ORAL ARGUMENT – 7/24/02
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STATE OF TEXAS V. HODGES

PARSLEY: Faced with disqualification as a Democratic candidate on the general November election ballot, because he voted in the Republican primary, Judge Hodges asserts that §162.015 of the Election Code is unconstitutional as applied to him because it severely burdens his right to vote.

But Judge Hodges mischaracterizes the burden here. Section 162.015 does not severely burden his right to vote. It is a restriction on his candidacy. And any restriction or burden on his right to vote is secondary.

But what he is really asserting here is the right to be a candidate in one primary and yet vote in another party's primary. And that right simply does not exist.

Because the statute does not impose a severe burden on any right, the state's important regulatory interest in ensuring the stability and integrity of the election processes and in ensuring the protection of the associational rights of the political parties justify any restriction on Judge Hodges' candidacy.

O'NEILL: What would be wrong with constructing a narrow rule, and specifically I'm concerned about the as applied challenge. If we were to construct a narrow rule and interpret the statute under the as applied challenge to only allow him to be a candidate if there is no opposition in either party or as a write-in candidate, then what interest does the state have in precluding that result?

PARSLEY: There are still the interests in the basic integrity of the political process being harmed and in voter confusion as to which party he's actually affiliated with.

O'NEILL: Well how can that happen if he's completely unopposed?

PARSLEY: It can happen because the voters in the primary would be confused as to why he voted in the Republican primary in the first place. As to whether he holds those ideologies are still the ideology of the democratic party. And that confusion still exists regardless of whether he has opposition or not. And to kind of back up a little bit and explain. This restriction is just an extension of the basic restriction placed on any voter. Any voter that votes in a primary is confined to that political party for the remainder of the political cycle. You can vote in that primary and the runoff, and you can't cross-over and vote in the other primary's runoff if there is one.

When you have a candidate, that candidate is more visible than the members of the general public. There is a heightened public scrutiny given to people who are seeking

leadership in a party, or who are already leaders in the party. And the sheer fact that a leader of a party crosses over to vote in another party's primary creates turbulence in the system. It obviously would cause some consternation among members of both parties as to why someone was going from one party and voting in the other party, regardless of the motives, regardless of whether they had an opposition or not.

O'NEILL: Why shouldn't we leave that to the democratic party to decide if they want to put him back on the ballot?

PARSLEY: Because even though the democratic party in this particular instance may not have any ill motives, there may be a situation that would occur where a candidate would do this and the party would be complicit in that and put them back on the ballot regardless of whether they had an opponent or not. And as an applied challenge even in the context of an as applied challenge, the fact that the state has legitimate interests in preserving the statute as a whole justify the statute and the burdens placed on their candidacy by that statute even if they all didn't appear in that one particular as applied challenge. And that's the Monroe case, which was an applied challenge in which the US SC said, we've never required a state to empirically prove that everyone of its interests underlying a regulatory statute in terms of election processes was met in any given situation.

PHILLIPS: Why shouldn't we interpret the statute as Judge Hodges alleges, and if his interpretation is a reasonable one, why shouldn't we give it that interpretation in order to enhance voter choice?

PARSLEY: Well first his interpretation isn't reasonable, because his interpretation is essentially that if he is a candidate in one primary and votes in the other primary then he can now be the candidate in either primary. And that's not apparent at all from the face of the statute. The face of the statute clearly prohibits you from being a candidate for one party and voting in the other party's primary. He wants to read an additional word in there before or as a candidate to say parties as a candidate to get the plural for both parties. And that's just not available from the face of the statute.

Additionally, the regulatory construction given the statute by the Sec. of State's office is the reading that the state urges and that the DC found was unconstitutional, but found was the actual statutory construction, which is if you are a candidate in one party, yet vote in the other party's primary, you are prohibited from being on the general election ballot as the candidate for the other party.

JEFFERSON: Do you agree that we have jurisdiction to decide that statutory question?

PARSLEY: Yes, you do, because Judge Hodges is not seeking to change the judgment of the TC. He is simply asserting another independent ground for affirmance of the TC's judgment. So I believe under rule 25 of the Rules of Appellate Procedure that there is jurisdiction for this statutory construction argument.

HECHT: I can see the state's interest in trying to bring order to the primary and general election process, but it's awfully hard to see how this statute furthers that. If at all very much. I can understand why the state might have an interest in preventing crossover voting of voting in one primary and then voting in the other party's runoff. If the state has an interest here it seems awfully slight. What interest does this further that the state has?

PARSLEY: It really furthers the stability and integrity of the election process.

HECHT: It just doesn't seem to me like it's going to fall apart if we let candidates do this sort of thing. I can understand that it might impair it significantly if we let people vote just willy nilly. I can understand that. But how is this going to really hurt anybody?

PARSLEY: It hurts the process because it allows someone, as I said before, someone who is a leader in one party to crossover to vote and select as the US SC has set the standard barrier of a party for which he is obviously ideologically diverse. It harms the associational rights of the political parties themselves, because that is exactly what he is doing even though it is not his own race that he is voting in. He voted in a DC race for his friend and Sunday school teacher. And even though it was an act of friendship and not something malevolent it still works to have him as a Democrat electing the Republican party's nominee. And that in and of itself is harmful to the process.

HECHT: It seems to me that if we gave the party the choice of disqualifying him, that would protect the associational rights. But to tell the party you can't have him even if you want him seems to me to - it may impair associational rights as much as it protects them. I mean you just can't tell.

PARSLEY: But again, you could have a situation where the party itself was complicit in whatever mischief was going on with the cross voting. And in this circumstance the state has an interest in keeping people aligned along their party lines for that 8 month period between March and November. And that's all the state requires is - you vote in the primary, you're affiliated and you are affiliated through whatever party processes there are thereafter. And if he did cross back over and was the Democratic candidate, at the end of the day you would have someone affiliated with Republican party as a Democratic candidate, which does harm to the two party system.

HECHT: What if the law said you couldn't be a candidate if you had voted in the other party's primary for the last two cycles? the last three? the last four cycles?

PARSLEY: The US SC has said that's unconstitutional. A 23-month restriction on affiliation is unconstitutional. But a 9 to 11 month restriction has been held to be constitutional. And this is at most an 8 month. It doesn't count during off-ballot years. And although Judge Hodges attacks as being under inclusive, it's actually constitutional. Because for the state to require him to hold that affiliation for an extended period of time without being able to switch, then it would run into constitutional implications.

There is also in terms of the under inclusiveness argument, there is also a good reason why that statute doesn't exist, and that is the ability for the parties to make their own decisions in that regard. If he had done this in an off ballot year it would likely become a campaign issue. The voters wouldn't know why. He could explain. And they could determine whether as a matter of their voting preference whether they thought that was an adequate reason or not. But as it is, the voters never got the chance to make that determination. They were voting for him in the Democratic primary when he was voting in the Republic primary. And because that occurred, there has been no ability for the voters who actually make up the party, and not just the party leadership, to determine whether they believe he is still ideologically the candidate they would choose to vote for. It also doesn't give anyone the ability to say, I am more ideologically aligned with you, or he's not a Republican. I am. You should vote for me. And oppose him in that election.

ENOCH: It seems to me that argument is stronger if we had a primary system like other states that require people to register with one political party as opposed to another and therefore actually have an association of Republicans or an association of Democrats and then restrict their rights on which primary you go to. It seems to me you have a stronger argument that the state has an interest in keeping registered Republicans from voting in the Democratic primary. But our state, its only interest is your affiliation occurs when you vote in the primary or you sign some sort of affidavit of affiliation, but it has nothing to do with whether you are a candidate. We're really only interested in holding that through that general election cycle essentially, and then you're free to vote in somebody elses primary afterwards. And so all the arguments about the association that - it seems to me the Republicans under the statute can't assert they have the right to associate only with Republicans and not Democratic candidates if the mark of the association is the voting in the Republican primary. Democratic candidates can vote in the Republican primary. There is nothing that keeps them from doing so by law or otherwise, and so the Republicans don't have an argument that we don't want to have Democratic candidates at our state conventions because they are eligible to be there the moment they run in the primary.

So the only thing that happens is, I guess, the Democrats have the rights to insist that whoever represents them on the ballot in the general election has not voted for a Republican in a primary before that general election. Because that's all that happens here. If I file as a candidate in the Democratic party, that's not my affiliation under the statute. So I just do that. I then go and affiliate with the Republican party by voting in the Republican primary. The result of the statute is, I now cannot represent the Democratic party on the ballot. So it seems to me the interest that's being protected is the Democratic party's right to keep their candidates from affiliating with another political party. It seems to me that's the interest that here. Do they have the right to keep their candidates from voting in the other party's primary?

PARSLEY: Certainly under the Democratic Party v. Jones case, that is exactly what the US SC said, that the right to association means anything. It means the right to disassociate withe people of unlike ideology and to require that people who vote in your primary are people who will at least affiliate with your party. So that is a valid interest. But there is also a valid interest as I previously stated for the Republican party to not have people of unlike ideologies choosing their

standard barrier. And simply because the legislature chose to use a less restrictive system than some other states did is simply a policy choice on the part of the legislature.

ENOCH: The Republicans can't stop a Democratic party candidate from affiliating with the Republican party because you do that just by voting in the Republican primary. That interest is not before us here. It really is an interest in the Democratic party to require their candidates to not vote in the Republican primary.

PARSLEY: I don't agree, Judge Enoch, that the Republicans don't have an interest - the way this sets up that the Republican party's interests are not also impacted because under the system you're really talking about cross voting and party raiding, and under the system the legislature has put together, the legislature assumes that the persons of one ideology are going to want to cast their vote in that particular primary in order to choose...

HECHT: But that just doesn't happen. I mean people vote life long Democrats vote in the Republican primary because of the same reason this judge did. You can have a friend there. And vice versa. I mean if all the action is in a particular primary it quite frequently happens so I am told that people vote in that primary just so they will have a choice. I mean it would horrify them if they had to carry around a sign that said I am one or the other.

PARSLEY: But as a matter of public record that's what they are. They have affiliated with whichever party they voted in that primary, either their card is stamped, or it's in public record as that's who they affiliated with and that is as a matter of concern, that's who they are for that political cycle.

JEFFERSON: Aren't there examples where even the party at the top might have incentive to support even against their own party's candidate the other party's candidate because that - let's say the Republican party knows somebody who is in the Democratic party but who supports more precisely and specifically principles that the Republican party espouses on. And that the person in the Republican party they would prefer not to be a nominated or elected candidate. And if that's permissible and if that happens then why shouldn't we look at this as a similar situation?

PARSLEY: Fundamentally because the statute is reasonable and legitimate and nondiscriminatory and the purposes that it serves may not be served in that particular circumstance or there may be some other reasons for the cross party voting. But that is what the statute is really intended to prevent. It is intended to prevent someone in one party from going over, voting in the other party's primary as kind of the leader that we either imbold in other people to do precisely what...

JEFFERSON: But the party could make a statement that says, we prefer the Democratic party candidate for our own. For whatever reason. They could do that. But the statute would still prevent the candidate from voting in the primary.

PARSLEY: In the primary that would be correct. Simply because that may happen doesn't make this statute unconstitutional. This statute is only unconstitutional if it severely burdens a right. And it doesn't severely burden a right. This is actually - it's a restriction on a candidacy. It's no less a restriction than if you moved out of the county and was then therefore ineligible. That wouldn't impact his right to travel anymore than this impacts his right to vote. But there is, because it is a regulatory scheme some impact on his right to vote. But because that burden is slight, the statute is not unconstitutional.

The questions that are being posed about people cross-party voting and whether that's reasonable in some circumstances or not, is really a matter of policy decision for the legislature to make. The legislature has decided in passing these election laws that they don't want that to happen as a matter of general course.

O'NEILL: In the as applied challenge, again this is following up on some of the other questions, we have to look to see if a particular prohibition is as narrowly drawn as it can be in order to promote the interest that's being asserted. Because the Republican party cannot prevent someone, a Democrat from coming and voting in the primary, it's hard for me to see how the Republican party's associational rights would be disturbed or impinged by allowing the Democratic party to determine whether to put him back on the ballot and look at it. It seems to me the only associational rights implicated are those of the Democratic party in this particular case. And if you could address that concern.

PARSLEY: Two things. First it does not have to be narrowly tailored unless there's a severe burden on a right. If it's not a severe burden...

O'NEILL: If we were to find that it was a severe burden - let's presume that we found that.

PARSLEY: Well there are compelling interests - the compelling interests are really the integrity of the two-party system...

O'NEILL: I understand the overriding compelling interests. But in terms of narrowly being able to address that interest in an as applied challenge, why couldn't we narrowly interpret the statute to allow the Democratic party to put him back on the ballot since the Republican party's associational rights are not implicated?

PARSLEY: Because even though it's an as applied challenge, if any of the state's legitimate compelling interests are present to justify the statute it is valid. And that's the Monroe case.

O'NEILL: But how are they implicated here is what I'm having a hard time understanding.

PARSLEY: At the end of the day who will be on the ballot in November if Judge Hodges is on the ballot is a person affiliated with the Republican party will be the Democratic party's candidate. And that in and of itself undermines the two party electoral system. In the situation in Parker county where there is an opponent in the Republican/Democratic primary, and the Democratic candidate voted in the Republican primary, the end result is going to be that there will be two people affiliated with the Republican party at the end of the day on the general election ballot. That undermines the two party system. And the legislature has the right to determine that the election processes in Texas are best served by having a valid two party system. And that is a compelling interest. The US SC has determined that is a compelling interest.

I think maybe what you're asking me too is about the as applied challenge, how that changes the test here. In this particular context for these election cases it really doesn't change the test at all. Simply because it's an as applied challenge just means that it's as applied to his facts as being the person who voted in the Republican primary and wants to be a candidate. It really doesn't get to his motives. And under the test simply because particular interests are implicated under these facts or not implicated under these facts doesn't prevent the state from offering a compelling interest being an overriding one.

Also in terms of the as applied challenge, even as an applied challenge we can't look to his motives. Because we are not permitted as a state to go behind a voter's vote and try to figure out why they did what they did. All we can do is look at the objective evidence...

O'NEILL: I have no problem with that proposition. But it seems to me that that would be uniquely something that the Democratic party could look at and they could examine his motives and determine under their associational rights whether they want to keep him on the ballot or not.

PARSLEY: But what you're referring to too is the leadership of the party, not the party in terms of the voters. The voters don't really have a choice here in that situation. And it's legitimate and reasonable for the state to determine that it's better that someone else who is not affiliated with the Republican party and who has essentially signed on to those ideologies be actually the candidate for the rival party.

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APPELLEE

BARRETT: My name is Roy Barrett and I am here on behalf of Judge David Hodges. The state's argument in this case would have the court convert what is generically known as the sore looser statute in Texas that has legitimate public purposes behind it in most of its _____. Would have it convert that statute from a sore looser statute into a defrocked winner statute. It would have the court turn the purposes of the election code on its ear, which is to let the will of the people come through to prevail. And instead have the result be that 120,000 McLennan county voters are disenfranchised, cannot have any voice in the picking of their judge for the next 4 years, that's going to be picked by the party leadership of the Democratic party.

ENOCH: Can the state though - that it is permissible for the Democratic party to have as its rule that our nominees for the general election will not affiliate with the Republican party because of the election cycle?

BARRETT: I believe it perhaps could. Now that's not the rule though.

ENOCH: Could they have a rule that says that our nominee in the general election will not vote for a Republican primary as a condition for them to be our nominee in that general election.?

BARRETT: If the Democratic party imposed that rule, which was a restriction on the right to vote. The Democratic party being an entity that would exercise to some extent a state power would have to show that they had a compelling interest to restrict that right to vote.

ENOCH: So you disagree that the state as a part of its compelling interest can divide the people among those who voted Democrats and voted Republicans and prohibit one voting for the other. You disagree with those cases that say that there is permissible regulation on the right to vote if you're dealing with a nominating process for political parties?

BARRETT: I do not disagree with those. But I believe if you look at those cases, each of those cases is based upon or grounded upon a state interest in preventing party raiding. All of those cases, whether it's Pondikes, whether it's Resario, all of those cases go back and the reason the court gave is to prevent party raiding. And party raiding has been described as either intraparty raiding between parties or interparty raiding. Interparty raiding is what would be involved here. In those cases the courts have said, you can place reasonable restrictions on the time in which you must affiliate before you can vote in the primary, for example. In one case they said, 11 months is a reasonable time. In another case 23 months is an unreasonable time. But those cases are based upon the state interest in preventing interparty raiding.

Interparty raiding is defined by the US SC in those cases to be the organized switching of blocks of voters in order to affect to the other party's primary system. So that you do not get in the other party a candidate that comes out that is really representative of the interest of that party. It's an effort to go over and interfere with the due election process by getting some nut elected as the nominee of the other party so you can beat him in the general election.

Now when there is a state interest in preventing that blocks of voters from going over, that's a legitimate state interest and the state can impose that.

ENOCH: Isn't a reasonable extension of your argument be that every voter in Texas ought to be able to vote in both the Democratic and Republic primary?

BARRETT: That is allowed in some states, and the State of Texas could do that.

RODRIGUEZ: But wasn't that struck down in California Democratic Party v. Jones?

BARRETT: No. What was struck down there was a primary system where everybody was on one ballot. There wasn't separate Republican ballots or separate Democratic ballots. It was a unitary ballot. All the people were on the same ballot and you could vote from race to race for different people and then the one that had the majority ended up being the nominee.

RODRIGUEZ: Wasn't the underlying purpose of that though was to prevent dual affiliations which is what we have here. I'm having trouble distinguishing the US SC case there in Jones verses what we have here.

BARRETT: Again the US SC in that case said, interparty raiding is the state interest that justifies that restriction. They said it's interparty raiding because you don't know whether the two nominees that come out really represent the will of the political parties that are supposed to be putting them forth. So it's an interparty raiding concern. It's a switching of votes in that case on a vote by vote basis rather than a primary by primary basis, and you're not sure that the parties come out with nominees that represent their interest. So it's grounded on interparty raiding.

Interparty raiding has been defined by the US SC in at least 3 or 4 cases to be the organized switching of blocks of voters to improperly influence the other party's primary election.

David Hodges, going into the privacy of the ballot box and casting one vote could hardly be called a raid. It could hardly be called anything that would affect the integrity of the election process. The Democratic party of California v. Jones case is clearly, absolutely, unquestionably grounded on the state interest of preventing interparty raiding.

O'NEILL: But wouldn't that require us to delve into each person's motive in voting in another primary?

BARRETT: No. It would not. Because motive here has no - the state has argued that, David Hodges had innocent motives, but the court cannot draft a rule that would be related to the motives of the candidates. Too amorphous. The reason this statute is unconstitutional it does not have any sore looser aspects as applied to David Hodges. It's constitutional in most of its applications. This is only an as applied challenge under this fact.

ENOCH: Under the associational rights of the Democratic party it is your position that the Democratic party cannot have as one of its rules that its candidates during an election will not participate in the Republican party by voting in its primary or attending its conventions or whatever. You're saying that under an associational rights to _____, that does not permit the Democratic party to require its candidates in that election cycle to not participate in the other political party process?

BARRETT: No. I am not saying that. I am saying that if the Democratic party promulgated a rule that said, none of its candidates can vote in the other party's primary, then the Democratic party would have to show where it had a compelling state interest to support that restriction on a constitutional protected right, which is the right to vote. Now if the Democratic party's rule was you can't vote in the other party's primary alone they would have a - I think there would be an issue, a significant issue. It would be a better issue because it would be party issue, and that's not like the State of Texas denying access to a general election ballot. Which is what we've got here. We've got the state exercising its police power to deny access to the general election ballot on some amorphous idea of protecting party purity. If the Democratic party did it, now if they combine that with if you get out and you campaign for other candidates, if you were disloyal to the party, if you hurt the party, then they would have a better argument.

ENOCH: Isn't that what this statute does? Isn't the effect of this statute to say that if you are a candidate for one political party in this election cycle and you vote in the other party's primary the nominating process for that same general election, you are ineligible to continue representing the party?

BARRETT: That's what it says. And in order for that to be constitutional, since it is a restriction on the right to vote, there has to be a legitimate state interest for that restriction.

JEFFERSON: It's a restriction on whose right to vote?

BARRETT: It's a restriction on David Hodges right to vote.

JEFFERSON: Well he has a right to vote and exercise his right.

BARRETT: It does not deny his right to vote. It does not absolutely prevent him from voting. But it is a restriction on the right to vote. In the Pondike's case and the Resario case both of which involved the constitutionality of the pre-affiliation requirements in one case they said 23 months was too long. The other case said 11 months is fine and constitutional. In both of those cases the person could go vote in the primary of they had previously been affiliated with. They just couldn't vote in the primary of the party they wanted to affiliate with now unless they met those preaffiliation requirements. Now in both of those cases the US SC recognized that's a restriction on the right to vote. It is restricting you to voting only in the primary of the party that you've previously been affiliated with.

In addition, in Baker v. Carr, remember the voting rights cases, there was this dissipation of the right to vote, to the dilution of the right to vote. And in that case the opponents of the position said, well this is not a denial of the right to vote. The person could vote. They went and voted. Their vote was counted. And Justice Frank_____ in the dissent said, I think that's right. They voted. Their vote was counted. That's not a denial of a right to vote or an affect upon it. It's constitutionally significant. But the prevailing party was able to convince the US SC that if you even dilute the effectiveness of the vote, then you have restricted the right to vote.

David Hodges right to vote it is illogical to argue in this court that his right to vote is not restricted by the statute. This statute says that any person who wants to be on the general election ballot as the nominee of a political party cannot vote in the other party's primary.

ENOCH: I can agree that this is restriction on his right to vote, but in the context of restriction on his right to participate in a political party, this vote is not a vote for the person, the candidate who is going to be the officeholder and the elected official. This is a vote to determine who the nominee from a political party will be on the general election ballot. And it seems to me that it is not a simple answer to say, well I can vote for anybody I care to choose, because that is interparty raiding. The Republicans are nominating their candidate, and so it ought to be Republicans voting for their candidate. And it seems to me the parties can legitimately decide that we do not want our nominees to be participants in the other party's selection process for who the candidates will be as their nominees for this general election. It seems to me that is a significant restriction on what party you will participate in, but it seems to me it's not a significant restriction on the vote for the official who will be the elected official for that office.

BARRETT: Section 162.015 says, for example, to an independent candidate, if you want to be an independent candidate for JP in Hidalgo County, you can't vote in either party's primary. This statute restricts the right to vote. The issue is, is this restriction supported by a legitimate state interest. Now is there a legitimate state interest in interparty raiding when you have only the candidate prevented from voting? The interparty raiding has to be a significant restriction. It has to be a restriction that is necessary to accomplish a legitimate state purpose if you're going to burden this constitutionally protected right to vote. Interparty raiding does not rise to the interest of burdening the right to vote unless the raiding can effect the validity and outcome of the election process.

Here when you say a candidate or even a - all people that are candidates cannot go vote in the other party's primary. There's no interparty raiding justification for that. So what they have come up with, and the state doesn't even argue that in their brief. And you asked me about the Democratic party. The Democratic party has no rules that say he can't go vote over there. If John Culler, who's the chairman of the party had gone and voted in the Republican primary, he would not have lost his chairmanship in the Democratic party. Because he doesn't have to be on the general election ballot. He just has to be elected in the primary. He was elected in the primary. If the Democratic party is so ____ about, my goodness going and voting for Republicans in the other primary and it just destroys all the leadership and all the integrity and ruins us, they don't even prohibit but their own rules, their party chair from doing it.

O'NEILL: Can you assert the Democratic party's interest in that regard here? It seems to me that if there were a rule within the party that says if a candidate is determined ineligible under this statute, and yet we have a rule within our party that says that we can nevertheless decide in our discretion to put them back on the ballot as our nominee, then I would see that we might be in a situation of weighing the associational interest and saying that it could be more narrowly tailored, but we don't have anyone here arguing that.

BARRETT: That's right. And another reason this statute is unconstitutional, the reason it goes a bridge too far is in order to protect these alleged pie in the sky associational rights of the party, the Democratic party, and they are not really involved here and implemented and denied in a significant way, in a way adequate to deny the right to vote, but to the extent they are implicated here, this statute could be totally effective if it said one of either two things. One, if you go vote in the other party's primary and you've won the nomination, the party leadership whether it be the state committee or the county committee has the right to remove you from the ballot. That would be a significant restriction. It would protect party loyalty, party purity, protect against dual party affiliation, protect the associational rights of a party. You could just say you can remove them. This statute doesn't say you can remove them. It's the State of Texas exercising its police power to say, you are dead. You are removed.

Not only does it do that. It goes a step further. It says, not only are you removed, we have exercised the police power of the State of Texas to say you can't even get back on the general election ballot, because this statute denies you any access to the general election ballot. So when the Democratic party goes to pick their replacement nominee if this court overturns the TC's decision, they cannot pick David Hodges even though 40 of the 50 Democratic precinct chairs cite David Hodges has been a wonderful 20 year servant, and we want to pick him. He hasn't harmed the party really. So if we're trying to protect the associational rights of political parties, if we're trying to protect dual party affiliation in some sense, which is not prohibited by the code here by being a candidate, or if we're trying to protect party purity for some general, generic reason of party purity, this statute is not narrowly tailored. It goes a bridge too far.

O'NEILL: But the Democratic party disagrees with you on that. Their brief in this case takes just the opposite position.

BARRETT: Their brief in this case takes the position that they would not have the right to decide whether to keep him back. That's because of the way this statute is drafted. This statute goes too far.

O'NEILL: But they don't claim that it's unconstitutional on that basis.

BARRETT: Well that may be because the Democratic party leadership in McLennan county sees this as an opportunity to pick their own hand made judge.

O'NEILL: Regardless, there is no one asserting that interest here.

BARRETT: It's not that interest has to be asserted. This court has to determine is there a legitimate state interest to support this restriction of a right to vote. And then you have to determine whether or not the remedy applied by this statute is correct and appropriate, or is it overly harsh. Has the state used a method of restricting the right to vote that goes beyond what is required to protect the interest that is defined.

O'NEIL: I understand that, but in terms of asserting associational rights the Democratic party is not asserting any here. In fact, it's arguing for the constitutionality of this statute.

BARRETT: That's right. And I don't know why, and so I don't think there is associational rights of a party that are involved in this appeal, because they are not asserting it.

PHILLIPS: Is it fair to say based on your argument that you're waiving the statutory _____?

BARRETT: No. I just haven't gotten to it.

O'NEILL: Are you waiving your associational point? Are you not claiming then that this statute is violative of the constitution because it violates associational rights?

BARRETT: I'm claiming it's violative of the constitution because it restricts the right of a person to vote when there is no legitimate state interest to do so. And I'm claiming that the associational rights of either the Democratic or Republican party in this case are not an adequate basis for this restriction on the right to vote when there is no evidence or indication of interparty raiding. The only time associational rights of a party has been held to be a sufficient reason to deny the right to vote is where there was organized switching of voting, or the potential for that, so there was interparty raiding concerns. Just the general associational rights of the parties is not sufficient to restrict the right to vote.

Also I'm claiming that if that is what the restriction is intended to do here, then it goes too far and it is too harsh and, therefore, it's unconstitutional because the state has applied a remedy - denial of access to the general election ballot - which is too far for these protections of associational rights.

Now with regard to the point about statutory construction. That is the first point I raised. I think that is a legitimate and correct point. This statute says you can be the nominee of a party if you vote in the primary or were a candidate. You can be the nominee of any party if you vote in the primary or were a candidate. Now they say, you can't read it that way. They say it's not ambiguous. Well John Culler testified when he first read it he thought it meant that. Judge Hodges when he first read it thought it meant that. The district judge in deciding the case says, this statute has problems and you have to ellipse the words.

The state in their brief in order to get to the position they want when they tell you how to read it have to add words to the statute. They do that in their brief. It is clearly an ambiguous statute. Five times this court has said, if a statute is ambiguous, an election code provision is ambiguous and it involves eligibility of candidates, it must be construed in favor of eligibility. Five times you said that. Because we want the will of the people to prevail, and the will of the people does not prevail when they don't get their vote.

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REBUTTAL

PARSLEY: With all due respect, counsel has not identified any right that is severely burdened by this statute. In fact, he essentially ignored the balancing test that the SC is required to be placed on these kinds of election challenges. And that balancing test is highly deferential to the state and maybe that is why it's being ignored. But all it requires is that if there is not a severe burden on any right, then the state's legitimate, nondiscriminatory reasonable restrictions and framework in ordering its election processes are constitutionally valid. That is exactly what this is. It is a reasonable restriction on candidacy. It doesn't matter if party raiding is present or not present under these circumstances. The fact is is that there are other legitimate interests of the state in the first instance that are met. And second, the fact that it could prevent interparty raiding in another set of circumstances is not defeated by the fact that this is an applied challenge.

ENOCH: Take my question on - the question in this case could be framed this way. Can the state prohibit the nominee of a political party, could as a requirement to be the nominee from a political party in the general election could one of those requirements be that they not participate in the other party's nominating process during that election cycle, and in this case prohibit them from voting in the other party's primary?

PARSLEY: Could the party make that rule?

ENOCH: Well, the state is making the rules about the two major political parties but I'm just saying, could the state do that? Could the state regulate the party machinery in such a way that the party's nominee could be prohibited from voting for candidates in the other party's nominating process in the primary?

PARSLEY: I think that would probably raise questions of constitutionality because you would be prohibiting them from actually voting in the other party's primary, which is not what this statute does.

ENOCH: So that would raise a compelling - the state would have to have a compelling reason for telling the nominee of the Democratic party cannot vote in the other party's primary under the statute and you say if that was the way this was read, then the state would have to have a compelling reason for burdening that right to vote?

PARSLEY: If it was a severe burden on the right to vote, then it would have to be a compelling interest, would come forth with a compelling interest that justifies that restriction. And under these circumstances the compelling interest is the voter confusion, the validly of the election process itself. There are a myriad of state interests that are present here that Judge Hodges has ignored simply because they do justify this reasonable, nondiscriminatory statute, and therefore, it requires it be held constitutional.

Simply because Judge Hodges made what he believes now may be a regrettable mistake doesn't bring this constitutionality of this statute into play. It is a constitutional statute that does not severely burden anyone's right under this program, and therefore, it is constitutional and the TC's judgment should be reversed.

O'NEILL: What if the statute provided that if a candidate voted in the other party's primary, the candidate's party could elect to remove them from the ballot. Wouldn't that protect all state interests here?

PARSLEY: To go back, that wouldn't be necessary to reach that unless it was severe burden on his right. That would also require the state to hold some sort of a special election to determine whether to retain him on the ballot.

O'NEILL: No. My question is. If it said that the party could decide whether to remove that candidate from the ballot, leaving it up to the party to decide whether they still wanted to associate, wouldn't that satisfy all interests here?

PARSLEY: It would still result in someone affiliated with the Republican party being on the Democratic ballot in the general election, because that affiliation would remain regardless of what the Democratic party wanted to do. And that choice as well as most of the choices that were discussed by counsel and that have been posed as questions by the court really are policy questions best left to the legislature. The legislature created this system in order to prevent the interest as set out in our brief and those interests are reasonable and nondiscriminatory. And because they are reasonable and nondiscriminatory they are therefore constitutional.