

United States Court Of Appeals For The Eighth Circuit

No. 20-2244

Libertarian Party of Minnesota; Chris Holbrook; Mason McElvain;
Chris Dock; Brian McCormick

Plaintiffs - Appellants

v.

Steve Simon, in his official capacity as the Minnesota Secretary of State,
or his successor

Defendant – Appellee

APPELLANTS' PRINCIPAL BRIEF

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SUMMARY OF THE CASE

The Libertarian Party challenged the petitioning process for minor political parties under the First and Fourteenth Amendments as fundamentally unfair, causing disparate treatment in favor of major political parties. To appear on the general election ballot, minor political party candidates have 14 days to acquire the necessary minimal number of signatures on nominating petitions for the office sought. On that nominating petition is an oath in which signatories promise that they do not intend to vote in the primary for that particular elected office. In Minnesota, for nominating petitions, making a false oath is a felony. Voters who sign a petition are purposefully led to believe that later voting in a primary can result in criminal prosecution. Nothing states on the petition, as the Minnesota's Secretary of State states that "[i]f you change your mind...it's perfectly legal."

Meanwhile, the Libertarian Party contended that signing a nominating petition is the equivalent of casting a vote because the person promises not to vote in the primary while executing the petition without knowing all primary candidates; that she does so without the same secrecy provided to voters who do cast a ballot in a major political party primary voters; and while major political party primaries are afforded absentee ballots, minor political parties are afforded no similar process.

The district court granted the Secretary's motion to dismiss.

The Libertarian Party respectfully requests 30 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure, Rule 26.1 and Local Rule 26.1A of the United States Court of Appeals for the Eighth Circuit, Appellants Libertarian Party of Minnesota, Chris Holbrook, Mason McElvain, Chris Dock, and Brian McCormick note that Chris Holbrook, Mason McElvain, Chris Dock, and Brian McCormick are individuals and are not a corporate entity nor affiliated with any corporate entity regarding their appeal.

The Libertarian Party of Minnesota is a non-profit member association. It is a minor political party in Minnesota as defined under Minnesota Statutes § 200.02 engaging in political activities relating to political elections and campaigns in Minnesota. The Libertarian Party of Minnesota is a part of the national Libertarian Party which is the third largest political party in the United States. The Libertarian Party also recruits and supports Libertarian candidates for elected public office.

The Libertarian Party of Minnesota does not own stock of any parent corporation.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Minnesota issued a final judgment on May 29, 2020. The judgment adjudicated all claims as against all parties with the court's grant of motions to dismiss. The district court had asserted jurisdiction under 28 U.S.C. §1331. Under 28 U.S.C. §1291, the court of appeals shall have jurisdiction of appeals from all final decisions of the federal district courts. Appellants filed their Notice of Appeal on June 18, 2020.

STATEMENT OF ISSUES

A Minnesota nominating petition's oath for minor political party candidates leads voters to believe that they have cast their support for that candidate and cannot vote later in a major political party primary for that same office for fear of criminal prosecution. The required oath discourages voters from signing the petition manipulating the exercise of the voter's choice between competing ideas or candidates for the later general election.

I.

Whether a nominating petition's oath in support of a minor political party's candidate is an undue burden under the First and Fourteenth Amendments when the oath leads a person to believe the promise is not to vote in a subsequent major political party primary subject to felony criminal prosecution which becomes meaningless when the State professes that it is "perfectly legal" for that same person to later vote in a primary election.

Apposite Case(s): *Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985).

II.

Whether electors who sign a minor political party candidate's petition in support of that candidate appearing on the general election ballot is subject to public disclosure while others who support major political party candidates in primary elections are secret violates the candidate's and electorate's First Amendment right of association and the Fourteenth Amendment's Equal Protection Clause.

Apposite Case(s): *Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985).

III.

Whether the 14 day period for obtaining the required threshold number of signature-votes on a minor political party candidate petition, without the availability of absentee voting is violative of the First Amendment right of association and the Fourteenth Amendment's Equal Protection Clause.

Apposite Case(s): *Socialist Workers Party v. Hechler*, 890 F.2d 1303 (4th Cir. 1989).

STATEMENT OF THE CASE

I. Minor political party candidates have 14 days to campaign to attain petition signatures for candidates to appear on the general election ballot.

In Minnesota, for the 2020 general election cycle, the primary election for major political party candidates is August 11th. For minor political party candidates, their period for attaining the minimum number of petition candidate signatures to appear on the general election ballot is 14 days—May 19th to June 2nd. This is the same 14-day period for all candidates to file for elected office. The general election will be held on Tuesday, November 3, 2020.

II. The Libertarian Party, as a minor political party, is an association of members seeking to have its candidates appear on the general election ballot.

A. Potential candidates must attain a certain number of eligible voter signatures on a nominating petition.

The Libertarian Party of Minnesota is a minor political party under Minnesota law.¹ There are four major political parties in Minnesota; Minnesota Democratic-Farmer-Labor Party, the Republican Party of Minnesota, the Grassroots-Legalize Cannabis Party, and the Legal Marijuana Now Party.² Each of the individual Plaintiffs, Chris Holbrook, Mason McElvain, Chris Dock, and Brian McCormick, are Libertarian Party members and have either run for elected office or are potential

¹ Plts. Amend. Compl. ¶¶4–14 and 70; Minn. Stat. § 200.02, subd. 23(a).

² *Id.* ¶¶69.

candidates for elected office as a Libertarian candidate in the 2020 election or future elections.³ As members of the Party, they are associated with the Party, and as candidates or potential candidates wish to be associated with the Party and the electorate.⁴

Like others, Holbrook, McElvain, Dock, and McCormick have signed Libertarian Party candidate petitions and have sought signatures from eligible voters for other petitioning candidates. In this regard, as signatories of a minor political party's petition, they too associate with the particular petition candidate as they seek to have that candidate appear on the general election ballot.⁵

In an election year in Minnesota, potential candidates of a minor political party, must attain a certain number of registered eligible voter⁶ signatures before the candidate's name will be placed on the general election ballot in November. For example, a Libertarian Party presidential and vice presidential candidate must attain 2,000 signatures on a nominating petition;⁷ U.S. Senate, 2,000 signatures; a state office voted state-wide (e.g., Governor, Attorney General), 2,000 signatures; county or legislative office, 500 signatures.⁸

³ *Id.* ¶¶15–53.

⁴ *Id.*

⁵ *Id.*

⁶ An eligible voter is defined under Minnesota Statutes § 201.014, subdivision 1. An eligible voter must be registered under Minnesota Statutes § 201.18. Plts. Compl. ¶¶71—74.

⁷ Minn. Stat. § 204B.08, subd. 3(a); Plts. Compl.¶87.

⁸ Amend. Compl. ¶88–91. *See* Minn. Stat. § 204B.08, subd. 3(c).

However, whatever office a potential Libertarian Party candidate may seek, but for the presidential nominating petition in 2020, each petitioning candidate has only 14 days to acquire the necessary number of eligible voter signatures—May 19th to June 2nd, the due date for filing an affidavit of candidacy.⁹ An affidavit of candidacy is not the same as a nominating petition. The June 2nd deadline is 65 days before the state’s primary election date.¹⁰ For major political party candidates, they must file their affidavits for candidacy by June 2nd.

While minor political party nominating petitions only have 14 days to gather the required number of signatures, a Libertarian Party nominating petition for a presidential candidate, requiring 2,000 signatures has from May 19 to August 18, 2020 before it must be filed with the Office of the Minnesota Secretary of State, 77 days before the general election.¹¹—August 18, 2020.

B. While minor political parties must attain minimum signatures in 14 days, the presidential nomination has 83 days to attain 2,000 signatures.

For the minor political party presidential nominating petition, that requires 2,000 eligible voter signatures, the time period in 2020 is from May 19th to August 18th:

The first day signatures may be collected is the first day of the filing period (May 19, 2020). The Nominating Petition

⁹ *Id.* ¶86.

¹⁰ *Id.* ¶85.

¹¹ *Id.* ¶ 103. *See* Minn. Stat. § 204B.09.

must be filed with the Office of the Secretary of State by 5:00 pm 77 days before the General Election (August 18, 2020).¹²

The major political party primary occurred on March 3, 2020.

III. The government’s required nominating petition’s oath causes confusion regarding primary voting causing eligible voters not to sign minor political party candidate petitions.

Minnesota law requires that a minor political party candidate’s nominating petition must contain the following oath:

“I solemnly swear (or affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for the office for which this nominating petition is made, and that I signed this petition of my own free will.”¹³

When voters read this oath on a petition, they become reluctant to sign and some would not sign at all.¹⁴ As a result, minor political party candidates could not and did not reach the threshold number of signatures to appear on the general election ballot.¹⁵ The oath’s confusion also led voters to believe that, by signing the petition, they were in effect, casting a ballot for that candidate to appear on the general election ballot much like voting in a primary election.¹⁶

¹² Amed. Compl. ¶ 103. *See also* Minn. Sec. of State; <https://www.sos.state.mn.us/election-administration-campaigns/become-a-candidate/presidential-candidates/?searchTerm=minor party presidential candidate> (last visited Aug. 10, 2020).

¹³ Amend. Compl. ¶ 76; APP. 35; Ex. B, ADD. 15. *See also* Minn. Stat. § 204B.07, subd. 4.

¹⁴ *Id. e.g.* ¶¶ 154; 157, 164, 187; APP. 50–52.

¹⁵ *Id. e.g.* ¶ 158, 161; APP. 51.

¹⁶ *Id. e.g.* ¶ 77, 109; APP. 35, 41.

IV. Major political parties are entitled to primary absentee balloting wherein minor political parties are not.

Minnesota provides for the Libertarian Party in 2020, no absentee ballot process available by the Secretary to have eligible voters sign a nominating petition to gain access to the general election ballot.

V. The district court dismissed the underlying amended complaint.

The district court granted the Secretary's motion to dismiss.¹⁷ The court determined that the oath "only requires the signers to attest to a present intention not to vote in an upcoming primary. Because the oath is expressly limited to the intent at the time of signature, it does not preclude signers from changing their minds thereafter and from voting in a later primary."¹⁸ That laid the basis for dismissing the Libertarian Party's other claims.¹⁹ The court made no reference or otherwise recognized the allegations asserted in the amended complaint regarding signatories' belief as to their signatures constituting the reluctance or refusal to sign the minor political party petitions because of the oath, their fear of prosecution, or belief that they would be casting a vote and, hence, could not vote in a later primary.²⁰

¹⁷ Or. (May 29, 2020); ADD. 1–14. Contrary to the district court's decision, the Libertarian Party *did not* abandon all claims regarding the oath; only the number requirements for the petitions. Compare Or. at 8, ADD.8 and Lib. Prty. Opp. Memo. to Dismiss at 24 (Dckt. No. 25).

¹⁸ Or. at 8; ADD. 8.

¹⁹ *Id.* at 8–12; ADD. 8–12.

²⁰ *Id.*

The district court’s decision followed the Secretary’s arguments. For instance, in oral argument the Secretary opined that regardless of the oath, the voter could change her mind and later vote without fear of prosecution:

The only thing that the petition signer is swearing to in that clause is that he does not at that moment in time “intend” to vote in the August primary for that office...Can he change his mind and vote for that office in the primary? Yes. Has he forfeited his right to vote in the primary? No. Is he at risk if he votes in the August primary? No.²¹

Yet, the government’s required oath caused voters to believe that their intent—their course of action – was not to vote in a later primary for that particular candidate’s office for fear of prosecution and believing they had already voted for that candidate to appear on the general election ballot.²²

SUMMARY OF THE ARGUMENT

ARGUMENT

I. Facts alleged in a complaint are accepted as true even if proof is improbable and recovery is remote or unlikely.

This Court will review de novo the district court's grant of a motion to dismiss. *Keating v. Neb. Pub. Power Dist.*, 562 F.3d 923, 927 (8th Cir. 2009); *Buckler v. U.S.*, 919 F.3d 1038, 1044 (8th Cir. 2019).

²¹ Hearing Transcr. 9:11–20 (May 19, 2020) (Dckt. No. 38); *see also id.* at 26:11–15 and 27:7; ADD.17–18.

²² Amend. Compl. *e.g.* ¶¶ 154; 157, 164, 187; APP. 50–52.

A motion to dismiss under Rule 12 (b)(6) challenges the legal sufficiency of the complaint. *See Carton v. General Motor Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010); *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). To render ineffective a motion to dismiss, the complaint must include “enough facts to state a claim to relief that is plausible on its face” and something “more than labels and conclusions,” “that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *Ashcroft v. Iqbal*, 566 U.S. 662 (2009). The Court must grant all reasonable inferences in favor of the nonmoving party. *Lustgraaf v. Behrens*, 619 F.3d 867, 872–73 (8th Cir. 2010).

Notably, under a Rule 12 analysis, plaintiffs are required only to show the factual basis of their claims—not the legal basis. *Ashcroft*, 566 U.S. at 678; *Twombly*, 550 U.S. at 555. *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 346–47 (2014). Because Rule 8 (a)(2) calls only for a short and plain statement of the claim showing that the pleader is entitled to the relief requested, a court may not apply a more rigid or heightened standard of pleading particularly, for instance, in civil rights cases asserting municipal liability. *E.g., id.; Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

Likewise, when considering a motion to dismiss, a complaint must be liberally construed in the light most favorable to the plaintiff. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2006). The Court must accept the alleged facts in the

complaint as true even if it appears that “actual proof of those facts is improbable,” and reviews the complaint to determine whether its allegations show that the pleader is entitled to relief, even if it appears that recovery is very remote or unlikely. *Twombly*, at 555–56; Fed. R. Civ. P. 8 (a)(2).

Here, the district court applied none of the required principles in dismissing the underlying Amended Complaint.

While primaries and general elections have a strong interconnection as “a single instrumentality for choice of officers,” there is a difference between the effect of a primary and that of the general election. *Smith v. Allwright*, 321 U.S 649, 660 (1944). The Supreme Court has recognized, the right to vote in a primary election for the nomination of candidates without discrimination by the state is, like the right to vote in a general election, a right secured by the Constitution so that the same tests to determine the character of the discrimination or abridgement should be applied to a primary election as are applied to a general election. *Id.* at 661–62; *Terry v. Adams*, 345 U.S. 461 (1953).

The First Amendment of the U.S. Constitution protects the right of association for both the voter and the candidate:

Congress shall make no law ... prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, incorporates the First Amendment against the states, and guarantees due process and equal protection under the laws.

To determine whether a statute violates the Equal Protection Clause, the Court considers “the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). In analyzing equal protection challenges and the interests and burdens at issue, the Court must consider “whether the law disadvantages one group over another so as to result in unequal treatment and whether this unequal treatment is justified by a compelling interest.” *Libertarian Party of N. Dakota v. Jaeger*, 659 F.3d 687, 702 (8th Cir. 2011). Although “reasonable election regulations may, in practice, favor the traditional two-party system,” *Green Party of Arkansas v. Martin*, 649 F.3d 675, 684 (8th Cir. 2011) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997)), they may not serve the purpose of allowing the same two parties “to retain a permanent monopoly on the right to have people vote for or against them.” *Williams*, 393 U.S. at 32. “Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.” *Id.*

Indeed, ballot access cases have emphasized that the states “have important interests in protecting the integrity of their political processes from frivolous or

fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections.” *Clements v. Fashing*, 457 U.S. 957, 964–65 (1982) (citations omitted). Likewise, in recognizing these interests, the Supreme Court has upheld “reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections.” *Id.* at 965.

However, the classifications created by law and applied to minor political parties, their candidates, and their voters, must be constitutionally analyzed for any detrimental effect on minor party candidates to gain access to the general election ballot. *See Libertarian Party v. Bond*, 764 F.2d 538, 541 (8th Cir. 1985) (“It has been recognized...that the entire election scheme must be analyzed to determine whether undue constraints on access to the ballot exist.”). And in analyzing the entire primary election scheme, Minnesota does place undue constraints on the Libertarian Party, as a minor political party, and its candidates to gain access to the general election ballot.

Minnesota Statutes § 204B.07, subdivision 4 requires each page of a minor political party candidate’s petition have the oath as legislatively prescribed:

Each separate page that is part of the petition shall include an oath in the following form:

"I solemnly swear (or affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for the office for which this nominating petition is made, and that I signed this petition of my own free will."

The legislature requires the specific language it crafted to be placed on a nominating petition. The oath also has legal consequences:

An individual who, in signing a nominating petition, makes a false oath is guilty of perjury.

Minn. Stat. § 204B.07, subd. 6. Perjury is a criminal offense. Minn. Stat. § 609.48, subd. 4 (up to five years in prison or \$10,000.00 in fines or both).²³

Looking at the oath, it begins with the statement “I solemnly swear (or affirm).” *Black's Law Dictionary* defines “oath” as follows:

1. A solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise. The person making the oath implicitly invites punishment if the statement is untrue or the promise is broken. The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false....
2. A statement or promise made by such a declaration.
3. A form of words used for such a declaration.
4. A formal declaration made solemn without a swearing to God or a revered person or thing.

Black's Law Dictionary 1101 (Bryan A. Garner ed., 8th ed., West 2004). It defines “affirmation” as follows:

A pledge equivalent to an oath but without reference to a supreme being or to “swearing”; a solemn declaration made under penalty of perjury, but without an oath.... While an oath is “sworn to,” an affirmation is merely “affirmed,” but either type of pledge may subject the person making it to the penalties for perjury.

²³); Amend. Compl. e.g. ¶¶ 7 9; 120–121; 133; 264; 287.

Id. at 64. The term “swear” means to “administer an oath to (a person)” or to “take an oath.” *Id.* at 1488.

Another dictionary source finds the meaning of an “oath” as “a solemn promise often invoking a divine witness, regarding one’s future action or behavior.” *New Oxford American Dictionary* 1209 (Agus Stevenson, Christian A. Lindberg eds., 3rd ed., Oxford University Press 2010). To “swear” is to “make a solemn statement or promise undertaking to do something or affirming that something is the case.” *Id.* 1755. And to “affirm” is to “state as a fact; assert strongly and publically.” *Id.* 27. In *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir.2002), the court noted that. That court added:

An oath or affirmation “is designed to ensure that the truth will be told by insuring that the witness or affiant will be impressed with the solemnity and importance of his words. The theory is that those who have been impressed with the moral, religious or legal significance of formally undertaking to tell the truth are more likely to do so than those who have not made such an undertaking or been so impressed.”

Id. at 1105–06 (citation omitted). “[A] person who manifests an intention to be under oath is in fact under oath.” *Id.* at 1105.

Hence, when a person swears or affirms something, the meaning is a promise or a solemn pledge to do something or not to do something. Here, under the oath of a minor political party candidate’s petition, it is the pledge not to “intend” to vote in a later primary election for the same candidate’s office for which the petition was signed.

“Intend” means “have a course of action as one’s purpose or objective; plan...plan that (something) function in a particular way.” *Id.* 903. “Intend,” according to *Black’s Law Dictionary*, means “to have in mind a fixed purpose to reach a desired result.” *Black’s Law Dictionary* 825.

The Appellants are not lawyers. As ordinary people, when obtaining signatures: Minnesota’s nominating petition, the oath has caused confusion and has caused people not to sign the petition as the Amended Complaint has alleged. Any signer promises not to have any plans to vote in the later primary. Nowhere in the oath, does the government announce or give notice that after signing the petition the voter may change their mind with no legal consequences as the Secretary has professed and as the district court so agreed. In short the term, “intend to” is at best vague. And in making a promise when signing the petition, voters carry out their intent not to vote in a primary election believing they have supported their candidate to appear on the general election ballot and cannot cast a ballot in the primary for that particular candidate’s office.

Ballot access cases have emphasized that the states “have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections.” *Clements v. Fashing*, 457 U.S. 957, 964–65 (1982) (citations omitted). Likewise, in recognizing these interests, the Supreme Court has upheld

“reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections.” *Id.* at 965. However, the classifications created by law and as applied to the Libertarian Party, its candidates, and voter supporters, does not explain the detrimental effect of minor party candidates to gain access to the general election ballot. *See Libertarian Party v. Bond*, 764 F.2d 538, 541 (8th Cir. 1985) (“It has been recognized, however, that the entire election scheme must be analyzed to determine whether undue constraints on access to the ballot exist.”). And in analyzing the entire primary election scheme, Minnesota does place undue constraints on the Libertarian Party, as a minor political party, and its candidates to gain access to the general election ballot.²⁴

Minnesota has not made a concerted effort to allow competition to the two-party system by “afford[ing] minor political parties a real and essentially equal opportunity for ballot qualification,” *Am. Party of Texas v. White*, 415 U.S. 767, 788 (1974). In fact, Minnesota, by the use of the petition’s oath places an undue burden on the candidate and upon the voter. Here, the primary election process for minor political parties freezes the status quo of a two party system and the unreasonable constraints impede access to the ballot.

Because the petition’s oath is a legislative mandate, the role of the government is direct. As the allegations of the Amended Complaint reflect, the petition’s oath is

²⁴ *E.g.* Holbrook ¶¶33–34.

designed to discourage signatories and does discourage signatories to support a minor political party candidate's effort to achieve the minimal number of signatures for a particular elected office to gain access to the general election ballot. The reading of the oath is interpreted by voters as promising not to do something in the future, here, not to vote in a major political party primary for that office. It reflects a governmental interference with the process for minor political party candidates to gain access to the general election ballot, events which major political parties do not experience.

If the oath is read as the district court and the Secretary purports it to read, that immediately after signing the petition the voter may change her mind and vote in the later primary, then what is the purpose of the oath?

At the time a voter signs a minor political party candidate's petition, she is supporting the notion that the general electorate should have more choices among other candidates than what major political parties offer. But, by the government's requirement of swearing to an intent not to do something in the future that the voter must decide at the time of execution, the government places an undue burden on the process. The oath serves no purpose but to discourage the voter to determine not only the meaning of the oath, but its consequences and sees nothing more than a limitation of choice.

The requirement of the oath is not narrowly tailored to meet any compelling state interest. If the state is concerned about the veracity of the signatory, the oath should focus on the truth of the signatory as being an eligible voter at the time of

executing the petition or will be at the time of the general election. Nothing more is required. Such a statement would be a less restrictive means than overtly or covertly discouraging a voter from participating in a later primary by signing a candidate's petition.

The Secretary cannot explain the purpose of what the oath is to achieve; it serves no purpose what ever and has a chilling effect on the voter as the Amended Complaint alleges. It violates the constitutional principles of the First and Fourteenth Amendments.

II. The lack of absentee balloting denies ballot access to petitioning minor political party candidates and is arbitrary and discriminatory under the Fourteenth Amendment.

The Libertarian Party had taken the position in district court, that if a voter signed a candidate's petition and could not vote in a later primary election position, the effect was the equivalent of a cast ballot. In the district court's analysis of the oath, it concluded the act of signing a petition is not the same as to cast a ballot because the voter could change her mind and later vote in a primary.²⁵

However, this should not distract from the claims relating to the election process as it affects the minor political party. And while it may be true that "the nominating process is designed to 'demonstrate a certain level of support among the electorate before the minor party or candidate may obtain a place on the ballot...[and]

²⁵ Or. at 9; ADD. 9.

[i]n contrast, the primary process is designed to determine which candidate from each major political party will be placed on the ballot,”²⁶ the same result is sought from the general electorate—getting enough voters to agree that the candidate should appear on the November general election ballot.

However, the election process does not provide minor political party candidate equal access to the electorate to achieve the goals of obtaining the necessary petition signatures within the state’s imposed 14 day time limit.

Minnesota Statutes § 204B.09, subdivision 1(a) governs the time period for federal, state, and county candidate nominating petition filings and for minor political parties. This law establishes the 14-day period to attain the minimum number of petition signatures as found under § 204B.08, subdivision 3(a), (b), and (c). The Secretary of State has adopted Minnesota Rules chapter 8205, which also establishes requirements for minor political party candidate nominating petitions.

“It is important, at the outset, to consider the nature of absentee voting in the election process. The opportunity of an absentee voter to cast his vote at a public election by mail has the characteristics of a privilege rather than of a right. Since the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.” *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975) (citations omitted); *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 790

²⁶ *Id.* at 10; ADD.10.

(Minn. 2011) (“Voting in absentia is a privilege....”). In *Bell v. Gannaway*, the Minnesota Supreme Court explained that “voting by absentee ballot is a privilege, not a right, and affirmed the mandatory nature of absentee voting requirements.” *Gannaway*, 227 N.W.2d at 802-03. The Court reiterated that because “the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.” *Id.*, 227 N.W.2d at 802 quoting *In re Contest of Gen. Election Held on November 4, 2008, for Purpose of Electing a U.S. Sen. from State of Minnesota*, 767 N.W.2d 453, 462 (Minn. 2009).

A similar privilege is not given to the minor political party.

The district court disagreed and adopted an illusory process in which the court asserts that “Minnesota law allows signers of nominating petitions to fill out the petition form and send it to the candidate, which is *akin* to submitting an absentee ballot,” citing Minnesota Statutes § 204.07, subdivision 1.²⁷ Notably, nowhere in the statute does it describe an alternative process. It is illusory because the Secretary has promulgated rules that hinder an individual from meeting the requirements he has imposed on the petitioning process.²⁸ Even the example the Secretary uses for the public violates his own rule by not demonstrating a mandated phrase, that “all information on this petition is subject to public inspection.” Minn. R. 8205.1010, subp. 2(1).

²⁷ Or. at 10; ADD. 10.

²⁸ See *e.g.*, Minn. Rules 8205.1010, subp. 2(B); 8205.1010, subp. 2(F);

Furthermore, major political parties, through the absentee process have access to military and overseas eligible voters, while the same electorate have no opportunity how to access minor political party nominating petitions. With the limited 14 day period to gain the necessary petition signatures, there is no practical way of allowing absentee balloting for minor political parties. In 2020, it began on May 19th and ended on June 2, 2020.²⁹

Moreover, the Secretary's administrative policies favor major political party candidates. As the Amended Complaint alleged, "State elections' include the state primary and state general election held in even numbered years ...as well as the presidential nomination primary." *See* Minn. Stat. § 203B.065; 2018 Absentee Voting Administration Guide, § 3.3.2.1 "Absentee Voting Management Methods."³⁰ According to the Absentee Voting Administrative Guide, Minnesota rules set the form and content of the absentee instructions and envelopes and absentee voting instructions conforming to these requirements are available on the Secretary of State's webpage. And at partisan party primary elections, additional instructions are provided to absentee voters. *Id.*³¹

No absentee voting instructions are provided for minor political party nominating petitions within the Absentee Voting Administration Guide or Minnesota

²⁹ Amend. Compl. *E.g.* ¶ 346; APP. 84.

³⁰ *Id.* ¶¶ 67–68 and Ex. D; APP.32–33 and Dckt No. 6.

³¹ *Id.*

rules promulgated by the Secretary. *Id.*³²

And as to the district court's reference to Minnesota Laws ch.77, subdivision 4,³³ passed and effective on the eve of the minor political party petitioning time frame, allowing for electronic signatures on electronic submissions of nominating petitions, that too was illusory. The Amended Complaint was filed long before the Legislature passed the law which was effect for only 2020, but there is no evidence of its effectiveness, nor any guidance of how the minor political parties were to engage the law and no evidence of the Secretary providing the guidance necessary to allow relief to the parties.

While it may appear impractical to allow absentee balloting because of the 14-day filing window it highlights the discriminatory effect of a minor political party candidate unable to reach a required threshold number of signature-votes on his petition. Two classes of otherwise eligible voters are being treated differently as alleged in the Libertarian Party Amended Complaint.

III. Voters supporting minor political party candidates are subject to disclosure in the primary election process where major political party supporters have no fear of exposing their candidate of choice for the general election ballot.

The nominating process that gives a candidate support to have him appear on the general election ballot is done so in secrecy—for only those who vote in a major

³² *Id.* ¶ 68; APP.33.

³³ Or. at 10–11; ADD. 10–11; *see* Dckt. No. 30-1.

political party primary. Those who participate in that primary do not disclose their support nor is that support subject to exposure. Yet, voters signing a minor political candidate's petition as supporting that candidate to appear on the general election ballot is exposed.

First, the candidate's nominating petition is *not* campaign material. No known Minnesota statute defines it as such. Second, the petition is not a campaign finance report. No known Minnesota statute defines it as such.

Yet, there is no dispute that a Libertarian Party candidate's petition is subject to the Minnesota Government Data Practices Act under chapter 13.³⁴ The Secretary can use his authority to make those disclosures. In so doing, the identities of the eligible voters supporting the candidate is revealed. But, this is not the case for the major political party candidate in a primary election.

The U.S. Supreme Court has recognized that the secret ballot is of paramount importance to our system of voting. In *Burson v. Freeman*, 504 U.S. 191, 206 (1992), for example, the Court found a "widespread and time-tested consensus" that the secret ballot is necessary to prevent voter intimidation and election fraud. Three terms later, the Court used the tradition of the secret ballot, which it described as "the hard-won right to vote one's conscience without fear of retaliation," in recognizing a First Amendment interest in anonymous political advocacy. *McIntyre v. Ohio Elections*

³⁴ Amend. Compl. ¶246; APP. 68–69. *See also* Minn. R. 8205.1010, subp. 2(1).

Comm'n, 514 U.S. 334, 343 (1995). And while our U.S. Court of Appeals for the Eighth Circuit has not decided whether there is a constitutional right to a secret ballot, there is nevertheless a strong and established privacy interest in a secret ballot. *See Campaign for Fam. Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000).

While it is true signing a nominating petition is not per se a “ballot,”³⁵ what occurs with the Libertarian Party nominating petition is a public declaration of a voter’s support for a specific candidate.³⁶ That same public declaration does *not* occur in a major political party primary election.³⁷ Nor are they subject to disclosure by any law or rule. The Equal Protection Clause difficulties are revealed as it affects the voter and the right of association and results in a chilling effect on those rights:

It is only those electors wishing to sign a petition who must declare their desire to vote for a specific individual. Electors who support other candidates have to make no such public declaration. The chilling effect that such a practice has on associational and voting rights is obvious. The voting citizen must decide whether to sign the petition, having his political preference clearly and unmistakably disclosed, or to refrain from signing. A potential subscriber, who is uncertain about whom he will support in the general election, but with an interest in the candidate will be unable to sign a petition because of the requisite declaration. The impact to the candidate is equally drastic. He is unable to espouse his views because the declaration greatly curtails his ability to appear on the ballot and become widely known. The possibility of having new candidates with unusual and creative political philosophies is greatly reduced. As a result, this requirement

³⁵ Minnesota’s election laws only protect ballot secrecy within the polling place as it pertains to actions of voters. *See e.g.*, Minn. Stat. § 204C.17.

³⁶ *See* Amend. Compl. ¶ 246; APP. 68–69.

³⁷ *Id.* ¶ 249–250; APP. 69.

fosters a system which favors the status quo, while discouraging independent candidates and new political parties.

Socialist Workers Party v. Hechler, 890 F.2d 1303, 1310 (4th Cir. 1989), quoting *Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981).

Indeed, the *Socialist Workers Party* involved a situation in which persons who signed a nominating petition stating that they “desire to vote” for the candidate named in the petition and that required the signing of a nominating certificate determined to be analogous to casting a ballot, the principle remains the same and applicable here as a violation of the Equal Protection Clause as pled in the underlying Amended Complaint.

Here, only minor political party candidate supporters must declare their support of a specific individual which in turn is subject to disclosure. Major political party candidate supporters make no such public declarations during the primary election process. Since Minnesota Rule 8205.1010, subpart 2(1) declares that the information on the minor political party petition is subject to “public inspection,” the voter must decide between whether to sign the petition and having his political preference disclosed or refrain from signing.

Hence, the voter is not only treated differently, but loses his right to associate with the candidate. Likewise, the candidate is treated differently and the impact is equally drastic. The candidate’s views are curtailed by the loss of a signature that in turn leads to his inability to appear on the general election ballot. The loss of

candidates on the general election ballot of differing political philosophies is not only reduced but encourages the fostering of an election process that favors the status quo.

As our previous arguments reveal with the nominating petition's oath, and as alleged in the Amended Complaint, the issue is what the voter thinks. *Id.* 1310. Even if the district court is correct and the oath means what the court says it means as it pertains to "intend," it should not be "enough to say what some court might interpret the [oath] to mean; it is the voter's rights that are being affected, not someone from the judiciary." *Id.* Disclosing the voter's preferences serves no purpose except to have a chilling effect on the voter.

Based upon the arguments here, the Amended Complaint alleges sufficient facts to make the challenges and claims asserted to survive a motion to dismiss and to move forward with those claims as violating the First and Fourteenth Amendments to the U.S. Constitution.

RELIEF SOUGHT

The district court's order to dismiss the underlying Amended Complaint of the Appellants should be reversed. The matter should be remanded to district court for further proceeds in accordance with the disposition of this Court's determination.

Dated: August 11, 2020

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**United States Court Of Appeals
For The Eighth Circuit**
No. 20-2244

Libertarian Party of Minnesota; Chris Holbrook; Mason McElvain;
Chris Dock; Brian McCormick

Plaintiffs - Appellants

v.

Steve Simon, in his official capacity as the Minnesota Secretary of State,
or his successor

Defendant – Appellee

CERTIFICATE OF COMPLIANCE

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