

FILED

November 25, 2020

**OFFICE OF
APPELLATE COURTS**

A20-1486

**STATE OF MINNESOTA
IN SUPREME COURT**

Tyler Kistner, Gene Rechtzigel, Rich Draheim,
Steve Drazkowski, Jeremy Munson, Tim
Miller, Calvin Bahr, Erik Mortensen, Dan Hall,
Jose W. Jimenez, Sandra A. Jimenez, Tomas
Settell, Megan Olson, Leilani Holmstadt, Pam
Myhra, Roz Peterson, Lucia Vogel, Jennifer
Zielinski, Diane Napper, Alexander Deputie,
Charlotte Smith, Fern Smith, Mariah Delapaz,
Cynthia Londquist, Lisa Pohlman, Nora L.
Felton, Deborah Coxe, Jane L. Volz, Paul
Staut, Kathleen Hagen, Janine Kusnierek, Greg
Buck, Don Bumgarner, Amy Bruno, and
Kathleen Nydegger,

Petitioners,

v.

Steve Simon, only in his official capacity as the
Minnesota Secretary of State and member of
the State Canvassing Board, Margaret H.
Chutich, only in her official capacity as a
member of the State Canvassing Board, Gordon
L. Moore, III, only in his official capacity as a
member of the State Canvassing Board, Regina
Chu, only in her official capacity as a member
of the State Canvassing Board, and Christian
Sande, only in his official capacity as a
member of the State Canvassing Board,

Respondents,

and

Minnesota Democratic-Farmer-Labor Party
Ken Martin, its Chair,

Proposed Intervenor-Respondent.

**MINNESOTA DEMOCRATIC-
FARMER-LABOR PARTY'S
MOTION TO INTERVENE AS
RESPONDENT**

TO: The Minnesota Supreme Court and all counsel of record.

Proposed Intervenor-Respondent Minnesota Democratic-Farmer-Labor Party, by Ken Martin, its Chair (the “DFL Party”), hereby moves the Minnesota Supreme Court, under Minnesota Rule of Civil Appellate Procedure 127, for an order permitting it to intervene as a Respondent in the above-captioned matter and participate in any briefing permitted by the Court.

In this action, Petitioners challenge both a lawful consent decree entered by Respondent Steve Simon, the Minnesota Secretary of State, and the State’s postelection review process—*after* the ballots of more than 3.2 million Minnesotans have been cast, counted, and certified. In so doing, Petitioners pose a clear and direct threat to the DFL Party’s rights and legal interests. The DFL Party is entitled to intervene in this matter as of right under Minnesota Rule of Civil Procedure 24.01 to safeguard its substantial and distinct legal interests. Alternatively, the DFL Party should be granted permissive intervention pursuant to Rule 24.02.

I. Intervention as of Right

It has long been the “policy” of Minnesota courts “to encourage intervention whenever possible.” *Norman v. Refsland*, 383 N.W.2d 673, 678 (Minn. 1986). “The requirements of Minn. R. Civ. P. 24.01 provide guidance for appellate intervention.” *In re Crablex, Inc.*, 762 N.W.2d 247, 251 (Minn. Ct. App. 2009); *see also League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 641 (Minn. 2012). “Rule 24.01 establishes a 4-part test that a non-party must meet before being allowed to intervene as of right”:

(1) a timely application for intervention, (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) a showing that the party is not adequately represented by the existing parties.

Minneapolis Star & Trib. Co. v. Schumacher, 392 N.W. 2d 197, 207 (Minn. 1986).

The DFL Party satisfies each of these requirements.

First, this motion is timely. Petitioners filed their petition yesterday, so there has been no significant action in this case, and there is no risk of delay or prejudice to the parties. *See id.* at 207. The DFL Party also stands ready to abide by this Court's scheduling order requesting filing of responsive informal memoranda by 9:00am on Monday, November 30.

Second and *third*, the DFL Party has significant cognizable interests that might be impaired by this action. Petitioners seek to disrupt the certification of lawfully cast ballots and cast doubt on the legitimacy of the election of the DFL Party's candidates. Courts have often concluded that such interference with a political party's electoral prospects constitutes a legally cognizable injury. *See, e.g., Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586–87 (5th Cir. 2006) (recognizing that “harm to [] election prospects” constitutes “a concrete and particularized injury”); *Owen v. Mulligan*, 640 F.2d 1130, 1132 (9th Cir. 1981) (holding that “the potential loss of an election” is sufficient injury to confer Article III standing). Indeed, political parties have been granted intervention in several recent voting cases on these grounds. *See, e.g., Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting intervention to state party and party committee where “Plaintiffs’ success on their claims would disrupt the

organizational intervenors’ efforts to promote the franchise and ensure the election of Democratic Party candidates” (quoting *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020)); see also *Engelrup v. Potter*, 224 N.W.2d 484, 488 (Minn. 1974) (looking to federal cases applying analogous Federal Rule of Civil Procedure 24); *Jerome Faribo Farms, Inc. v. County of Dodge*, 464 N.W.2d 568, 570–71 (Minn. Ct. App. 1990) (same).

Moreover, Petitioners’ action threatens the DFL Party’s members’ right to vote. “[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place.” *United States v. Saylor*, 322 U.S. 385, 387–88 (1944). In turn, the disruptive and potentially disenfranchising effects of this suit would require the DFL Party to divert resources to safeguard the certification of statewide results, thus implicating another of its protected interests. See, e.g., *Ne. Ohio Coal. for Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (finding concrete, particularized harm where organization had to “redirect its focus” and divert its “limited resources” due to election laws); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (concluding that electoral change “injure[d] the Democratic Party by compelling the party to devote resources” that it would not have needed to devote absent new law), *aff’d*, 553 U.S. 181 (2008); *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018) (finding standing where law “require[d] Democratic organizations . . . to retool their [get-out-the-vote] strategies and divert [] resources”), *rev’d on other grounds sub nom. Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir.

2020) (en banc); *see also Issa*, 2020 WL 3074351, at *3 (granting intervention and citing this protected interest).

Fourth, the DFL Party’s interests are not adequately represented by the present parties in the case. *See Jerome Faribo Farms*, 464 N.W.2d at 570 (intervenors “carry the ‘minimal’ burden of showing that the existing parties ‘may’ not adequately represent their interests” (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972))). This is a case where “the government’s representation of the public interest [is] not [] ‘identical to the individual parochial interest’ of a particular group just because ‘both entities occupy the same posture in the litigation.’” *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 899 (9th Cir. 2011) (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)). The DFL Party has specific interests and concerns—from its overall electoral prospects to the most efficient use of its limited resources—that neither Respondents nor other parties in this lawsuit share. *See Paher*, 2020 WL 2042365, at *3 (granting intervention as of right where proposed intervenors “may present arguments about the need to safeguard [the] right to vote that are distinct from [state defendants’] arguments”). As one court recently explained under similar circumstances,

[w]hile Defendants’ arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors [including a state political party] are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures. As a result, the parties’ interests are neither “identical” nor “the same.”

Issa, 2020 WL 3074351, at *3 (citation omitted). Because the DFL Party’s particular interests are not shared by the present parties, it cannot rely on Respondents or anyone else to provide adequate representation. It has thus satisfied the four requirements for intervention as of right under Rule 24.01. *See id.* at *3–4; *Paher*, 2020 WL 2042365, at *3.

II. Permissive Intervention

Alternatively, the DFL Party easily satisfies the requirements for permissive intervention under Rule 24.02. Under Rule 24.02, the Court may grant intervention “upon timely application . . . when an applicant’s claim or defense and the main action have a common question of law or fact.” Minn. R. Civ. P. 24.02. In exercising its discretion under Rule 24.02, “the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.*

As discussed in Part I *supra*, this motion is timely. Moreover, the DFL Party’s defenses share common questions of law and fact with the petition; indeed, they are “directly responsive” to Petitioners’ claims because the DFL Party seeks to both uphold the very consent decree that Petitioners “seek to overturn,” *Franconia Minerals (US) LLC v. United States*, 319 F.R.D. 261, 266 (D. Minn. 2017) (quoting *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002)), and ensure the timely certification of Minnesota’s returns. Lastly, intervention will result in neither prejudice nor undue delay. The DFL Party has an undeniable interest in a swift resolution of this action, to ensure that the votes of all Minnesotans are properly certified. Given the legal and factual shortcomings of Petitioners’ claims, the DFL Party is confident that its intervention in this case, and the filings that will follow, will result in expeditious resolution of this matter.

The DFL Party respectfully requests that this Court issue an order permitting it to intervene as a Respondent in this proceeding.

Dated: November 25, 2020

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Charles N. Nauen

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