right to vote. Strict scrutiny must apply to Mr. Crum’s “as applied” constitutional challenge to the statute.

A. Any legislation that prevents the free exercise of the right to vote violates art. II §8, whether the legislation is described as a “requirement,” “condition” or “not severe” burden on the right to vote

The district court incorrectly applied rational basis by concluding that not all voting regulations are subject to strict scrutiny unless the regulations cause severe restrictions. [RP 181] The district court characterizes Section 1-12-7[B] and [C] as merely imposing a requirement or condition on the right to vote and describes it as not a severe burden. [RP 182] Those characterizations do not avoid the application of strict scrutiny. The district court can not ignore the effect of the statute as applied to Mr. Crum for it prohibits him from voting. The district court’s analysis fails to address the plain and unambiguous language of art. II, §8 which protects the right to vote from any action that “interferes to prevent the free exercise of the right of suffrage.” There are no exceptions, qualifications, or limitations in art. II, §8 for interference that prevents exercise of the right to vote.

The only question to answer when reviewing legislation alleged to violate art. II, §8 is: does the application of Section 1-12-7[B] and [C] to Mr. Crum “interfere

to prevent [him] from freely exercising [his] right to vote?" The answer is yes, because without Section 1-12-7[B] and [C], Mr. Crum would have voted in the 2014 primary election. A fundamental right protected by the Bill of Rights requires strict scrutiny of any legislation that interferes to prevent the free exercise of a fundamental right. *Griego v Oliver*, 2014-NMSC-003, ¶¶1, 45.

Strict scrutiny begins from the premise that the legislation is presumptively unconstitutional and it is the state's burden to rebut the presumption with facts. *NARAL v Johnson*, 1999-NMSC-005, ¶36. The Appellees presented no facts to support a compelling state interest in denying Mr. Crum and 240,000 other DTS voters their right to vote in primary elections.

B. The district court failed to interpret and apply the protections of art. II, §8 to Mr. Crum's right to vote

The district court's opinion contains no interpretation or application of art. II, §8 to Section 1-12-7[B] and [C] to determine if the statute violates the constitution. [RP 181-182] The district court found that the right to vote includes the right to vote in primary elections and that membership in a major party is not a requirement of voting under the N.M. Constitution. The court also concluded that voting is a fundamental right "in the context of equal protection." [RP 178 and 181] The right to vote and equal protection are separate rights established by our state constitution. The right to vote is granted by art. VII §1 and guaranteed by art. II §8. Equal rights protection is provided by art. II, §18.

If an action by the government violates a constitutional right, no amount of evidence manifesting the legislature's purportedly benign intent in authorizing that action can render the action constitutional. A state can not restrict or diminish an individual's constitutional rights by statute. *State v Nuñez*, 2000-NMSC-013, ¶47 and *State v Barber*, 1989-NMCA-058, ¶4. In reviewing a constitutional challenge to a statute, courts do not pass judgment as to the wisdom of the legislation, instead, courts are to measure the act against the provisions of our state's constitution to determine its validity. *State ex rel. NM Voices for Children v Denko*, 2004-NMSC-011, ¶6 [interpreting art. II, §6 of the Bill of Rights – right to bear arms].

The district court did not apply the principles of constitutional and statutory construction in comparing art. II, §8 and art. VII §1 to Section 1-12-7[B] and [C] to determine if those subsections conflict with the constitution. Legislation may not abridge a constitutional right and art. II § 8 and art. VII §1 trump the statute. *City of Las Cruces v. Sanchez*, 2007-NMSC-042, ¶20. Mr. Crum presented analysis based on constitutional and statutory interpretations of art. II, §8 and art. VII, §1 with case law to support his complaint that Section 1-12-7[B] and [C] violate the N.M. Constitution.³ The district court's conclusion that Section 1-12-7[B] and [C] do not violate the constitution was not based on the appropriate constitutional analysis.

³ See Complaint [RP 2-5], [MSJ] [RP 28-32], Reply brief to MSJ [RP 79-80, 82-85, 87-88, and 94-96], Response to MTD [RP 145-148], which also incorporated the MSJ and Reply to MSJ.

C. The district court's failure to apply strict scrutiny to determine the constitutionality of Section 1-12-7[B] and [C] is not supported by New Mexico law

The district court begins its analysis by asserting that Plaintiff has the burden of showing a statute is unconstitutional, citing *Zhao v Montoya*, 2014-NMSC-025, and *People's Constitutional Party v Evans*, 1971-NMSC-116. Mr. Crum meets his initial burden of showing the statute is unconstitutional through his "as applied" challenge. The undisputed facts are that he tried to vote in the 2014 primary and was banned from freely exercising his right to vote because of Section 1-12-7[B] and [C]. Denying a qualified elector the right to vote strikes at the heart of the basic individual right in a democracy – the right to vote – which demands no less than strict scrutiny judicial review. *NARAL v Johnson*, 1999-NMSC-005, ¶¶36-37.

Zhao v Montoya, relied on by the district court, did not involve the fundamental right to vote. The case involved the classification of property for taxation purposes, and the court concluded rational basis applied because it was a challenge to a tax law. 2014-NMSC-025, ¶¶1-2, 34, 45-46.

Plaintiffs in *People's Constitutional Party v Evans* were members of a minor party who sought ballot position for a general election by a petition process. They sued, claiming the statutes setting requirements for nominating petitions were unconstitutional because of the number of signatures needed and the added requirement that each signer either affirm endorsement of the party principles or the

signer agree to register as a member of the party. 1971-NMSC-116, ¶5. Plaintiffs claimed the statute violated art. II, §8 and art. VII, §5 of the N.M. Constitution and the First and Fourteenth Amendment of the U.S. Constitution. *Id.* at ¶5.

Evans did not involve the right to vote or any arguments or challenges that the statute regarding nominating petitions interfered with the free exercise of an individual's right to vote. *Evans* included no analysis of whether strict scrutiny applied or not – the issue was not raised. The case was about the right to be listed on a ballot, not the right to vote in an election. *Kane v City of Albuquerque*, 2015-NMSC-027, ¶9 [explaining the right to be a candidate is not fundamental, whereas the right to vote is a fundamental right].

The district court cited *Evans* for the proposition that the state has a legitimate interest in assuring voters who want to vote in primary elections demonstrate at least a modicum of support for the political party and its nominee to be placed on a general election ballot. [RP 180] *Evans* did not involve any issues about voting in primaries. The phrase “modicum of support” in *Evans* refers to the nominating petition requirement that signers endorse the principles of that party or register as a member of the party. *Id.* at ¶19. The case does not hold that a modicum of support is required to vote in a primary election or that a voter must be a member of a political party to vote.

In 1988, a similar New Mexico election law that required signers of petitions for a minor party to declare that they were members of the party whose petition they sign, was declared unconstitutional in *Workers World Party v Vigil-Giron*, 693 F. Supp. 989 [D. NM. 1988]. The court held that the requirement that a petition signer affirm that they were a member of the party violated the First and Fourteenth Amendments to the U.S. Constitution. *Id.* at 997. The court explained that when 500 people decide to sign their names to a party's petition for access to a ballot, that alone is sufficient to demonstrate significant interest in and commitment to the new party and to impose additional requirements is an unnecessary burden on associational and voting rights. *Id.* at 996, citing *Anderson v Mills*, 664 F.2d 600 [6th Cir. 1981].

In *Workers World Party*, the state argued that *Evans* was dispositive because it upheld a similar requirement under a prior statute. The court criticized the *Evans* court for not considering all of the holdings in *Jenness v Fortson*, 403 U.S. 431 [1971], a case *Evans* relied on. The court explained that in *Jenness*, the Supreme Court held Georgia's petition process for ballot access was constitutional because the statute did not require signers to be members of the party. 693 F. Supp. at 996. In 1990, the New Mexico Legislature removed the requirement of party membership for signers of minor party petitions. NMSA 1978 §1-7-2[A] [1990] *Workers World Party's* analysis that membership with a political party is an unnecessary burden also

applies to a requirement that a voter must be a member of a political party to vote in primary elections. The act of voting on a political party's primary ballot is an act of affiliation with a party that is arguably a more important form of association than registering as a member of the party. *Clingman v Beaver*, 544 U.S. 581, 600-601 [2005] [conurrence, O'Connor, J.].

In *Democratic Party v Nago*, 982 F. Supp. 2d 1166 [D. HI. 2013], the Democratic Party claimed the open primary system violated its associational rights because persons who were not affiliated with the Democratic Party were allowed to vote in the primary election. The court concluded that the act of choosing a party ballot is an act of party association or affiliation and was sufficient to avoid violating a party's associational right. *Id.* at 178.

The district court's conclusion in this case that there is a requirement of "a modicum of support" to vote in a primary election, and such support can only be shown by requiring membership in a party is not found in art. II §8 or art. VII §1, and that interpretation is not supported by *Evans*. The associational right of a political party is satisfied by the selection of a party's primary ballot and voting for that party's candidate. *Clingman v Beaver*, 544 U.S. at 600-601. Forcing Mr. Crum to become a member of the Democrat or Republican Party to vote is unnecessary and unconstitutional. Strict scrutiny must be applied to Section 1-12-7[B] and [C], because they prohibit Mr. Crum's right to vote.

D. *Montaño v Los Alamos County* does not support applying a rational basis analysis in this case

The district court cites *Montaño v Los Alamos County*, 1996-NMCA-108, as authority that strict scrutiny does not apply in this case. [RP 18] *Montaño* did not involve a claim of denial of an individual's right to vote in an election as a violation of art. II, §8 or art. VII §1. The *Montaño* court explained that it was not applying strict scrutiny because the Appellant's "right to vote, per se, is not being hindered." *Id.* at ¶10. Conversely, Mr. Crum's right to vote was, per se, hindered on May 21, 2014.

The plaintiffs in *Montaño* claimed that Los Alamos County was required to elect its governing body from single member districts. *Id.* at ¶¶3-4. The plaintiffs argued equal protection violations because at-large elections were used instead of single member districts.

In analyzing the level of scrutiny in *Montaño*, this Court recognized an important principle that is applicable to this case, "voting is of the most fundamental significance under our constitutional structure." *Id.* at ¶8. The implication in *Montaño* was that if the right to vote is hindered, strict scrutiny applies.

The district court highlights the statement in *Montaño* that not every voting regulation is subject to strict scrutiny, except when the right is subjected to severe restrictions. *Montaño* at ¶8, citing to *Norman v Reed*, 502 U.S. 279, 289 [1992] for that proposition. *Norman* was a ballot access case involving a party's associational

rights, not an individual voter's claim of denial of the right to vote in a public election. The right discussed and decided by *Norman* was the plaintiffs' right to be listed on a Cook County ballot; not a violation of an individual's right to vote protected by a state constitution. *Id.* at 288. The voting regulations in *Norman* related to how to get on a ballot.

Mr. Crum agrees that not every voting regulation is subject to strict scrutiny unless the regulation "interferes to prevent the free exercise of the right to vote", then such regulation is in conflict with art. II, §8 of our Bill of Rights and requires that the state show a compelling interest for such interference. Where state legislation directly conflicts with the state's constitution, the legislation is void. *Az. St. Legis. v. Az. Indep. Redst. Com.*, _ U.S. _, 135 S. Ct. 2652, 2674, 192 L. Ed. 2d, 704 [2015]. In *Richardson v Carnegie Library Restaurant*, 1998-NMSC-084, ¶28, the court explained a fundamental right is that which the Constitution explicitly or implicitly guaranties.

The right to vote is explicitly granted by art. VII, §1 and is explicitly protected and guaranteed by art. II, §8. Section 1-12-7[B] and [C] prevented Mr. Crum from voting in the 2014 primary election, and that injury to his fundamental right must be measured against art. II, §8 and art. VII §1 with the strict scrutiny standard.

II
APPLYING PRINCIPLES OF CONSTITUTIONAL AND
STATUTORY INTERPRETATION TO ART. II §8, ART.
VII §1 AND SECTION 1-12-7[B] AND [C] REVEALS
IRRECONCILABLE CONFLICTS, AND INTERFERENCE
WITH THE RIGHT TO VOTE BY SECTION 1-12-7[B] AND [C]
VIOLATES THE NEW MEXICO CONSTITUTION

When government is alleged to have violated any of the rights protected by the New Mexico Bill of Rights, it is the responsibility of courts to interpret and apply the protections of the Constitution. *Griego v Oliver*, 2014-NMSC-003, ¶1. The district court did not apply the well-established standards for interpreting the N.M. Constitution nor did it explain why art. II, §8 does not protect Mr. Crum's right to vote against the prohibitions of Section 1-12-7[B] and [C].

The district court mischaracterized Mr. Crum's complaint as raising a question of "whether the legislature exceeded its authority by enacting a closed primary." [RP 178] The question presented by Mr. Crum's complaint is, does Section 1-12-7-[B] and [C] interfere to prevent Mr. Crum and 240,000 other DTS voters from exercising the right to vote in all elections for public officers as guaranteed by the N.M. Constitution? [RP 2-5]

The requirements for becoming a qualified elector [voter] are set out in art. VII §1, and being a member of a political party is not one of those requirements. Denying Mr. Crum and other DTS qualified electors the right to vote in primary elections because they are not members of the Democrat or Republican party

conflicts with the mandates of art. II, §8. In addition to being unconstitutional, requiring a voter to publically join a political party to be allowed to vote in a primary election, to many people, is an invasion of their privacy and repugnant to our democratic system. *Democratic Party v. Nago*, 982 F. Supp. 2d at 1170.

A. Standards for interpreting the Constitution and laws affecting the fundamental right to vote

The supreme right guaranteed by the Constitution of this state is the right of a citizen to vote at public elections. *State ex rel. Walker v Bridges*, 1921-NMSC-041, ¶8. Construction and interpretation of the N.M. Constitution requires that the language be taken in its common and ordinary sense as likely understood by the people who adopted the Constitution. *State ex rel. Witt v State Canvassing Board*, 1968-NMSC-017, ¶¶30-31. Art. II §8 and art. VII §1 were adopted at the 1910 constitutional convention. There were no primary elections in 1910 and there is no mention of primary elections or political parties in the N.M. Constitution.⁴

The plain, common and ordinary meaning of art. VII, §1 is every citizen who meets the qualifications listed in the first paragraph of that provision and is registered to vote "... shall be qualified to vote at all elections for public officers." Mr. Crum and other registered DTS voters meet those qualifications to vote. Primary elections are elections for public officers. [RP 178] Prohibiting Mr. Crum and other DTS

⁴ See published original version 1910 Constitution adopted by the Constitutional Convention held in Santa Fe, NM from October 3 to November 21, 1910, and as amended November 6, 1911 and November 5, 1912, Secretary of State published on April, 1914.

voters the right to vote in primary elections conflicts with the plain, ordinary meaning of art. VII, §1. The legislature has authority to establish a primary election; but, the legislature can not interfere to prevent qualified electors from exercising their right to vote in those primary elections. *Chase v. Lujan*, 1944-NMSC-027, ¶27.

Art. II, §8 mandates that all elections shall be free and open. The plain and ordinary meaning of the word “open” is not restricted to a particular group, category or participants. [www.merriam-webster.com/open.] Restricting publicly funded primary elections only to Democrat and Republican registered voters is contrary to the plain ordinary meaning of “open.” On its face, Section 1-12-7[B] and [C] violate the Bill of Rights and as applied to Mr. Crum, on May 21, 2014, interfered to prevent the free exercise of his right to vote in the 2014 publicly funded primary election. All elections are to be “open” meaning the primary election should not be closed to Mr. Crum and other DTS qualified electors.

The district court fails to explain how or why prohibiting Mr. Crum and other DTS voters from exercising their right to vote at the primary election does not violate art. II, §8. The district court provides no interpretation of art. II, §8 that would condone prohibiting qualified electors from voting in primary elections because they are not members of a political party.

B. Art. II §8 and art. VII §1 must be liberally construed in favor of the right to vote

The N.M. Constitution and statutes relating to elections must be liberally construed in favor of the right to vote. *Chase v. Lujan*, 1944-NMSC-027, ¶88 [Justice Mabry dissent – describing standards for interpreting the Constitution and statutes relating to elections.] Where strict interpretation of a statute threatens large scale disenfranchisement of voters, such interpretation shall fall to a more liberal interpretation in favor of the right to vote. *Bardacke v. Dunigan*, 1982-NMSC-93, ¶ 14. Voters shall not be lightly deprived of the right to vote. *State ex rel. Read v. Crist*, 1919-NMSC-005, ¶¶ 6, 63.

Section 1-12-7[B] and [C] must be critically analyzed through the prism of art. II, §8. The New Mexico Supreme Court explains the phrase “free and open” to be based on the principle that a ballot allows the voter to choose between lawful candidates for offices and no elections can be free and equal if any substantial numbers of persons who are entitled to vote are denied the right to do so. *Gunaji v Macias*, 2001-NMSC-28, ¶¶27-28. In *Gunaji*, the New Mexico Supreme Court interpreted the phrase “free and open” from art. II §8 by adopting the principles announced in *Wallbrecht v Ingram*, 164 Ky. 463, 175 S.W. 1022, 1026-1027 [1915], by the Kentucky Supreme Court’s interpretation of a similar Bill of Right in the Kentucky Constitution that reads all elections shall be “free and equal.” The Kentucky Supreme Court interpreted that phrase to mean “in an

election in which every person entitled to vote may do so, if he desires.... and when any substantial number of legal voters are, for any cause, denied the right to vote, the election is not free and equal in the meaning of the Constitution.” 175 S.W. at 1026. [emphasis added] The Kentucky Supreme Court also declared that its constitutional provision is mandatory and applies to all elections. That court held that the legislature could not pass any law, no matter how well-intentioned, if the law interfered in any manner to prevent any substantial number of legal voters from exercising their free and equal right to vote. *Id.* at 1026-1027.

Mr. Crum and 240,000 other qualified DTS electors were prohibited from voting in the 2014 primary election because they were not members of a major political party and that prohibition conflicts with and violates the constitutional mandate that all elections shall be free and open. The interpretation of the phrase, “*free and open*” in art. II §8 in *Gunaji* confirms art. II §8’s application to primary elections. Section 1-12-7[B] and [C] irreconcilably conflict with arts. II §8 and VII §1 by prohibiting qualified electors from voting in primary elections because they are not members of the Democrat or Republican parties.

III

THE LEGISLATURE CAN NOT FORCE QUALIFIED ELECTORS TO BECOME MEMBERS OF A POLITICAL PARTY TO VOTE BECAUSE PARTY MEMBERSHIP IS NOT A REQUIREMENT TO BECOME A QUALIFIED ELECTOR PURSUANT TO ART. VII §1

Art. VII, §1 of the N.M. Constitution contains the qualifications a citizen must meet to become a qualified elector. Art. VII §1 does not require membership or registration with a major party as a qualification to be a voter. Section 1-12-7[B] and [C] force Mr. Crum to join the Democrat or Republican party to exercise his right to vote at a primary election. The Election Code defines a “qualified elector” as one who is qualified to vote under the Constitution of the State of New Mexico and the Constitution of the United States. NMSA 1978 §1-1-4 [2011]. Only qualified electors are permitted to register to vote and after registration, become qualified voters. NMSA §1-4-2 [2011]. Mr. Crum and 240,000 other DTS voters meet the qualifications of art. VII, §1 and are qualified electors who have the right to vote in all elections for public officers.

Art. VII, §1, is the exclusive and supreme authority for establishing the qualifications for becoming a voter. *Chase v Lujan*, 1944-NMSC-027. The Constitution grants no authority to the legislature to add additional qualifications for becoming a qualified elector, except for requiring registration.

The district court tries to avoid the clash between Section 1-12-7[B] and [C] and art. II, §8 and art. VII, §1, by relying on provisions in the second paragraph of

art. VII, §1. That paragraph gives the legislature the power to require the registration of a qualified elector as a requisite for voting and the legislature shall regulate the manner, time, and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot, purity of elections, and guard against the abuse of the elective franchise. That section only gives authority for the Legislature to regulate the conduct of elections and the “manner” of voting. It does not allow for adding other qualifications to be a voter. Requisite means needed for a particular purpose, essential, necessary. [www.merriam-webster/requisite.] Section 1-12-7[B] and [C] exceeds the power granted by the Constitution because the legislature has added another requisite for voting – membership in the Democrat or Republican Party.

The New Mexico Supreme Court holds that the legislature’s authority under art. VII, §1 is limited to the specific language and provisions contained in that provision. In *Chase v Lujan*, 1944-NMSC-027, the court struck legislation that permitted absentee voting because the language of art. VII, §1 required qualified electors to be personally present to vote. *Id.*, ¶¶23-25. The plaintiffs argued that the legislature had authority under the second paragraph of art. VII §1 to allow absentee voting because the legislature could regulate the manner, time, and places of voting. The Supreme Court answered that the power to regulate the manner, time, and

places of voting, can not include changing the specific requirements of in-person voting as specified in the first paragraph of art. VII, §1.

The *Chase* court explained that the framers of the N.M. Constitution described all the requirements of those who are entitled to vote in the first paragraph of art. VII §1, and the legislature has no power or authority to change those qualifications. *Id.*, ¶¶ 23-24. The purpose of the power granted to the legislature in the second paragraph of art. VII, §1 is to ensure free and full exercise of the right to vote and those powers are subordinate to the right to vote. The right to vote must not be impaired by legislative regulation. *Id.* at ¶24, citing and quoting *In re Contested Election Fifth Ward*, 281 Pa. 131, 126 A. 199 [1924].

Just as the New Mexico Supreme Court held the legislature could not provide for absentee voting because of the specific requirements of in-person voting in the first paragraph of art. VII, §1, the Legislature also exceeds its authority by adding membership in a political party as a requisite to be a qualified elector for primary elections. It is a fundamental principle of our Constitution that changes to the Constitution must proceed by amending the Constitution – not by legislation. *Id.* at ¶23-24, 37, 39.

New Mexico's constitutional right to vote, with the added level of protection of the Bill of Rights at art. II, §8 is highlighted in the recent law review article, *The Right to Vote Under State Constitutions*, Joshua A. Douglas, 67 Vand. L. Rev. 89,

103-04, 113-14 [2014]. Professor Douglas discusses *Gunaji v Macias*, 2001-NMSC-028 and the New Mexico Supreme Court's interpretation of art. II, §8 that free and open elections connotes all eligible voters should have a chance to vote and that art. II, §8 applies to all elections. *Id.* at 103. The right to regulate elections is derivative of the people's right to vote. *Id.* at 136. State constitutions, like New Mexico's, grant the right to vote in mandatory terms and only secondarily delegate legislative control to regulate some aspects of the election process. The legislature's power to regulate can not override the fundamental right to vote and courts should consider a law that adds additional voter qualifications to be presumptively invalid under the state constitution because the law is contrary to the constitution's explicit grant of the right to vote. *Id.* at 134-136, 139.

The *Chase* court explained that the qualifications for voting in the first paragraph of art. VII, §1 can not be enlarged, diminished or dispensed by the legislature. *Chase* at ¶27. The district court does not mention *Chase v Lujan* and that case remains good law and should be followed in declaring Section 1-12-7[B] and [C] to be unconstitutional. Stare decisis requires that the district court and this Court follow *Chase*. *Trujillo v City of Albuquerque*, 1998-NMSC-031, ¶33.

Although the district court refers to the second paragraph of art. VII, §1 in its opinion, the court provides no explanation of how applying Section 1-12-7[B] and [C] to prohibit Mr. Crum from voting secures the secrecy of ballot, the purity of

elections, or guards against the abuse of the elective franchise. The court refers to *People's Constitutional Party v Evans*, 1971-NMSC-116, ¶10 and recites "elections of necessity must be organized and controlled to protect the right of suffrage, secrecy of the ballot and against confusion, deception, dishonesty, and other possible abuses of the elective franchise." [RP 179] The district court provides no analysis of how allowing Mr. Crum to vote in a primary election causes confusion, deception, dishonesty and other abuses of the elective franchise. There are ample protections in the election code for ensuring the secret ballot, the purity of elections and for guarding against abuse of the elective franchise. *Lopez v. Kase*, 1999-NMSC-011, ¶13 [discussing numerous protections in the election code]. Forcing qualified electors to join the Democrat or Republican party to vote is not needed for any additional protections under the election code. There was no evidence or facts presented to the district court of inadequate protections in the election code.

The Legislature can not interfere with Mr. Crum's right to vote by requiring him to become registered as a member of a political party in order to exercise his right to vote in a publicly funded primary election.

IV
A POLITICAL PARTY'S ASSOCIATIONAL
RIGHTS DO NOT TRUMP AN INDIVIDUAL'S
STATE CONSTITUTIONAL RIGHT TO VOTE

Mr. Crum's right to vote is granted by the N.M. Constitution and not the U.S. Constitution. Unlike art. II, §8 and art. VII, § 1 of the N.M. Constitution, the U.S.

Constitution does not provide an explicit right to vote. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 [1982]. States are sovereign and autonomous political entities for matters not ruled by the U.S. Constitution. *Id.* The questions in this case regarding infringement of Mr. Crum's right to vote are governed by the N.M. Constitution and not the U.S. Constitution. The N.M. Constitution is the supreme law of the State of New Mexico and each department of government, including the legislature, must comply with it. *State v. Lynch*, 2003-NMSC-020, ¶21.

The New Mexico Supreme Court holds, when reviewing rights protected by the N.M. Constitution, courts should independently analyze the N.M. Constitution if there is no comparable federal constitutional right, or when it determines federal doctrine is inadequate. *Naral*, 1999-NMSA-005, ¶29, *State v. Crane*, 2014-NMSC-026, ¶17.

The United States Supreme Court holds that political parties have associational rights protected by the First Amendment to the U.S. Constitution *Tashjian v Republican Party*, 479 U.S. 208, 214 [1986]. The Court has not addressed a political party's associational rights balanced against a right to vote granted by a state constitution. There is no comparable federal constitutional right to vote and the United States Supreme Court cases cited by the district court do not confront the issues presented in this case. Federal law can not answer the question

whether requiring membership/registration with a political party as a requirement for voting violates the N.M. Constitution. Stated another way, does a political party's right of association trump the New Mexico constitutional right to vote granted by art. VII, §1 and guaranteed and protected by art. II §8? The answer to that question begins and ends with analysis and interpretation of the N.M. Constitution.

A. The United States Constitution grants states broad powers to regulate elections

The right to vote is the most fundamental right in our democratic system. *Shelby County v Holder*, ___ U.S. ___, 133 S. Ct. 2612, 2637, [2013] [dissent Ginsburg, J.], citing *Yick Wo v Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 [1886]. The framers of the Constitution intended the states keep for themselves, as provided by the Tenth Amendment, powers to regulate elections. States have broad powers to determine the conditions under which the right of suffrage may be exercised. *Shelby County*, 133 S. Ct. at 2623. The right to vote deserves the most robust protection. *Wesberry v Sanders*, 376 U.S. 1, 17 [1964].

New Mexico provides greater protections for the right to vote than the U.S. Constitution. New Mexico's Constitution provides an individual's right to vote as a superior right over a political party's right of association because political parties are not mentioned in the constitution. Art. II §8 and art. VII §1 were part of the original 1910 constitution. Since 1910, there have been no amendments to the

Constitution recognizing political parties or establishing a closed primary system of elections restricted only to members of Democrat and Republican parties.

Core aspects of the electoral process such as qualifications to vote are regulated by the state constitution and the state legislature had no hand in making New Mexico's constitution in 1910, and the legislature can not alter or amend the state constitution. *Az. St. Legis. v. Az. Indep. Redst. Com.*, _U.S._, 135 S. Ct. 2652, 2673, 2675, 192 L. Ed. 2d, 704 [2015] [holding amendment to the state constitution, adopted by voters of Arizona, taking redistricting away from legislature and giving it to an independent commission does not violate the U.S. Constitution]. The animating principle of our constitution is that people themselves are the originating source of all powers of government and the power of a legislature in the enactment of laws of a state is derived from people of the state. 135 S. Ct. at 2671.

The people of the state of New Mexico established the qualifications for the right to vote in art. VII §1, and citizens who meet those qualifications have the right to vote at all elections for public officers. The people expressed clearly and succinctly in art. II §8 that all elections shall be "free and open" and the legislature shall not interfere to prevent the free exercise of the right to vote.

The people of New Mexico, not political parties, are the source of powers set out in the state constitution. The legislature can adopt a primary election system; but, can not prohibit qualified electors from voting in those public primary elections

because art. II §8 mandates “open” – not closed – elections and the legislature is prohibited from interfering with the constitutional right to vote.

B. No U.S. Supreme Court case has held that the right to vote is subordinate to a political party’s associational rights

The rights of political parties derive from the associational rights of members and candidates, and it would make little sense to afford greater protection to the rights of political parties than to the rights of voters and candidates. *Republican Party v Faulkner County*, 49 F. 3d 1289, 1297 [8th Cir. 1994]. Every burden on a party’s associational right in the election law context is not a severe one. *Burdick v Takushi*, 504 U.S. 428, 434 [1992]. A state may impose significant restrictions on a party’s associational freedoms because both the general and primary elections are quintessential forms of state actions. The protections that the First Amendment affords to a political party’s internal processes do not encompass a right to exclude non-members from voting in a state required – state financed primary election. The First Amendment does not inhibit states from acting to broaden voter access to state run – state financed elections. When states act to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment – but as a friend and ally. *California Democratic Party v Jones*, 530 U.S. 567, 594-595, [2000] [dissent Stevens, J.]

The district court’s conclusion that the legislature can prohibit Mr. Crum and other DTS qualified electors voting in primary elections to “safeguard the

associational rights of parties” is not based on any facts presented by the Republican Party or any other Appellees that allowing Mr. Crum to vote in a primary violates any party’s associational rights. [RP 179] Denying Mr. Crum his constitutional right to vote by the application of Section 1-12-7[B] and [C] can not be defended by a mere assumption that his act of voting in a primary election endangers the viability of the Democrat or Republican Parties. The district court provides no interpretation of the plain language of art. II §8 and art. VII §1 that supports excluding Mr. Crum and other DTS qualified electors from participation in a primary election simply because they are not members of the Democrat or Republican party. No United States Supreme Court or New Mexico Supreme Court case has held that a political party’s associational rights trump an individual’s right to vote granted and protected by our state constitution.

The district court relies primarily on *Cal. Democratic Party v Jones*, 530 U.S. 567 [2000], to support party associational rights as justification for Section 1-12-7[B] and [C]. That case did not address a state constitutional right to vote being infringed by legislative action. The case involved a challenge by the California Democratic Party to a referendum law that adopted a blanket primary system. The law required use of only one primary ballot that listed all candidates regardless of party affiliation and all voters, no matter what their party registration, could vote

for any candidate on the single primary ballot. The two top vote-getters from the primary election would then be listed on the general election ballot. *Id.* at 569.

A blanket primary system is not what results from allowing Mr. Crum the right to vote in primary elections. Each major New Mexico party would continue to have its own ballot and Mr. Crum will request a party ballot and cast his vote for that party's candidates. Republicans and Democrats will continue to be allowed only to vote on their respective party ballots.

In *Jones*, the Court explained that a primary system where one can change voter registration on the day of election, but, limits the person to only vote on one party ballot that the voter selects, does not violate a party's associational rights. *Id.* at 577. This is essentially what will happen at a primary election when Mr. Crum asks for either a Republican or Democrat ballot; except he will not be required to change his DTS registration and become a member of a political party to vote.

The *Jones* majority stated its two greatest concerns about the California blanket primary were the stated objectives of the proponents of Proposition 198 to change the parties' political messages and party raiding. *Jones*, 530 U.S. at 578-580.

Mr. Crum has repeatedly emphasized in briefs and oral argument that he has no intent to change any party message and he has no desire to engage in internal party conventions or party nominating procedures. [RP 1-6, 32, 90-91, 93, 95] The

objective of his complaint is to be allowed to vote. There are no facts in his complaint to support a concern of party raiding by allowing him the right to vote in primary elections. "Party raiding" would not occur because Mr. Crum and other independent voters are not members of an opposing party. Party raiding only occurs when voters registered with one political party, vote in large numbers on an opposing party's ballot. *Rosario v. Rockefeller*, 410 U.S. 752, 770 [1973] [dissent, Powell, J.] [danger of party raiding is insubstantial where a voter has made no party commitment at all].

Instead of presuming facts in the complaint to be true, as required for a Rule 1-012[B][6] motion, the district court assumed facts for which no evidence was presented. The *Jones* court decision was based on facts presented to the trial court, unlike the district court's conclusions in this case, which were not supported by any facts or evidence presented by Appellees that denying the right to vote to Mr. Crum preserves parties as viable and identifiable interest groups and enhances party's electioneering and party building efforts, minimizes voter confusion, and prevents party raiding. [RP 181] No facts were presented to support any of those concerns and the Attorney General [Intervenor] admits that if those concerns were the result of allowing DTS voters to vote in primaries, one would expect there would be plenty of evidence from states that have open primaries to support those concerns. [RP 43] The only facts the court is to consider on a motion to dismiss are facts in Mr.

Crum's complaint, which are presumed true, and the court does not point to any of those facts to support its conclusion that allowing Mr. Crum to vote in a primary election violates RPNM's associational rights. *Delfino v. Griffo*, 2011-NMSC-015, ¶9 [standards for reviewing Rule 1-012[B][6] motion].

In *Jones*, the Court described how California could construct a blanket primary system that would not violate party associational rights by simply having states determine the qualifications for candidates to be on the primary ballot which could include nominations by each party. Then each voter, regardless of party affiliation, could vote for any candidate and the top two vote getters would move on to the general election. *Jones*, 530 U.S. at 585-586. That description explains that a primary system open to independent voters does not violate associational rights.

Eight years after *Jones*, Washington state's blanket primary system was upheld by the Court from a facial attack in *Washington State Grange v Washington State Republican Party*, 552 U.S. 442 [2008]. Using the same argument RPNM makes in this case [that allowing unaffiliated voters to vote in a primary election violates associational rights], the court dismissed those arguments pointing out the slight difference between Washington state's blanket primary and the California blanket primary, made Washington's primary system constitutional and allowing independents to vote in that primary was not a per se violation of associational

rights. The Court emphasized that the political parties presented no evidence that allowing unaffiliated voters to vote in primary elections violated their associational rights. *Id.* at 456-58. This is the same error the district court makes in concluding that denying Mr. Crum his constitutional right to vote protects the RPNM's associational rights because that conclusion is based on assumptions – not facts.

In another United States Supreme Court case relied on by the district court, *Clingman v Beaver*, 544 U.S. 581 [2005], the Court explained that an Oklahoma election law allowing parties to invite independent voters to vote in primaries by selecting a major party primary ballot without having to change party affiliation did not violate the associational right of a major party. *Id.* at 592.

None of the United States Supreme Court cases cited by the district court hold that allowing non-affiliated voters to participate in a primary election by selecting a major party ballot and voting on that party's ballot, without having to become a member of that party, violates a political party's associational rights. The district court's rationale that Section 1-12-7[B] and [C] protect a political party's associational rights by denying the right to vote to Mr. Crum is based on assumptions. Absent a factual basis, the court's conclusions of potential harm, such as party raiding, amounts to nothing more than a generalized unsupported statement which is neither substantial nor persuasive, nor appropriate in a motion to dismiss. *State ex rel. NM Press Assn. v Kauffman*, 1982-NMSC-060, ¶30 [holding mere

speculation that publishing the names of jurors might expose them to intimidation during a trial is not enough to justify a prior restraint on the media's First Amendment rights]. Speculation that allowing Mr. Crum and other DTS qualified electors the free exercise of the right to vote in primaries might cause party raiding is not sufficient to prohibit Mr. Crum and 240,000 other DTS voters from exercising their constitutional right to vote at primary elections.

C. The dissents in *Jones* and *Clingman* support New Mexico's constitutional right to vote as a superior right to a political party's associational right

The New Mexico Supreme Court does not hesitate to adopt or rely on dissenting opinions in United States Supreme Court cases to support analysis of greater protections under N.M.'s Constitution compared to the U.S. Constitution. *State v. Crane*, 2014-NMSC-026 ¶¶22-25, adopting dissent in *California v. Greenwood*, 486 U.S. 35, 45-46, 55-56 [1988]. In *Clingman*, Justice Stevens, joined by Justice Ginsburg, stated the majority was focusing too much on associational rights rather than the right to vote and when a state makes a primary election part of the state's election process, every eligible citizen's right to vote should receive the same protection as in the general election. 544 U.S. at 609-10. Justice Stevens continued that a state simply has no interest in classifying voters by their political party and limiting the election in which voters may participate as a result of that classification. *Id.* at 611. That analysis comports with art. II, §8 and

art. VII §1 of the N.M. Constitution. which makes no distinction for the right to vote in a primary or general election, nor requires membership or registration with a political party as a requisite to be a qualified elector.

Justice Stevens also recognized that primary elections are replacing general elections as the most common method of determining the composition of state and local legislative bodies. *Id.* at 620. This concern was proven in the New Mexico 2014 primary election when almost 60% of public officers on the primary ballots were elected without any general election opposition – meaning Mr. Crum and 240,000 other independent voters had no say in electing New Mexico officials who are supposed to represent them.

Justice O'Connor in her concurring opinion in *Clingman* pointed out the weakness of the political party's arguments that only those voters who are registered or become members of a party show sufficient association for voting. She explained association with a party takes on many forms other than registering as a member, and voting for a party's candidate at a primary election is arguably a more important act of association than registration as a member. 544 U.S. at 600-601. The United States Supreme Court has acknowledged a benefit to major parties from allowing independent voters to participate in primary elections by helping parties choose candidates more likely to be successful in general elections. *Tashjian*, 479 U.S. at 221-222. The Court has explained that opening primaries to all registered voters to

encourage greater voter participation might serve a compelling state interest. *Democrat Party of the United States v Wisconsin, ex rel. La Follette*, 450 U.S. 107, 121, 101 S. Ct. 1010, 57 L. Ed. 2d 82 [1981]. Prohibiting voters unaffiliated with a major political party from voting in primaries empowers political parties at the expense of rights of qualified electors. *O'Callaghan v State*, 914 P.2d 1250, 1262 [AK. 1996] [upholding Alaska's blanket primary system against claims of violations of associational rights].

The district court's opinion is not based on any facts in the record to support a conclusion that allowing Mr. Crum to vote in a primary election severely interferes with RPNM's associational rights. The N.M. Constitution gives greater rights and protection to the right to vote than to a political party's associational rights. No United States Supreme Court case holds that a state constitution granting the right to vote to all qualified electors in all elections violates a political party's associational rights when all qualified electors are allowed the right to vote in primary elections.

V CONCLUSION

The sovereign power of the State of New Mexico comes from the people. Art. II §2. The people of New Mexico spoke powerfully, forcefully, and clearly that Mr. Crum, a citizen who meets the constitutional qualifications to vote, shall have the right to vote in "all elections for public officers." A wall of protection was

erected around Mr. Crum's right to vote when the people adopted art. II §8 and no power, including the Legislature, can prevent Mr. Crum's "free exercise" of his right to vote. The Legislature violated the will of the people when it enacted Section 1-12-7[B] and [C] which prohibited Mr. Crum from voting in publicly funded primary elections because he is not a member of a political party. The people of New Mexico have the sole and exclusive power to change the qualifications for becoming a voter and only they can add membership in a political party as a qualification to vote in an election by amending the constitution.

The state constitution grants no preferential right to vote to Republicans and Democrats. The associational right of RPNM does not make their party members right to vote superior to Mr. Crum's constitutional right to vote. No United States Supreme Court case holds that a state constitutional right to vote in a primary election, regardless of political party membership, violates a party's associational rights. RPNM's associational rights do not preempt Mr. Crum's constitutional right to vote.

The district court's decision that the Legislature can take Mr. Crum's right to vote away through Section 1-12-7[B] and [C] is not based on any facts showing a compelling state interest in denying Mr. Crum his right to vote in a primary election. Section 1-12-7[B] and [C] cannot constitutionally stand against strict scrutiny analysis because of the statute's infringement on the fundamental right to vote.

A. Relief requested

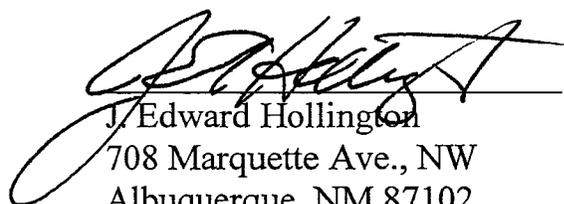
Mr. Crum respectfully requests this Court to reverse the district court's order of dismissal and because there are no material issues of fact in dispute, decide the constitutional question in favor of Mr. Crum's right to vote and order Appellees to permit him and other DTS registered voters the right to vote in primary elections by requesting a party ballot and casting their votes on the requested ballots.

B. Oral argument requested

Appellant requests oral arguments because this case involves the fundamental right to vote that affects Mr. Crum and over 240,000 other DTS voters' right to vote. Oral argument will assist the Court in deciding the important constitutional issues of this case.

Respectfully submitted,

J. EDWARD HOLLINGTON & ASSOCIATES, P.A.



J. Edward Hollington
708 Marquette Ave., NW
Albuquerque, NM 87102
(505) 843-9171; (505) 843-7027 (fax)
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to all counsel of record on this 13th day of January, 2016:

John C. Anderson
Holland & Hart LLP
P.O. Box 2208
Santa Fe, NM 87504
jcanderson@hollandhart.com

*Attorney for Republican Party
of New Mexico*

Nicholas M. Sydow
Office of the Attorney General
408 Galisteo St.
P.O. Box 1508
Santa Fe, NM 87504-1508
nsydow@nmag.gov

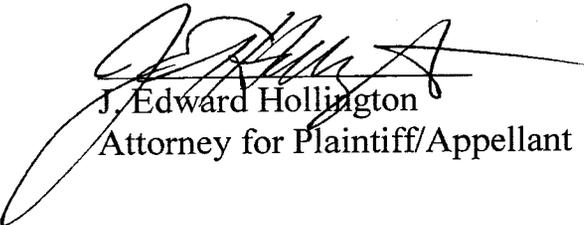
Attorney for New Mexico Attorney General

Randy Autio
Bernalillo County Legal Department
520 Lomas Blvd NW, 4th Fl.
Albuquerque, NM 87102-2118
rmautio@bernco.gov

Attorney for Bernalillo County Clerk

Robert M. Doughty, III
Doughty, Alcaraz, & deGraauw, P.A.
20 First Plaza NW, Suite 412
Albuquerque, NM 87102
robdoughty@dadglaw.com

Attorney for New Mexico Secretary of State


J. Edward Hollington
Attorney for Plaintiff/Appellant