

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

DAVID G. CRUM,

Plaintiff,

v.

D-202-CV-2014-03730

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

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Republican Party of New Mexico's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. The motion is **GRANTED**.

I. BACKGROUND

Plaintiff filed a *Verified Complaint for Declaratory Judgment and Injunctive Relief that the New Mexico Constitution Grants Voters Registered as "Declines to State a Party Affiliation" [DTS] the Right to Vote in Primary Elections* (Complaint). In the Complaint, Plaintiff alleges he is a resident of Bernalillo County and a qualified voter who is registered to vote. [Compl. ¶ 1.] Plaintiff further alleges his certificate of registration contains the letters "DTS" which means Plaintiff has declined to designate a party affiliation. [Compl. ¶ 1.] Plaintiff further alleges that on May 21, 2014, he attempted to cast his vote in the 2014 primary election and was not allowed to vote. [Compl. ¶ 4.]

Plaintiff seeks a declaration that: (1) Article VII Section 1 of the New Mexico Constitution requires that Plaintiff and other DTS registered voters be allowed to vote in all elections for public officers including primary elections; (2) Article II Section 8 requires that all elections be open to Plaintiff and other DTS registered voters including primary elections; (3) NMSA 1978, § 1-12-7 (B) and (C) (2003) violate the New Mexico Constitution and should no longer be enforced in such a manner that it prevents Plaintiff and other DTS registered voters from voting; and (4) Plaintiff and other DTS voters be allowed to vote in primary elections by requesting a particular party ballot and that the votes they cast during a primary election be counted as all other votes cast in the primary election. [Compl. ¶ 32.] Plaintiff also requested that the Secretary of State and Bernalillo County Clerk be enjoined from taking any action to prevent him and other DTS registered voters from requesting party ballots and voting in primary elections. [Compl. ¶ 34.]

The Court ordered the two major political parties—the Democratic Party of New Mexico and the Republican Party of New Mexico—joined as Defendants. The Republican Party appeared and filed a motion to dismiss. The Democratic Party did not enter an appearance.

II. LEGAL STANDARDS

A motion to dismiss for failure to state a claim under Rule 1-012(B)(6) NMRA tests the legal sufficiency of the complaint, not the facts that support it. *Wallis v. Smith*, 2001-NMCA-017, ¶ 6, 130 N.M. 214. For purposes of the motion, the well-pleaded material allegations are taken as true and all doubts are resolved in favor of the sufficiency of the complaint. *Id.* “[D]ismissal is proper only when the law does not support the claim under any set of facts subject to proof.” *Id.*

III. DISCUSSION

A. Plaintiff's Argument

Plaintiff asks the Court to declare that the following statutory provisions violate the New Mexico Constitution:

1-12-7. Conduct of election; persons not permitted to vote.

* * *

- B. A person whose major party affiliation is not designated on his original certificate of registration shall not vote in a primary election.
- C. 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.

NMSA 1978, § 1-12-7 (B), (C). Specifically, Plaintiff claims these two provisions violate Article II, section 8 of the New Mexico Constitution, which states:

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.

N.M. Const. art. II, § 8. Plaintiff claims these provisions also violate the clause of Article VII, section 1, which states:

Every citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons and persons convicted of a felonious or infamous crime unless restored to political rights, shall be qualified to vote at all elections for public officers.

N.M. Const. art VII, § 1.

Plaintiff argues that by enacting sections 1-12-7 (B) and (C), the Legislature unconstitutionally infringed on his and other DTS voters' constitutional right to vote. He argues that because the right to vote is fundamental, any limitation on the right is subject to strict scrutiny. According to Plaintiff, the Secretary of State and Bernalillo County Clerk have not shown compelling state interests for denying DTS voters the right to vote in primary elections.

B. Analysis

1. Sections 1-12-7 (B) and (C) do not violate the New Mexico Constitution.

The Court assumes for purposes of this analysis that, as Plaintiff contends, Article II, section 8 and Article VII, section 1 of the New Mexico Constitution encompass the right to vote in primary elections. The Court declines to hold, however, that NMSA 1978, § 1-12-7 (B) and (C) violate the New Mexico Constitution.

The party contesting the constitutionality of a statute, Plaintiff in this case, bears the burden of showing the statute is unconstitutional. *Zhao v. Montoya*, 2014-NMSC-025, ¶ 11. The statute is presumed constitutional and the Court must uphold it “unless satisfied beyond all reasonable doubt that the Legislature went outside its constitutional authority in enacting [the] statutory requirements.” *People’s Constitutional Party v. Evans*, 1971-NMSC-116, ¶ 11, 83 N.M. 303.

The Court is not persuaded that the Legislature exceeded its constitutional authority by enacting sections 1-12-7 (B) and (C). These sections establish what is commonly referred to as a closed primary system. According to Intervenor State of New Mexico, our state is one of eighteen states that conduct closed primaries. [Intervenor’s Resp. at 2 & n.1] However, the question here is not whether open primaries are preferable to closed primaries, but whether the Legislature exceeded its constitutional authority by enacting a closed primary system.¹

Plaintiff correctly asserts that the New Mexico Constitution does not require voters be members of a major party. This does not mean, however, that the Legislature acts outside its constitutional authority by requiring voters to affiliate with a party as a requirement of

¹ The Court notes Plaintiff’s claim that he is not seeking an “open” primary, but simply the right to request either a Democrat or Republican ballot and cast his votes on that party’s ballot, without having to designate a party affiliation. [Resp. at 6–7.] Primary elections may be “open” to different degrees. Suffice to say that Plaintiff seeks a primary system that is more “open” than the law currently permits.

participating in a primary election. “The Legislature is charged with the duty of enacting laws to accomplish the purity of elections and protecting against abuses.” *Evans*, 1971-NMSC-116, ¶ 10.

“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.” *Evans*, 1971-NMSC-116, ¶ 10. The New Mexico Constitution expressly confers on the Legislature the authority to impose restrictions that secure these purposes:

The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of the elective franchise.

N.M. Const. art VII, § 1.

Plaintiff, as a DTS voter, seeks the right to request a Democrat or Republican ballot at a primary election and cast his vote for candidates’ names that appear on the Democrat or Republican ballot. [Resp. at 3.] However, the Legislature has determined that only voters who have designated a party affiliation in advance may vote in primary elections, and further, a voter at a primary election may only vote for the candidate of the party with which the voter has previously affiliated.

The Court concludes the Legislature did not exceed its constitutional authority because the requirement to affiliate safeguards the associational rights of political parties. The First Amendment of the United States Constitution protects the rights of citizens “to band together in promoting the electorate candidates who espouse their political views.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402, 2408 (2000) (holding blanket primary system, in which voters could vote for any candidate regardless of voter’s party affiliation, violated political parties’ First Amendment right of association); *see also Tashjian v. Republican Party of Conn.*,

479 U.S. 208, 214, 107 S. Ct. 544, 548 (1986) (“The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization.”). New Mexico also recognizes that “[o]ne of the principal purposes of a political association or party, as well as of any association, is to promote the advancement of common ideas and beliefs and the airing of grievances.” *Evans*, 1971-NMSC-116, ¶ 17.

Plaintiff argues that because he asserts his rights under the New Mexico Constitution only, the Court is not bound by federal case law. While this case presents an issue of New Mexico constitutional law, one of the major political parties has appeared and expressly asserted its First Amendment protections. The Court therefore must consider the fact that the statute Plaintiff challenges safeguards rights that arise under the federal constitution; namely, the associational rights that the First Amendment confers on political parties.

Plaintiff claims the right to vote in primaries does not implicate internal party matters because candidates who appear on primary ballots are determined by the parties’ nominating conventions. It is perhaps correct that the right to vote in a primary election does not entail the same degree of party involvement as the right to participate in a party nominating convention. Nevertheless, voting in a primary has at least some effect on party affairs because the candidate selected in a primary convention is the candidate who will appear on the ballot as the party’s representative in the general election. The State has a legitimate interest in assuring that voters who wish to vote in a primary election demonstrate at least a modicum of support for the political party and its nominees whose names are placed on the general election ballot. *See Evans*, 1971-NMSC-116, ¶ 19.

Finally, the requirement to affiliate as a condition of voting in the primaries also has been held to advance a number of important state interests related to the integrity of the electoral

system, aside from First Amendment associational rights. These interests include: preserving parties as viable and identifiable interest groups; enhancing parties' electioneering and party-building efforts; minimizing voter confusion to the extent the general voting population relies on party labels as representative of certain ideologies; and preventing "party raiding."² *Clingman v. Beaver*, 544 U.S. 581, 593–97, 125 S. Ct. 2029 (2005). That Plaintiff claims he has no interest in party raiding does not alter the conclusion that the statute serves the legitimate and valid state goal of preventing this potentially disruptive practice that distorts the electoral process. *See Rosario v. Rockefeller*, 410 U.S. 752, 760–61, 93 S. Ct. 1245, 1251 (1973).

2. Strict scrutiny does not apply.

The whole of Plaintiff's argument relies on his assertion that voting is a fundamental right. However, Plaintiff's express disclaimer of an equal protection claim causes the Court to question whether it is necessary to address Plaintiff's argument that strict scrutiny applies to the statutory provisions under review. Nevertheless, because the issue featured prominently in the briefs and at oral argument, the Court will address it.

In the context of an equal protection claim, it is undoubtedly correct that voting is a fundamental right. However, the inquiry does not end there. "[N]ot every voting regulation is subject to strict scrutiny. ...It is only when those rights are subjected to *severe* restrictions that the regulation must be narrowly drawn to advance a state interest of compelling importance." *Montano v. Los Alamos County*, 1996-NMCA-108, ¶ 8, 122 N.M. 454 (emphasis added; citations, alteration, and quotation marks omitted) (applying rational basis test to statute permitting H class county to conduct at-large elections for members of county council).


² "Party raiding" is defined as "the organized switching of blocks of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9, 103 S. Ct. 1564, 1570 n.9 (1983) (citation omitted).

The Court does not agree with Plaintiff's characterization that sections 1-12-7 (B) and (C) take away the right to vote; rather, they impose a requirement that voters designate a party affiliation as a condition of participating in a primary election. Plaintiff has not identified any burden imposed by this requirement—let alone a severe burden. Plaintiff argues instead that opening primaries to DTS voters will not severely burden political parties' associational rights. This formulation mischaracterizes the inquiry. The question is not whether the relief Plaintiff requests burdens the parties, but whether the statutory requirement to affiliate burdens him. Upon direct inquiry by the Court at oral argument, Plaintiff failed to articulate the nature of the burden imposed by the requirement that voters designate a party affiliation before they may vote in a primary.

IV. CONCLUSION

Plaintiff's Complaint, which asserts that sections 1-12-7 (B) and (C) violate the New Mexico Constitution, fails to state a claim upon which relief may be granted. Sections 1-12-7 (B) and (C) fall within the Legislature's constitutional authority to enact laws that secure the purity of elections and guard against the abuse of the elective franchise. Accordingly, Defendant Republican Party of New Mexico's Motion to Dismiss is **GRANTED**. Because the Complaint is dismissed for failure to state a claim, the Court does not reach the merits of Plaintiff's motion for summary judgment.

IT IS SO ORDERED.


The Honorable Denise Barela Shepherd
District Court Judge

This is to certify that a true and correct copy of
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