THE HONORABLE LEROY MCCULLOUGH

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WASHINGTON ELECTION INTEGRITY COALITION UNITED, a Washington State Nonprofit Corporation; DOUG BASLER; HOWARD FERGUSON; DIANA BASS; TIMOFEY SAMOYLENKO; MARY HALLOWELL; SAMANTHA BUCARI; RONALD STEWART; LYDIA ZIBIN; CATHERINE DODSON,

Plaintiffs,

v.

JULIE WISE, Director of King County Elections; KING COUNTY, and DOES 1-30, inclusive,

Defendants,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE,

Proposed Intervenor Defendant.

No. 21 2 12603-7 KNT

COMPENDIUM OF NON-WASHINGTON AUTHORITIES IN SUPPORT OF WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S RENEWED MOTION TO INTERVENE

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CASES

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Respectfully submitted this 30th day of March, 2023.

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CERTIFICATE OF SERVICE

On March 30, 2023, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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Dated March 30, 2023.

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TAB 1

640 F.2d 1130
United States Court of Appeals,
Ninth Circuit.

Tracy OWEN et al., Appellees,
v.
John G. MULLIGAN et al., Appellants.

No. 79-4032.
|
Argued and Submitted Nov. 7, 1980.
|
Decided April 3, 1981.

Synopsis

An injunction of the United States District Court for the Western District of Washington, Morell E. Sharp, J., required the Postal Service to follow its own regulations. On appeal by the Postmaster, the Court of Appeals, Boochever, Circuit Judge, held that: (1) chairman of county Republican central committee and other plaintiffs had standing to seek by injunction to prevent their opponent from gaining unfair advantage in election process through abuses of mail preferences which arguably promoted opponent's electoral prospects, and (2) District Court did not abuse discretion in finding that requirements for preliminary injunctive relief were met.

Affirmed.

West Headnotes (7)

[1] Postal Service Postage

306 Postal Service
306II Mail in General
306k15 Postage

Qualified nonprofit organization, allowed to send matter at preferential third class rates, may send political literature at such rate, but only its own matter, and may not delegate or lend use of its permit or mail matter in behalf of or produced for, an organization not authorized to mail at preferential rate. 39 U.S.C.A. § 3626(a).

1 Cases that cite this headnote

[2] Postal Service Postage

306 Postal Service
306II Mail in General
306k15 Postage

Postal Service rules under which a qualified nonprofit organization, allowed to send matter at preferential third class rates, may send political literature but only its own matter are designed to prevent abuses in use of bulk mail permits. 39 U.S.C.A. § 3626(a).

1 Cases that cite this headnote

[3] Postal Service Postage

306 Postal Service
306II Mail in General
306k15 Postage

"Cooperative mailing" is mailing by permit holder on behalf of another, in violation of regulation. 39 U.S.C.A. § 3626(a).

[4] Injunction Persons entitled to apply; standing

212 Injunction
212V Actions and Proceedings
212V(A) In General
212k1505 Persons entitled to apply; standing (Formerly 212k114(2))

Republican opponent of Democratic candidate for public office, chairman of Republican state central committee for Washington and Washington committeeman to Republican national committee had standing to seek by injunction to prevent such Democratic opponent from gaining unfair advantage in election process through abuses of mail preferences which arguably promoted opponent's electoral prospects. 39 U.S.C.A. § 3626(a).

9 Cases that cite this headnote

[5] Injunction Mootness and ripeness; ineffectual remedy

Injunction Contributions and expenditures

212 Injunction
212I Injunctions in General; Permanent Injunctions in General

212I(B) Factors Considered in General
212k1066 Mootness and ripeness; ineffectual remedy
(Formerly 212k22)
212 Injunction
212IV Particular Subjects of Relief
212IV(J) Elections, Voting, and Political Rights
212k1349 Contributions and expenditures
(Formerly 212k22)

Where regulations of Postal Service had prevented state or national committee of political party from mailing material at reduced rate for local candidates, enactment of statute under which qualified political committee would be entitled to same third class rates as qualified nonprofit organizations did not moot case in which local candidate sought to enjoin loaning of permit to Democratic candidates in violation of Postal Service manual. 39 U.S.C.A. § 3626(a), (e)(1), (e)(2)(A).

3 Cases that cite this headnote

[6] Injunction Injunctions against government entities in general

212 Injunction
212IV Particular Subjects of Relief
212IV(E) Governments, Laws, and Regulations in General
212k1246 Injunctions against government entities in general
(Formerly 212k1383/4, 212k136(2))

In suit which district court correctly characterized as one to require Postal Service to follow its own regulation, district court did not abuse discretion in finding that requirements for preliminary injunctive relief were met.

2 Cases that cite this headnote

[7] Injunction Necessary and indispensible parties

212 Injunction
212V Actions and Proceedings
212V(B) Parties
212k1524 Necessary and indispensible parties
(Formerly 212k114(1))

Where injunction merely required Postal Service to follow its own regulations rather than cancel special permit, holder of special permit was not indispensable party. 39 U.S.C.A. §§ 409(a), 410(a); 28 U.S.C.A. § 1339.

Attorneys and Law Firms

***1131** Alfred Mellin, Atty., Washington, D. C., argued, John C. Merkel, Seattle, Wash., Linda M. Cole, Washington, D. C., on brief, for appellants.

Richard B. Sanders, Seattle, Wash., for appellees.

Appeal from the United States District Court for the Western District of Washington.

Before VAN DUSEN, Senior Circuit Judge, and FARRIS and BOOCHEVER, Circuit Judges.

Opinion

BOOCHEVER, Circuit Judge:

The Postmaster of the Seattle division of the United States Postal Service appeals from a federal district court injunction requiring the Postal Service to follow its own regulations. We hold that the district court did not abuse its discretion in issuing the injunction.

STATEMENT OF FACTS

On October 30, 1975, the chairman of the King County Republican Central Committee sued to compel the Postal Service to cancel the local Committee on Political Education of King County Labor Council's (COPE) bulk mail permit. A permit holder is entitled to mail at preferential rates. The plaintiff alleged that COPE loaned its permit to Democratic candidates, specifically Rick Bender, in violation of the Postal Service Manual (PSM).

[1] [2] By statute, qualified non-profit organizations are allowed to send matter at a preferential third-class rate. [1] Such an organization [2] may send political literature at that rate, but it must be, as with any preferential rate mailing, "only its own matter." PSM 134.57. [3] Additionally, the organization may not "delegate or lend the use of its permit" or mail "matter in behalf of or produced for an organization not authorized to mail" at the preferential rate. PSM 134.57. These Postal Service rules are designed to prevent abuses in the use of bulk mail permits.

1 See 39 U.S.C. s 3626(a) and former 39 U.S.C. s 4452(b).

2 It is not disputed that COPE is such an organization.

3 Section 134.57 of the Postal Service Manual provides in full:

> An organization authorized to mail at the special bulk third-class rates for qualified nonprofit organizations may mail only its own matter at these rates. An organization may not delegate or lend the use of its permit to mail at special third-class rates to any other person, organization or association. Cooperative mailings may not be made at the special bulk third-class rates for qualified nonprofit organizations if one or more of the cooperating persons or organizations is not entitled itself to the special rates. Cooperative mailings involving the mailing of matter in behalf of or produced for an organization not authorized to mail at the special bulk third-class rates for qualified nonprofit organizations must be paid at the applicable regular rate. If customers disagree with a postmaster's decision that the regular rate of postage applies to a particular mailing, the procedures in 146.14 may be followed.

(Emphasis in original)

[3] To determine whether an organization had made a "cooperative mailing,"[4] the Postal Service established certain guidelines. In short, the Postal Service allowed a mailing at the preferential rate if the permit holder prepared, printed and mailed the matter itself, i. e., the determination was made on the basis of the source of the material. The district court found these procedures to be inadequate to determine whether the permit holder was lending its permit to an unauthorized user.

4 A cooperative mailing is a mailing by a permit holder on behalf of another in violation of PSM s 134.57.

Consequently, the district court issued a preliminary injunction forbidding the Seattle Office of the Postal Service from accepting bulk mail at the reduced rate without first examining it for possible violations of the Postal Service Manual. Additionally, the court ordered the Postal Service to follow new procedures.[5]

5 The district court enjoined the Postal Service from processing the special class mailings without examining them to determine whether they constituted illegal cooperative mailings. The injunction further ordered the Postal Service to consider any mailing, which on its face supported a single candidate or issue, as a prima facie violation and to process it only upon payment of the higher rate. The court ordered the Postal Service to review all questionable mailings. Finally, it ordered that such mailings be accepted only if the permit holder would pay at the regular rate and later seek a refund. Formerly, the Postal Service had accepted the mail at the lower rate and then corrected errors by seeking postage due. Accordingly, nonprofit organizations that make political mailings are treated differently from those that do not, at least initially.

***1132** To comply with this injunction, the local Postal Service changed its internal operating procedures using a content-based test. The Postal Service notified the court that all mailings which appeared to be political in nature and supported one political candidate or issue would be charged a higher rate. Additionally, the Postal Service would sample, in each mailing under a special third-class permit which has political content, to determine if the mailing was the permit holder's own. The district court then dissolved the injunction.

On August 11, 1978, Tom Owen, a King County councilman who ran against Rick Bender, the Chairman of the Republican State Central Committee for Washington and a Washington committeeman to the Republican National Committee, all brought a second suit against the Seattle division of the Postal Service.[6] They alleged that the Postal Service: (1) had consistently violated its own regulation by permitting COPE to lend its permit to non-permit holders, specifically Rick Bender; (2) disregarded its representations to the court concerning the procedures implemented in response to the first injunction; and (3) enforced its regulations in a discriminatory fashion. The basis for these allegations was a single mailing on November 1, 1977, by COPE of Rick Bender campaign literature at the preferential rate. Although the Postal Service did not admit that the mailing was "cooperative," it acknowledged that local officials

inadvertently failed to require that COPE initially pay the higher rate and then appeal for a refund.

6 The named defendants were: (1) John Mulligan, Postmaster of the Seattle Division of the Postal Service and (2) Kenneth Burditt, an acting, Postmaster.

The case was referred to a magistrate. The magistrate concluded that: (1) there was standing and jurisdiction; (2) COPE was not an indispensable party because the only relief which could be granted was an order requiring the Postal Service to follow its regulations, not one canceling COPE's mailing permit; and (3) injunctive relief should be granted because the Postal Service was not following its own procedures, i. e., those procedures mandated by the first injunction. Accordingly, the magistrate recommended that the injunction be reinstated. The district court agreed with the magistrate's conclusions and issued a second injunction similar to the first injunction. [7] The Postal Service appeals each of these conclusions.

7 For a summary of the injunction, see note 5, supra.

STANDING

[4] The Postal Service contends that the district court erred in holding that the plaintiffs had standing. The court held that there was standing because the Postal Service actions caused the plaintiffs financial injury which concomitantly restrained their first amendment freedoms. The Postal Service argues that the plaintiffs failed to meet the requirement of a threatened or actual injury. Linda R. S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973).

The Postal Service asserts that the only threatened injury to the plaintiffs is the potential loss of an election caused by the Postal Service's alleged wrongful act in enabling their opponents to obtain an unfair advantage. The Postal Service argues that this injury is "too remote, speculative and unredressable to confer standing."

This argument has been uniformly rejected. For example, in Rising v. Brown, 313 F.Supp. 824, 826 (C.D.Cal.1970), John Tunney, a United States Senate candidate, sought an injunction to prevent another candidate, George Brown, a Congressman from another district, from using his franking ***1133** privilege to mail literature to voters which Tunney contended was campaign material. Brown argued that Tunney lacked standing because Tunney had no interest except as a citizen taxpayer in seeing that monies of the treasury were not spent on improper expenditures and that the correct postage fees were collected. Citing Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), the court held that Tunney "has such a personal stake in the outcome of the upcoming election wherein he and the defendant Brown are rivals as to assure 'concrete adverseness.' " *Rising*, 313 F. Supp. at 826. [8] Additionally, standing exists even though the election has already occurred. Schiaffo v. Helstoski, 492 F.2d 413, 417 (3d Cir. 1974).

8 See Schiaffo v. Helstoski, 492 F.2d 413, 417 (3d Cir. 1974) ("(A)nybody who personally intends to oppose the candidacy of an incumbent congressman or supports a person mounting such a challenge has a vital interest in securing the cessation of that incumbent's activities financed at least in part by the public fisc that arguably promote his electoral prospects."); Hoellen v. Annunzio, 348 F.Supp. 305, 311 (N.D.Ill.), aff'd, 468 F.2d 522 (7th Cir. 1972), cert. denied, 412 U.S. 953, 93 S.Ct. 3001, 37 L.Ed.2d 1006 (1973); Straus v. Gilbert, 293 F.Supp. 214 (S.D.N.Y.1968).

Although the cited cases involve abuses of franking privileges which enable an incumbent congressman to mail matter at a cheaper rate than his opponent, the plaintiff's stake in the outcome of this case is the same as a candidate's in the franking cases. Like Tunney, Owen and the Republic Committee members seek to prevent their opponent from gaining an unfair advantage in the election process through abuses of mail preferences which "arguably promote his electoral prospects." Id. The plaintiffs have a continuing interest in preventing such practices and, thus, have standing.

MOOTNESS

[5] The Postal Service contends that the case is moot because in 1978 Congress amended the Postal Reorganization Act to provide that a "qualified political committee" shall be entitled to the same third-class rates as qualified non-profit organizations. 39 U.S.C. s 3626(e)(1). The statute defines the term "qualified political committee" as

> a national or State committee of a political party, the Republican and Democratic Senatorial Campaign Committees, the Democratic National

> Congressional Committee, and the National Republic Congressional Committee.

39 U.S.C. s 3626(e)(2)(A).

We need not resolve whether the case is moot as to the State and National Republican Committees because we believe the case is not moot as to plaintiff Owen.

The Postal Service argues that even though the term "qualified political committee" does not include local candidates the case is moot as to local Republican candidates because they can "command the support of organizations which can write, print and disseminate political material on exactly the same terms that COPE does." This assertion is erroneous. First, there is no reason to assume that a local candidate could "command" the state organization to disseminate his material. Second and more importantly, it is doubtful that the State Republican Committee could mail matter for a local candidate even if that were its desire. Since 39 U.S.C. s 3626(e)(1) was enacted, the Postal Service amended its manual. The new manual, Domestic Mail Manual s 623.5 (1979),[9] prohibits any organization including qualified political committees, entitled to mail at special bulk rates from mailing "in behalf of or produced for an organization not authorized to mail at ***1134** the special bulk rates ...." Thus, the Postal Service's own regulations prevent a state or national committee of a political party from mailing material at the reduced rate for local candidates. Consequently, the enactment of 39 U.S.C. s 3626(e) (1) did not moot this case.

9 Section 623.5 provides in part:

> .51
>
> An organization authorized to mail at the special bulk rates may mail only its own matter *at* those rates. An organization may not delegate or lend the use of its permit to mail at the special bulk rates to any other person or organization.
>
> .52
>
> Cooperative mailings may not be made at the special bulk rates if one or more of the cooperating persons or organizations is not authorized itself to mail at the special bulk rates. Cooperative mailings involving the mailing of matter in behalf of or produced for an organization not authorized to mail at the special bulk rates must be paid at the applicable regular rate. If customers disagree with a postmaster's decision that the regular rate of postage applies to a particular mailing, they may appeal the decision in accordance with 133....
>
> (Emphasis added)

INJUNCTION

[6] **[7]** Finally, the Postal Service contends that the district court erred in granting the preliminary injunction. The standard of review is whether the district court abused its discretion. Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1132-33 (9th Cir. 1979). The factors to consider when granting a preliminary injunction are: (1) the likelihood of success; (2) the balance of irreparable harm; and (3) the public interest. City of Anaheim v. Kleppe, 590 F.2d 285, 288 n.4 (9th Cir. 1978).

Since the function of a preliminary injunction is merely to preserve the status quo until the merits of the case can be adjudicated, Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975), it is necessary to determine whether this injunction preserved or altered the status quo. The Postal Service characterizes the second injunction as a mandatory one requiring it to alter its procedures and interfering with the internal affairs of the Postal Service in dictating its procedures and regulations. This argument, however, would have been more persuasive had the Postal Service appealed from the first injunction, which it elected not to do. The second injunction merely preserved the status quo existing at the time it was issued by reinstating the first injunction and the procedures the Postal Service had already agreed to follow. We believe that the district court correctly characterized the suit as one to require the Postal Service to follow its own regulations. [10]

10 In its brief the Postal Service argued that there is no jurisdiction to review Postal Service determinations regarding cooperative mailings because of 39 U.S.C. s 410(a), which limits the general grant of jurisdiction regarding the Postal Service. At oral argument, however, its counsel conceded that if the suit is characterized as one requiring the Postal Service to follow its own regulations, there is jurisdiction. 39 U.S.C. s 409(a); 28 U.S.C. s 1339.

Considering the applicable factors for granting injunctions, we find that the district court did not err. First, there was a strong likelihood of success on the merits because Postal Service representatives admitted that the Postal Service failed to follow the procedures that it implemented to comply with the first injunction. Second, there was no harm to the Postal Service in requiring it to follow its own regulations. Third, if the alleged mail abuses continued, the harm to Republican candidates could be substantial. The district court did not abuse its discretion in granting the preliminary injunction. Its order is AFFIRMED. [11]

[11] The Postal Service also contends that COPE was an indispensable party. Since the injunction merely required the Postal Service to follow its own regulations rather than cancel COPE's special permit, this argument is meritless.

All Citations

640 F.2d 1130

TAB 2

450 F.3d 436
United States Court of Appeals, Ninth Circuit.

State of CALIFORNIA, ex rel. Bill LOCKYER, in his official capacity as Attorney General of the State of California; Jack O'Connell, in his official capacity as the State Superintendent of Public Instruction, Plaintiffs–Appellees,
Alliance for Catholic Health Care, Appellant,
v.
UNITED STATES of America; U.S. Department of Labor; Elaine Chao, in her official capacity as the Secretary of Labor; Department of Health and Human Services; Tommy G. Thompson, in his official capacity as the Secretary of Health and Human Services; United States Department of Education; Margaret Spellings, in her official capacity as the Secretary of Education, Defendants–Appellees,
v.
American Association of Pro–Life Obstetricians and Gynecologists; Christian Medical Association; Fellowship of Christian Physician Assistants, Third-party-defendants.
State of California, ex rel. Bill Lockyer, in his official capacity as Attorney General of the State of California; Jack O'Connell, in his official capacity as the State Superintendent of Public Instruction, Plaintiffs–Appellees,
v.
United States of America; U.S. Department of Labor; Elaine Chao, in her official capacity as the Secretary of Labor; Department of Health and Human Services; Tommy G. Thompson, in his official capacity as the Secretary of Health and Human Services; United States Department of Education; Margaret Spellings, in her official capacity as the Secretary of Education, Defendants–Appellees,
v.
American Association of Pro–Life Obstetricians and Gynecologists; Christian Medical Association; Fellowship of Christian Physician Assistants, Third–party–defendants–Appellants.

Nos. 05–17292, 05–17312
|
Argued and Submitted May 19, 2006.
|
Filed June 9, 2006.

Synopsis

Background: Health care providers moved to intervene in action brought by the state of California, challenging the constitutionality of a federal appropriations rider, which prevented state and local governments from receiving certain federal funds if they discriminated against health care providers that refused to provide coverage for abortions. The United States District Court for the Northern District of California, Jeffrey S. White, J., 2005 WL 3096603, denied motion. Health care providers appealed.

Holdings: The Court of Appeals, Kozinski, Circuit Judge, held that:

[1] health care providers had significant protectible interest, as would support their intervention as of right, in action;

[2] the disposition of the action would impair or impede providers' interest;

[3] providers' interest was not adequately represented; and

[4] providers could intervene as of right.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] Federal Civil Procedure Intervention

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak311 In general

A court construes the federal rule of civil procedure governing intervention as of right liberally in favor of potential intervenors. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

36 Cases that cite this headnote

[2] **Federal Civil Procedure** Grounds and Factors

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak314.1 In general

In determining whether intervention as of right is appropriate, a court applies a four-part test: (1) the motion to intervene must be timely, (2) the movant must claim a significantly protectable interest relating to the property or transaction which is the subject of the action, (3) the movant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and (4) the movant's interest must be inadequately represented by the parties to the action. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

201 Cases that cite this headnote

[3] **Federal Civil Procedure** Interest of applicant in general

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak315 Interest of applicant in general

A proposed intervenor has a "significant protectable interest" in an action, supporting intervention as of right, if (1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiff's claims. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

175 Cases that cite this headnote

[4] **Federal Civil Procedure** Particular Intervenors

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak331 In general

Anti-abortion health care providers had significant protectible interest, as would support their intervention as of right, in action brought by the state of California challenging constitutionality of a federal appropriations amendment, which prevented state and local governments from receiving certain federal funds if they discriminated against health care providers that refused to provide coverage for abortions; health care providers were intended beneficiaries of the amendment, and if the amendment was declared unconstitutional or substantially narrowed as a result of the litigation, they would be forced to choose between adhering to their anti-abortion beliefs and losing federal funding. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

2 Cases that cite this headnote

[5] **Federal Civil Procedure** Particular Intervenors

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak331 In general

The disposition of an action brought by the state of California challenging constitutionality of a federal appropriations amendment, which prevented state and local governments from receiving certain federal funds if they discriminated against health care providers that refused to provide coverage for abortions, would impair or impede anti-abortion health care providers' interest in the amendment, supporting providers' intervention as of right; if state prevailed in lawsuit, it could prosecute providers for failure to provide emergency abortion services required by state statute and state admitted that its employees were already investigating complaints against hospital for failure to provide emergency abortions, and providers had no alternative forum to contest striking down of amendment or narrowing interpretation that could result from lawsuit. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.; West's Ann.Cal.Health & Safety Code § 1317.

3 Cases that cite this headnote

[6] **Federal Civil Procedure** Interest of applicant in general

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak315 Interest of applicant in general

Even if a lawsuit would affect the proposed intervenors' interests, their interests might not be impaired, as required to support intervention as of right, if they have other means to protect them. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

95 Cases that cite this headnote

[7] **Federal Civil Procedure** Particular Intervenors

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak331 In general

Anti-abortion health care providers' interest in federal appropriations amendment, which prevented state and local governments from receiving certain federal funds if they discriminated against health care providers that refused to provide coverage for abortions, was not adequately represented by parties to the litigation, as would support intervention as of right, in action brought by state of California challenging the constitutionality of the amendment; the federal government and the providers had distinctly different interests, since federal government offered a limiting construction of the amendment to avoid any constitutional problems, which would avoid conflict with California law, and the providers argued that the amendment should be construed broadly. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.; West's Ann.Cal.Health & Safety Code § 1317.

1 Cases that cite this headnote

[8] **Federal Civil Procedure** Particular Intervenors

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak331 In general

Anti-abortion health care providers could intervene as of right, in action brought by the state of California challenging constitutionality of a federal appropriations amendment, which prevented state and local governments from receiving certain federal funds if they discriminated against health care providers that refused to provide coverage for abortions; providers had significant protectible interest in enforcing the amendment, which could be impaired by the outcome of the litigation, they had no other means to protect that interest, and neither the federal government, nor any other party, adequately represented providers' interest. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

8 Cases that cite this headnote

Attorneys and Law Firms

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Antonette B. Cordero, Deputy Attorney General, Los Angeles, CA, for plaintiffs-appellees.

***439** August E. Flentje, Assistant United States Attorney, Washington, DC, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Jeffrey S. White, District Judge, Presiding. D.C. No. CV–05–00328–JSW.

Before B. FLETCHER, KOZINSKI and FISHER, Circuit Judges.

Opinion

KOZINSKI, Circuit Judge.

We consider whether health care providers are entitled to intervene in a case challenging the constitutionality of a federal appropriations rider enacted to protect their interests.

Facts

California, like a number of other states, has a statute that compels emergency health care providers to deliver medical services "for any condition in which the person [seeking such services] is in danger of loss of life, or serious injury or illness." Cal. Health & Safety Code § 1317(a). The statute makes no exception for abortion services and can therefore be understood to mandate such services when needed to preserve the life or health of the patient.

In 2004, Congress attached a rider to an appropriations bill, in an effort to dissuade states from forcing health care providers to offer abortion services. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, 118 Stat. 2809 (2005). The rider, dubbed the Weldon Amendment after its sponsor, Congressman (and Doctor) Dave Weldon, prevents federal, state and local governments from receiving certain federal funds if they discriminate against health care providers that refuse to provide, pay for, provide coverage of, or refer for abortions. [1] *See id.* Div. F, § 508(d), 118 Stat. at 3163.

1 The portion of the Weldon Amendment at issue in this case reads:

> (1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.
>
> (2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

Id. § 508(d), 118 Stat. at 3163.

In light of the Weldon Amendment, enforcement of California Health and Safety Code section 1317 would arguably make California ineligible for certain federal funds. This caused California to bring suit in federal court seeking a declaration that the Amendment is unconstitutional on the grounds that it exceeds Congress's spending power and authority and violates the Fifth and Tenth Amendments. Alternatively, the state sought a declaration that enforcement of section 1317 would not disqualify it from receiving federal funds otherwise available under the Consolidated Appropriations Act. While the Weldon Amendment does not, technically, compel California to refrain from enforcing section 1317 against doctors who refuse to perform abortions, California argues that, as a practical matter, it will be precluded from so enforcing its law for fear of losing billions in federal aid. In support of this theory, the state presented an affidavit from its Attorney General stating that, so long as the Weldon Amendment is in place, he "will have no choice but to refrain from ***440** exercising [his] authority to enforce California's police powers."

Among the arguments raised by the United States in this litigation is that California lacks standing because it faces no imminent threat that the Weldon Amendment will be enforced against it, in part because it has not shown any plans to enforce section 1317. In response, the state argued as follows in its brief below:

> [F]ollowing the passage of the Weldon Amendment, the California Attorney General's Office has received complaints about two women allegedly being denied emergency abortion-related medical services at a California Hospital. These complaints have been referred to the California Department of Health Services, and this state agency *will initiate an investigation* into the complaints pursuant to its statutory authority under the California Health and Safety Code.
>
> That these complaints have been received by the California Attorney General's Office document [sic] that California's need to enforce Health and Safety Code section 1317 is not "unforeseeable," as defendants would have this Court believe. Instead, the undisputed evidence in this case shows that state officials *are already receiving information about alleged denials of emergency abortion-related medical services* in California....

Plaintiffs' Combined Opposition to Cross–Motion for Summary Judgment and Reply, at 6 (emphasis added) (internal citations omitted).

Two separate groups—the appellants here—sought to intervene both as of right, *see* Fed.R.Civ.P. 24(a), and with the district court's permission, *see id.* 24(b). The first group, the Alliance of Catholic Health Care, is a non-profit health care association representing Catholic health care providers in California. Alliance members object to providing *any* abortion service, even when essential to preserving the health or life of the mother. The other entity, known as the Medical Groups, consists of several pro-life organizations whose members will provide abortion services only in a very small class of emergencies. The Medical Groups contend that their members risk being prosecuted under section 1317 because they take a far narrower view than does California of what constitutes a medical emergency justifying an abortion.

The existing parties opposed intervention and the district court ruled in their favor. Finding that the proposed intervenors did not have a significant protectable interest in the case, and that disposition of the case would not impede their ability to protect their interests, it denied intervention both as of right and as a discretionary matter. This appeal followed.

Analysis

[1] **[2]** On appeal, appellants challenge only the denial of intervention as of right under Rule 24(a). Intervention as of right is governed by Federal Rule of Civil Procedure 24(a)(2). We construe Rule 24(a) liberally in favor of potential intervenors. *Sw. Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 818 (9th Cir.2001). In determining whether intervention is appropriate, we apply a four-part test:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

***441** *Sierra Club v. EPA,* 995 F.2d 1478, 1481 (9th Cir.1993). Appellees concede that the intervention motions were timely, so we address only the last three factors.

[3] **1.** "An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir.1998). The United States forthrightly conceded at oral argument what seems beyond dispute—that Congress passed the Weldon Amendment to protect health care providers like those represented by the proposed intervenors: "They are the intended beneficiaries of this law using the encouragement of Congress's spending power to try and protect their conscience rights."

[4] The proposed intervenors' interest thus is neither "undifferentiated" nor "generalized." *See United States v. Alisal Water Corp.,* 370 F.3d 915, 920 (9th Cir.2004) (quoting *Pub. Serv. Co. v. Patch,* 136 F.3d 197, 205 (1st Cir.1998)). For the health care providers represented by proposed intervenors, the Weldon Amendment provides an important layer of protection against state criminal prosecution or loss of their medical licenses. If the Weldon Amendment is declared unconstitutional or substantially narrowed as a consequence of this litigation, they will be more likely to be forced to choose between adhering to their beliefs and losing their professional licenses. Such an interest is sufficiently "direct, non-contingent, [and] substantial." *Dilks v. Aloha Airlines, Inc.,* 642 F.2d 1155, 1157 (9th Cir.1981) (per curiam).

California and the United States point out that the Weldon Amendment does not give the proposed intervenors any enforceable rights, nor does it seek to protect any of their existing legal rights. However, our intervention caselaw has not turned on such technical distinctions. Rather, we have taken the view that a party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.

In *County of Fresno v. Andrus,* 622 F.2d 436 (9th Cir.1980), for example, the underlying litigation concerned a federal statute passed to protect small farmers on lands receiving

federally subsidized water. The statute did not confer any rights on the small farmers; instead, it required owners of larger farms, as a condition of receiving federally subsidized water, to dispose of any excess land over a certain acreage at below-market rates. *Id.* at 437. In allowing the small farmers to intervene, we noted that "[w]e have rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest," and that the small farmers were "precisely those Congress intended to protect" with the statute. *Id.* at 438.

The proposed intervenors' interest in the litigation here is at least as substantial as that of the farmers in *County of Fresno.* Congress passed the Weldon Amendment precisely to keep doctors who have moral qualms about performing abortions from being put to the hard choice of acting in conformity with their beliefs, or risking imprisonment or loss of professional livelihood. And the Amendment appears to have had its intended effect: The state, in its complaint, contends that the Weldon Amendment "is so broad and severe as to leave the Plaintiffs with no choice but to accede to Congress's dictates." That Congress chose to use its spending power as a lever, rather than passing legislation granting affirmative rights to those represented by the proposed intervenors, is of no consequence. The Weldon Amendment effectively shields the proposed intervenors ***442** and their members from the difficult moral choice to which enforcement of section 1317 could otherwise subject them. The fact that California brought this lawsuit seeking to invalidate the Amendment, or restrict its sweep, is proof in itself of the efficacy of this congressional enactment and its significance to the proposed intervenors.

The interest of the proposed intervenors here is far more direct than that of the proposed intervenors in *Donnelly.* In that case, which had been brought by female Forest Service employees, male Forest Service employees sought to intervene to assert their own claims of gender-based discrimination. *See* 159 F.3d at 407. We concluded the fate of the women's claims wouldn't affect the men's claims at all, so we denied intervention on the grounds that the men's interests were unrelated to the underlying litigation. *Id.* at 409–10. In contrast, this case will determine conclusively whether, and the degree to which, the Weldon Amendment handcuffs states that would force health care providers to perform abortions.

[5] **2.** Having found that appellants have a significant protectable interest, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it. *See Berg,* 268 F.3d at 822 ("We follow the guidance of Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.' " (alteration in original) (quoting Fed.R.Civ.P. 24 advisory committee note to 1966 amendment)). Should California prevail in this lawsuit, it will be free to prosecute health care providers for failure to provide emergency abortion services, however it defines that phrase. California's argument that proposed intervenors have failed to show that section 1317 is being actively enforced against health care providers who refuse to perform abortions is fatally undermined by the state's own evidence demonstrating that its employees are investigating complaints that a hospital has failed to provide emergency abortions. *See* p. 440 *supra.* The same evidence that bolsters the state's standing to sue also bolsters the case for intervention.

[6] Even if this lawsuit would *affect* the proposed intervenors' interests, their interests might not be *impaired* if they have "other means" to protect them. *Alisal,* 370 F.3d at 921. In *Alisal,* the United States sought to place the defendant in receivership to remedy environmental violations it had committed. One of the defendant's judgment creditors tried to intervene because it feared that the receiver's power to veto outlays would impair its ability to enforce its judgment. *Id.* at 918. We held that litigation would not impair the creditor's interests because the district court had set up a separate process for approving claims against the debtor that was sufficient to protect the proposed intervenor's interests. *Id.* at 921. By contrast, proposed intervenors here have no alternative forum where they can mount a robust defense of the Weldon Amendment. *See* p. 443 *infra.*

United States v. City of Los Angeles, 288 F.3d 391 (9th Cir.2002), on which California relies, is not particularly helpful to it. That case involved a lawsuit by the United States seeking to enjoin certain police practices. A number of community groups sought to intervene seeking to protect the rights of their members to be free from unconstitutional police practices. We denied intervention on another ground, but noted it was "doubtful" that these proposed intervenors had shown their interests would be impaired by the litigation because the lawsuit did not "prevent any ***443** individual from initiating suit against LAPD officers who engage in unconstitutional practices or against the City defendants for engaging in unconstitutional patterns or practices." *Id.* at 402.

California's reliance on this passing comment in *City of Los Angeles* is misplaced. The comment does not amount to a holding because nothing in the case turned on it. And in any

event, the comment is entirely unhelpful to the opponents of intervention here. The community groups in *City of Los Angeles,* after all, were not precluded by the pending litigation from bringing their own lawsuits to enjoin or seek damages for unconstitutional police practices. By contrast, the proposed intervenors here have no such opportunity. Because the Weldon Amendment is a spending measure and thus gives the proposed intervenors no enforceable rights, they would be unable to bring a separate suit where they could argue for a broad reading of the Amendment. *Cf. Massachusetts (Frothingham) v. Mellon,* 262 U.S. 447, 487–88, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (holding that taxpayers generally lack standing to contest public expenditures); *Flast v. Cohen,* 392 U.S. 83, 105–06, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (carving out a narrow exception to *Frothingham* for Establishment Clause challenges). The argument raised by both of the existing parties that the proposed intervenors and their members could raise the issue as a defense if they are ever prosecuted by the California authorities for violating section 1317 is no more persuasive. Setting aside whether the ability to raise a defense in a criminal prosecution is *ever* an adequate substitute for settling a legal issue ahead of time and avoiding prosecution altogether, the simple answer to this argument is that a spending measure such as the Weldon Amendment can't possibly be used as a defense in a prosecution for a state crime.

While *City of Los Angeles* does not support the view that intervention is inappropriate here, another aspect of the case actually helps the proposed intervenors. In addition to the community groups there, the designated bargaining unit for the police officers also sought to intervene in the litigation. 288 F.3d at 396. While denying intervention to the community groups, we granted intervention to the bargaining unit because the proposed consent decree in the case purported to give the district court authority to override the officers' collective bargaining agreement. *Id.* at 401. In granting intervention, we noted that once the consent decree was entered, the officers would have no alternative forum to protect their rights. *Id.* The proposed intervenors here are in much the same position. If, as a result of this litigation, the Weldon Amendment is struck down, or its sweep is substantially narrowed, the proposed intervenors will have no alternative forum in which they might contest that interpretation of the Amendment.

[7] **3.** Finally, we turn to whether the United States will adequately represent the proposed intervenors' interests in this action. We have observed that "[w]hen an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki v. Cayetano,* 324 F.3d 1078, 1086 (9th Cir.2003). Moreover, "[t]here is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. In the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Id.* (quoting 7C Charles Alan Wright, et al., Federal Practice and Procedure: Civil 2d § 1909, at 332 (2d ed.1996)) ***444** (internal citation omitted). Arguably, this principle is nowhere more applicable than in a case where the Department of Justice deploys its formidable resources to defend the constitutionality of a congressional enactment. *See generally* Seth P. Waxman, *Defending Congress,* 79 N.C. L.Rev. 1073 (2001).

Here, however, the United States and the proposed intervenors have distinctly different, and likely conflicting, interests. "Often, defending Acts of Congress leads the Solicitor General to lean heavily on the *Ashwander* principle of construing a statute so as to avoid constitutional doubt." *See id.* at 1079–80 (citing *Ashwander v. TVA,* 297 U.S. 288, 348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)). We have recognized that willingness to suggest a limiting construction in defense of a statute is an important consideration in determining whether the government will adequately represent its constituents' interests. *See Prete v. Bradbury,* 438 F.3d 949, 958 (9th Cir.2006).

Of course, just because the government theoretically may offer a limiting construction of a statute that is narrower than that of a party proposing intervention does not mean that the party has overcome the presumption of adequacy of representation. In order to make a "very compelling showing" of the government's inadequacy, the proposed intervenor must demonstrate a likelihood that the government will abandon or concede a potentially meritorious reading of the statute.

Here, there is a limiting construction that the government could advocate that might assuage many of the constitutional doubts clouding the Weldon Amendment: The Weldon Amendment does not reach statutes like California Health and Safety Code section 1317 that do not facially discriminate against health care providers who refuse to provide abortion services. Section 1317, after all, speaks in terms of health care providers that fail to provide *any* emergency service; it does not single out abortion for special treatment.

That the government will offer such a limiting construction of the Amendment is not just a theoretical possibility; it has already done so. In its motion for summary judgment, the United States suggested that "because § 1317 applies to medical emergencies involving any life-threatening or other serious condition, and not simply abortions, it does not on its face constitute discrimination within the meaning of the Weldon Amendment." And it has indicated that it may adopt the position that "enforcement of a facially neutral state statute such as § 1317 (which applies to all emergency medical services, not simply abortions) [does not] constitute discrimination under the Weldon Amendment." By contrast, the proposed intervenors take the position that the Weldon Amendment must be read broadly to cut off federal funding to any state that uses facially neutral laws—such as section 1317—to force health care providers to perform abortions when they are unwilling to do so. [2]

2 As noted, the two proposed intervenors have somewhat different interests, in that Alliance members will *never* provide abortion services, whereas Medical Groups members will do so in certain limited circumstances. This difference is of no moment here because both groups suggest an interpretation of the Amendment that is far broader than that advocated by the United States.

These are far more than differences in litigation strategy between the United States and the proposed intervenors. *See City of Los Angeles,* 288 F.3d at 402–03 ("[M]ere[ ] differences in strategy ... are not enough to justify intervention as a matter of right."). They go to the heart of ***445** the defense of the Weldon Amendment. By making the strident argument that section 1317 is irreconcilably in conflict with the Weldon Amendment, the proposed intervenors bring a point of view to the litigation not presented by either the plaintiffs or the defendants.

We therefore conclude that the proposed intervenors in this case, like those in *Forest Conservation Council v. United States Forest Service,* 66 F.3d 1489, 1499 (9th Cir.1995), have "more narrow, parochial interests" than the United States. Through the presentation of direct evidence that the United States will take a position that actually compromises (and potentially eviscerates) the protections of the Weldon Amendment, the proposed intervenors have overcome the presumption that the United States will act in their interest.

* * *

[8] The proposed intervenors have a significant protectable interest at stake in this case that could be impaired by the outcome. They have no other means to protect this interest, and no current party adequately represents it. We therefore reverse and remand with instructions that both proposed intervenors be made parties to the litigation aligned with the defendant. The district court should take all reasonable steps to put the new parties on an equal footing with the original parties. Because the district court will soon hear arguments on the cross-motions for summary judgment, time is of the essence; the clerk is instructed to issue the mandate forthwith.

REVERSED AND REMANDED.

All Citations

450 F.3d 436, 64 Fed.R.Serv.3d 1225, 06 Cal. Daily Op. Serv. 4985, 2006 Daily Journal D.A.R. 7262

TAB 3

957 F.2d 1108
United States Court of Appeals,
Third Circuit.

Drew BRODY, Jennifer Hohnstine, By and Through their next friend, Joanne SUGZDINIS, on behalf of themselves and other students similarly situated

v.

Edward SPANG, individually and in his official capacity as Principal, Downingtown Area Senior High School, Ronald Gray, individually and in his official capacity as Superintendent, Robert Eldredge, individually and in his capacity as President, Downingtown Area School Board, Cynthia Hallman, Nancy Glenn, Olen Simmons, James Watson, Benjamin Lagarde, Andrew Harden, Frank Marcocci, Shirley Hamhons, individually and in their official capacities as members of Downingtown Area School Board, Bonnie Fitzgerald, by and through her guardian, Millard C. Fitzgerald, Millard C. Fitzgerald as an individual, Charles Guth, by and through his guardian John Guth as an individual, Lauri Kyler, by and through her guardian, Laura Kyler, Laura Kyler as an individual, Timothy Cura, by and through his guardian Joseph Cura, Joseph Cura as an individual, Amber Fernald, by and through her guardian, Patricia Fernald, Patricia Fernald as an individual, on behalf of themselves and other students and taxpayers similarly situated, Proposed Intervenors, Appellants.

No. 91–1209.
|
Argued July 31, 1991.
|
Decided Feb. 28, 1992.
|
As Amended March 18, 1992.

Synopsis

High school students brought suit against school board and school officials alleging violation of their rights under the establishment clause by school officials' sponsorship of official baccalaureate service, inclusion of religious benedictions and invocations at graduation ceremonies, and requirements that students write essays on religious subjects in English class. After temporary restraining order was entered prohibiting prayers at commencement, other students and parents filed motion to intervene, asserting that the TRO and final relief sought by plaintiffs infringed their rights of free speech and freedom of association. Following adoption of consent decree, the United States District Court for the Eastern District of Pennsylvania, Herbert J. Hutton, J., denied motion to intervene, and movants appealed. The Court of Appeals, Roth, Circuit Judge, held that: (1) motion to intervene was not rendered moot on appeal by fact that all student members applying to intervene had graduated from high school; (2) appellants were not entitled to intervene at merits stage of litigation; and (3) remand was necessary to determine whether appellants possessed a legally cognizable interest in remedial phase of the action sufficient to justify intervention in remedial phase.

Remanded.

West Headnotes (19)

[1] **Federal Courts** Nature of dispute; concreteness

Federal Courts Mootness

170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2103 Nature of dispute; concreteness
(Formerly 170Bk12.1, 170Bk12)
170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2108 Mootness
170Bk2109 In general
(Formerly 170Bk12.1, 170Bk12)

Court of Appeals is limited by Article III of the Constitution to adjudicating only live cases or controversies, and Court is consequently unable to decide questions that have become moot. U.S.C.A. Const. Art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[2] **Federal Courts** Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2108 Mootness

170Bk2113 Inception and duration of dispute; recurrence; "capable of repetition yet evading review"
(Formerly 170Bk12.1, 170Bk12)

Mootness bar does not apply if dispute presented is "capable of repetition, yet evading review"; under the doctrine, two elements must be met: challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and there must be reasonable expectation that the same complaining party would be subjected to the same action again.

11 Cases that cite this headnote

[3] **Federal Courts** Want of Actual Controversy; Mootness and Ripeness

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(I) Dismissal, Withdrawal, or Abandonment
170Bk3513 Want of Actual Controversy; Mootness and Ripeness
170Bk3514 In general
(Formerly 170Bk723.1, 170Bk723)

Appeal from denial of motion to intervene brought by students and parents in action challenging inclusion of prayer or religious ceremonies in high school graduation ceremony or other official events at high school was not rendered moot by graduation of students, considering that length of school year was too short to complete litigation and appellate review of case, and case was capable of repetition with regard to parents who had younger children in school district.

15 Cases that cite this headnote

[4] **Federal Courts** Parties

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3585 Parties
170Bk3585(1) In general
(Formerly 170Bk817)

Court of Appeals reviews denial of motion to intervene as of right for abuse of discretion, although review is more stringent than abuse of discretion review applied to denial of motion for permissive invention. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

17 Cases that cite this headnote

[5] **Federal Civil Procedure** Interest of applicant in general

Federal Civil Procedure Inadequacy of representation of applicant's interest

Federal Civil Procedure Time for intervention

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak315 Interest of applicant in general
170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest
170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak320 Time for intervention

Applicant is entitled to intervention as of right if: application for intervention is timely; applicant has a sufficient interest in the litigation; the interest may be affected or impaired, as a practical matter by the disposition of the action; and the interest is not adequately represented by existing party in the litigation. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

88 Cases that cite this headnote

[6] **Federal Civil Procedure** Interest of applicant in general

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak315 Interest of applicant in general

To meet test for intervention as of right, legal interest asserted must be a cognizable legal interest, and not simply an interest of a general and indefinite character. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

11 Cases that cite this headnote

[7] **Federal Civil Procedure** Grounds and Factors

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak314.1 In general
(Formerly 170Ak314)

In assessing whether proposed intervenor has stated a legally cognizable claim, it is appropriate in certain cases to conduct a two-step examination, separately evaluating whether applicant has right to intervene at merits stage and whether he or she may intervene to participate in devising the remedy. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

17 Cases that cite this headnote

[8] **Federal Civil Procedure** Governmental bodies and officers thereof

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak338 Governmental bodies and officers thereof

Parents and students were not entitled to intervene as of right in merits stage of action challenging inclusion of prayer or religious ceremonies in graduation ceremony or other official events at high school; applicants for intervention asserted that students possessed free speech right to discuss religion in graduation speeches, and merits phase of action concerned permissibility of baccalaureate services, invocations at graduation exercises, and certain English class assignments; litigation of such questions and any court findings on liability would not have implicated free speech rights of applicants. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

25 Cases that cite this headnote

[9] **Constitutional Law** Traditional Public Forum in General

Constitutional Law Designated Public Forum in General

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1736 Traditional Public Forum in General
92k1737 In general
(Formerly 92k90.1(4))
92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1745 In general
(Formerly 92k90.1(4))

In either "quintessential public forum" such as a street or park, or a "designated public forum" which the state creates by deliberately opening forum to the public, content-based restriction is only permissible if it can survive strict scrutiny. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[10] **Constitutional Law** Justification for exclusion or limitation

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1748 Non-Public Forum in General
92k1751 Justification for exclusion or limitation
(Formerly 92k90.1(4))

In a "non-public forum," state may enforce not only time, place, and manner restrictions, but also any other reasonable restrictions that are not based on an attempt to suppress a particular viewpoint; such restrictions may exclude certain categories of speech by subject matter and type

of speaker, provided that rules are reasonable and viewpoint neutral. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[11] Constitutional Law Nature and requisites

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1746 Nature and requisites
(Formerly 92k90.1(4))

Determination whether government has designated a public forum is based upon two factors: governmental intent and extent of use granted; to assess intent, Court of Appeals focuses on policies and practices, the nature of the property, and the compatibility of the property with expressive activity; when examining extent of use granted, Court is mindful that a designated public forum may be so designated for only limited uses or for limited class of speakers. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[12] Constitutional Law Establishment of Religion

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1295 In general
(Formerly 92k84.1, 92k84(1))

Government policy does not violate the establishment clause if: it has a secular purpose; its primary effect neither advances nor inhibits religion; and it does not create excessive entanglement of government with religion. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law Pedagogical concerns in general

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)1 In General
92k1966 Pedagogical concerns in general
(Formerly 92k90.1(1.4))

In the school context, limitations of speech in nonpublic forums are permissible if they are reasonably related to legitimate pedagogical concerns. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[14] Federal Civil Procedure Inadequacy of representation of applicant's interest

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest

Once an applicant for intervention has established that he or she possesses a sufficient legal interest in the underlying dispute, applicant must show that claim is in jeopardy in the lawsuit; applicant must demonstrate that legal interest may be affected or impaired, as a practical matter by disposition of the action. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

46 Cases that cite this headnote

[15] Federal Civil Procedure Interest of applicant in general

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak315 Interest of applicant in general

For purposes of intervention, it is not sufficient that claim of applicant be incidentally affected; rather, there must be a tangible threat to applicant's legal interest; however, factor may be satisfied if determination of action in the applicant's absence would have a significant stare decisis effect on the claim, or if the applicant's rights might be affected by a proposed remedy. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

29 Cases that cite this headnote

[16] **Federal Civil Procedure** Binding effect of principal action on applicant

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak317 Binding effect of principal action on applicant

Applicant for intervention need not prove that he or she would be barred from bringing a later action or that intervention constitutes the only possible avenue of relief; possibility of a subsequent collateral attack does not preclude an applicant from demonstrating that his or her interests would be impaired should intervention be denied. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

5 Cases that cite this headnote

[17] **Federal Civil Procedure** Inadequacy of representation of applicant's interest

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest

For purposes of intervention, representation of existing parties will be considered inadequate on following grounds: that although applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to applicant's interests; that there is collusion between representative party and opposing party; or that representative party is not diligently prosecuting suit. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

40 Cases that cite this headnote

[18] **Federal Civil Procedure** Inadequacy of representation of applicant's interest

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest

There is a presumption that if one party is a government entity charged by law with representing interests of applicant for intervention, then such representation will be adequate. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

25 Cases that cite this headnote

[19] **Federal Civil Procedure** Discretion of court

Federal Courts Parties

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak313 Discretion of court
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3585 Parties
170Bk3585(1) In general
(Formerly 170Bk817)

Whether to grant permissive intervention is within discretion of district court, and decision is reviewed only for abuse of discretion. Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.

46 Cases that cite this headnote

Attorneys and Law Firms

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Attorneys for The Rutherford Institutes of Delaware and Pennsylvania, for appellants.

Before BECKER, SCIRICA and ROTH, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge.

This suit derives from a dispute over whether and to what extent religious speech may be included in a public high school graduation ceremony, and requires us to evaluate the competing interests of students under the free speech and establishment clauses of the First Amendment. The underlying action was filed by two members of the Class of 1990 at the Downingtown Area Senior High School by and through a next friend. Among other allegations, the complaint asserted that the inclusion of prayer at commencement exercises violated the establishment clause.

The question raised on the present appeal is whether the district court erred in denying the motion of another group of students and their parents either to intervene as of right or in the alternative for permissive intervention. This second group asserts that students possess a free speech right to discuss religion in graduation speeches. The validity and sufficiency of this claimed legal interest under the test for intervention as of right, depends on whether the graduation ceremony qualifies as a First Amendment public forum. Because we find that the factual record as to the nature and history of commencement exercises at Downingtown Senior High School is inadequate, we are unable to decide this question. We will consequently remand this case to the district court for further development of the factual record and for a determination of the public forum issue.

I. FACTS AND PROCEDURAL HISTORY

The plaintiffs in the underlying suit are Drew Brody and Jennifer Hohnstine (the "Brody group"), two students in the Class of 1990 at Downingtown Area Senior High School. The defendants are the president and members of the school board, and the principal and superintendent of the school (the "school officials"). The central claim of the plaintiffs' complaint alleged that the school officials' sponsorship of an official baccalaureate service, inclusion of religious benedictions and invocations at graduation ceremonies, and requirements that students write essays on religious subjects in English class, all violated students' rights under the establishment clause. The Brody group also challenged the school's denial of permission for the formation of a student group to discuss the constitutionality of the baccalaureate and graduation ceremonies, on free speech grounds and under the Equal Access Act, 20 U.S.C. §§ 4071–74 (1988).

The plaintiffs filed their suit on June 7, 1990, one day before the June 8, 1990 graduation ***1112** ceremony, and several days after a school-sponsored baccalaureate service had been held on June 3, 1990. With the agreement of the defendant school officials, the district court entered a temporary restraining order that same day, prohibiting "any prayer or proselytization in [the] benediction or invocation" at the commencement. Joint App. at A–17. On the day of graduation, three other members of the Class of 1990 filed a motion to intervene.

Two weeks later, seven additional individuals joined in the intervention motion, and the group filed a brief in support of their position. These applicants for intervention (the "Fitzgerald group") fall into three categories: (1) Bonnie Fitzgerald, Charles Guth, and Lauri Kyler, the original applicants, who are members of the Class of 1990; (2) Timothy Cura and Amber Fernald, who are members of the Class of 1991; and (3) Millard Fitzgerald, John Guth, Laura Kyler, Joseph Cura, and Patricia Fernald, who are parents of these students and taxpayers in the school district. The Fitzgerald group's motion before the district court asserted that the TRO and the final relief sought by the Brody group infringed the Fitzgerald students' rights of free speech and freedom of association. The plaintiffs filed an opposition to the intervention motion, but the defendant school officials took no position on the issue.

Several days after the June 8th graduation, the Brody group also filed a motion for contempt, alleging that the president of the school board had offered a prayer during the commencement and that consequently defendants had breached the TRO. After negotiations by the parties on both the matters raised in the complaint and those asserted in the motion for contempt, the parties agreed to a consent decree, which the district court approved on September 24, 1990. As of that date, the district court had not yet ruled on the motion to intervene, and the members of the Fitzgerald group were not involved in the settlement negotiations. [1]

1 At oral argument, counsel for the school officials asserted that various members of the Fitzgerald group and their attorney did attend a school board

meeting on September 12, 1990, at which the board debated whether to adopt the proposed consent decree. (Tr. at 46–47). The record, however, is barren on this subject, and in any event it is clear that the Fitzgerald group did not participate in the negotiations during which the proposed decree was hammered out.

The consent decree entered by the district court prohibits conducting baccalaureate services or including prayer or religious ceremonies in any graduation ceremony or other official event at Downingtown Senior High School. The provision pertaining to commencement exercises and other official events applies not only to the defendant school officials, but also to "those acting by their invitation," and states that "[e]xcept with respect to students invited to speak at graduation, nothing in this agreement shall be interpreted to restrict any student's first amendment rights." Joint App. at A–61. Not surprisingly, this term provides the focus for the Fitzgerald group's free speech claims. The order also provides for compliance with the Equal Access Act, 20 U.S.C. §§ 4071–74 (1988), and establishes a procedure for amendment of the decree upon any change in the state of the law. [2]

[2] The full text of the consent decree's provisions is as follows:

1. Defendants, their successors, agents, employees, and those acting by their invitation shall not pray, proselytize with respect to religion, or engage in any religious ceremony or activity during the annual commencement exercises or any other official event at the Downingtown Senior High School. Except with respect to students invited to speak at graduation, nothing in this agreement shall be interpreted to restrict any student's first amendment rights.

2. Defendants, their successors, agents, and employees shall not sponsor, solicit or plan any baccalaureate service. A request to hold a baccalaureate at or on school facilities shall be treated in the same manner as any other request under the Downingtown Area School District Administrative Guidelines Section 707 relating to use of facilities.

3. If any student group complies with the requirements of the Federal Equal Access Act, 20 U.S.C. sections 4071–4074, the defendant will authorize its formation and make facilities available to it in accordance with the Equal Access Act.

4. Either party shall have a right to petition the court for relief from this Consent Decree if the law as it now exists and upon which this Consent Decree is based changes in such a way to make enforcement of the Consent Decree unconstitutional or inconsistent with governing law.

5. Defendants shall within 30 days settle plaintiffs' entitlement to attorney's fees. If this matter is not resolved within that time, plaintiffs shall be free to petition the Court for such an award.

6. Plaintiffs shall dismiss their Motion for Contempt with prejudice.

Joint App. at A–61.

***1113** Following the adoption of the consent decree, the applicants for intervention filed an appeal of the district court's order. This Court, however, dismissed the appeal for lack of appellate jurisdiction in *Brody v. Spang,* No. 90–1804 (3d Cir. Jan. 11, 1991). *See Pennsylvania v. Rizzo,* 530 F.2d 501, 508 (3d Cir.) (appellant must have been granted permission to intervene in order to appeal merits of case), *cert. denied,* 426 U.S. 921, 96 S.Ct. 2628, 49 L.Ed.2d 375 (1976). On February 22, 1991, the district court formally ruled on and denied the motion to intervene. *Brody v. Spang,* 1991 WL 24954 (E.D.Pa.1991). The district court found that none of the applicants for intervention possessed a sufficient legal interest in the dispute, and that to the extent any such interest existed, it was adequately represented by the defendant school officials. The Fitzgerald group now appeals from this denial of their motion to intervene.

II. MOOTNESS

As a preliminary matter, we must assess whether this case has become moot on appeal. Although the district court decided the motion to intervene several months before the 1991 graduation ceremony, by the time that we heard oral argument on this appeal, all the student members of the Fitzgerald group had already graduated from Downingtown Senior High School. We are therefore required to consider whether the graduation of the applicants for intervention who are members of the Class of 1991 renders this appeal moot.

[1] **[2]** This Court is limited by Article III of the Constitution to adjudicating only live cases or controversies, and we are consequently unable to decide questions that have

become moot. *De Funis v. Odegaard,* 416 U.S. 312, 316, 94 S.Ct. 1704, 1705, 40 L.Ed.2d 164 (1974) (per curiam). The mootness bar does not apply, however, if the dispute presented is "capable of repetition, yet evading review." Under this doctrine, two elements must be met: "(1) the challenged action [must be] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [must be] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975) (per curiam). *See also Roe v. Wade,* 410 U.S. 113, 124–25, 93 S.Ct. 705, 712–13, 35 L.Ed.2d 147 (1973) ("Pregnancy often comes more than once to the same woman, and ... provides a classic justification for a conclusion of nonmootness.").

In the present case, the length of the school year during which a student is a graduating high school senior is clearly too short to complete litigation and appellate review of a case of this complexity. *See Board of Educ. v. Rowley,* 458 U.S. 176, 186 n. 9, 102 S.Ct. 3034, 3041 n. 9, 73 L.Ed.2d 690 (1982) (student's claim under Education of the Handicapped Act for preceding school year not moot because claim may arise in subsequent years and "[j]udicial review invariably takes more than nine months to complete"); *cf. Roe,* 410 U.S. at 125, 93 S.Ct. at 713 ("the normal 266–day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete"). As a result, this controversy is one which "evades review." The applicants for intervention have greater difficulty, however, with the second prong of the test. These same students will never again graduate from Downingtown Senior High School, and thus, this dispute is not capable of repetition as to them.

[3] We reject the argument that the Fitzgerald group can escape this difficulty simply because they contemplated seeking class certification, and noted in their motion to intervene that they would "subsequently ***1114** file a motion pursuant to Rule 23 of the Federal Rules of Civil Procedure for class certification." Joint App. at A–19. Although class certification can substitute for the capable of repetition requirement if the controversy still exists as to the present members of the class, a class must have been properly certified in order to qualify under this exception. *See Board of School Comm'rs v. Jacobs,* 420 U.S. 128, 129–30, 95 S.Ct. 848, 849–50, 43 L.Ed.2d 74 (1975). In fact in *Jacobs,* the plaintiffs had not only filed a class certification motion, but the district court had granted it, and yet the Supreme Court still held that the plaintiffs had failed to meet the class action exception because the order did not adequately define the class to be represented. In the present case, however, the applicants for intervention never even moved for class certification.

Yet, also among the Fitzgerald group are five parents, who assert their claims on the basis of their children's interests.[3] Their inclusion is significant because these parents independently have standing to bring constitutional challenges to the conditions in their children's schools, *see School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 224 n. 9, 83 S.Ct. 1560, 1572 n. 9, 10 L.Ed.2d 844 (1963), and at least two of the five parents have younger children in the Downingtown School District: John Guth's daughter Susan is in the seventh grade and Patricia Fernald's son Charles is in the eleventh grade.[4] Since the consent decree is designed to remain in effect indefinitely, it is likely that these parents will confront the same barriers to religious speech when their younger children graduate from high school. *See Honig v. Doe,* 484 U.S. 305, 320–22, 108 S.Ct. 592, 602–03, 98 L.Ed.2d 686 (1988). Consequently, as to these two individuals, the present dispute is capable of repetition.

3 These parents also assert claims on the basis of their status as taxpayers, but they are unable to meet the taxpayer standing test set forth in *Flast v. Cohen,* 392 U.S. 83, 105–06, 88 S.Ct. 1942, 1955–56, 20 L.Ed.2d 947 (1968), because this case involves injunctive relief that does not implicate the government's treasury. Moreover, the Fitzgerald group's claims are not asserted under the establishment clause which does specifically limit the government's spending power, *id.* at 105, 88 S.Ct. at 1955, but under the First Amendment's free speech clause.

4 Although this fact is not part of the record below, the parties to this appeal have submitted a stipulation pursuant to Fed.R.App.P. 10(e), stating that these two parents do have such younger children in the Downingtown school system. Rule 10(e) permits us, in our discretion, to supplement the record on appeal in this manner. *See Salinger v. Random House, Inc.,* 818 F.2d 252, 253 (2d Cir.), *cert. denied,* 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987); *Dickerson v. Alabama,* 667 F.2d 1364, 1367 (11th Cir.), *cert. denied,* 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982). Because this potential mootness barrier arose only

> after briefing had been completed on this appeal, we choose to exercise our discretion under this rule. We also note that although parties may not waive jurisdictional defects by stipulation, *Sosna v. Iowa,* 419 U.S. 393, 398, 95 S.Ct. 553, 556, 42 L.Ed.2d 532 (1975), an admission of a fact which would clearly support jurisdiction, does not similarly violate Article III.

In fact, the Fifth Circuit confronted an almost identical mootness question in *Walsh v. Louisiana High School Athletic Ass'n,* 616 F.2d 152 (5th Cir.1980), *cert. denied,* 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981), which involved a free exercise of religion challenge to a high school's transfer policy for ninth graders. During the pendency of the *Walsh* case, all of the originally named students completed the ninth grade, and were therefore no longer subject to the challenged rule. The plaintiffs informed the district court, however, that several of the plaintiff parents had other children in the school system who would ultimately reach the high school. *See Walsh v. Louisiana High School Athletic Ass'n,* 428 F.Supp. 1261, 1263 (E.D.La.1977). The Fifth Circuit affirmed the district court's holding that the case had consequently not become moot, because "the district court reasonably could expect that the same complaining parties again would be subjected to the challenged action in the future." 616 F.2d at 157.

In addition, our own Court has stated in an *in banc* opinion that the capable of repetition prong of this exception should be applied liberally in cases involving significant individual interests. *See* ***1115** *United States v. Frumento,* 552 F.2d 534, 540–41 (3d Cir.1977) (*in banc*). In *Frumento,* this Court held that the appeal of a contempt order requiring imprisonment was not moot despite the fact that the appellant had already been released. After conducting an analysis demonstrating why the particular individual might again be subject to confinement, we stated:

> Even if we could not construct or project any "capability of repetition" in this case, we would nevertheless decline to dismiss [this] appeal as moot.
>
> While in each of the instances discussed, the Supreme Court has determined that "capability of repetition" existed, we are of the view that such capability was perceived so as to satisfy the true governing consideration behind the Court's decision—that of having review available when significant interests are at stake.

Id. at 540.

Thus, at least as to the parents John Guth and Patricia Fernald, this dispute is capable of repetition yet evading review. As a result, we hold that this controversy is not moot, and we will proceed to consider the merits of this appeal. [5]

5 For the sake of clarity and because all the individuals who joined in the motion to intervene assert the same legal arguments, we will continue to refer to these two parents with justiciable claims as the "Fitzgerald group," "appellants," or the "applicants for intervention."

III. STANDARDS FOR INTERVENTION

[4] We review a denial of a motion to intervene as of right for abuse of discretion, although this review is "more stringent" than the abuse of discretion review we apply to a denial of a motion for permissive intervention. *Harris v. Pernsley,* 820 F.2d 592, 597 (3d Cir.), *cert. denied,* 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987). Under the *Harris* standard, a denial of intervention as of right should be reversed if the district court " 'applied an improper legal standard or reached a decision that we are confident is incorrect.' " *Id.* (quoting *United States v. Hooker Chemicals & Plastics Corp.,* 749 F.2d 968, 992 (2d Cir.1984)). We are more reluctant to intrude into the highly discretionary decision of whether to grant permissive intervention.

[5] The Fitzgerald group seeks intervention as of right as a party defendant under Fed.R.Civ.P. 24(a)(2), which covers any proposed intervenor who by timely application, "claims an interest relating to the property or transaction which is the subject matter of the action and ... is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," and whose interest is not "adequately represented by existing parties." As construed by this Court, this rule entitles an applicant to intervene if:

> (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the

> interest is not adequately represented by an existing party in the litigation.

Harris, 820 F.2d at 596.

In the present case, there is no question that the Fitzgerald group's motion to intervene was timely, since the original motion was filed only one day after the complaint, and the amended version was filed only two weeks later. Of the remaining three elements of the test, the focus of the dispute is on the sufficient legal interest factor. Although appellants' ability to satisfy the impairment of interest and the adequacy of representation factors is also at issue, our analysis below demonstrates that if appellants can show that they possess a legally cognizable interest in this dispute, then they can also meet these two further elements of the Rule 24(a) test.

Should intervention as of right not be available, the Fitzgerald group alternatively seeks permissive intervention pursuant to Fed.R.Civ.P. 24(b). Permissive intervention is available upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common." The rule further provides ***1116** that in exercising its discretion as to whether to grant permissive intervention, the district court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

IV. INTERVENTION AS OF RIGHT

A. *Sufficiency of Asserted Legal Interest*

[6] **[7]** To meet this prong of the test for intervention as of right, the legal interest asserted must be a cognizable legal interest, and not simply an interest " 'of a general and indefinite character.' " *Harris,* 820 F.2d at 601 (quoting *United States v. American Telephone & Telegraph Co.,* 642 F.2d 1285, 1292 (D.C.Cir.1980)). In assessing whether a proposed intervenor has stated a legally cognizable claim, it is appropriate in certain cases to conduct a two step examination, separately evaluating whether the applicant has a right to intervene at the merits stage and whether he or she may intervene to participate in devising the remedy. *Id.* at 599.

We established the bifurcated inquiry approach in *Harris,* which involved a motion by the Philadelphia District Attorney to intervene as a defendant in a suit alleging that the conditions in city prisons were unconstitutional. As we pointed out in that case, particularly in institutional reform litigation, "while only some individuals may be held liable for the unlawful conduct, and thus have an interest in the determination of liability, a larger number of persons' interests may be infringed on at the remedial stage of the litigation." *Id.* Moreover, we further expressed a belief "that, given the complexity of much public law litigation, permitting courts to limit intervention as of right to discrete phases of the litigation may be necessary in some cases." *Id.* at 599 n. 11.

We are presently faced with one of these cases. Although this action does not involve "institutional litigation" per se, this lawsuit is analogous to *Harris.* The plaintiffs' underlying claims ask the straightforward, if nonetheless complex, question of whether or not the defendants' policies violate the constitution, whereas the proposed remedy affects all the people involved in an entire institution. Moreover, as in *Harris,* the existing parties chose to enter a consent decree, and we are now concerned with the breadth of injunctive relief that is appropriate at the remedial stage.

The specific legal interest that the Fitzgerald group asserts on this appeal is a First Amendment free speech right of students to discuss religion in commencement speeches. Appellants do not seek to contest the provision of the consent decree which prohibits the school from sponsoring baccalaureate services. (Tr. at 23–24). In addition, they have not here presented the freedom of association claim raised in their motion before the district court. Nor does the Fitzgerald group assert a claim under the First Amendment's free exercise clause, having made only a few oblique references to that clause in their brief before us, and never having stated such a claim in their intervention motion before the district court.

[8] Under our bifurcated inquiry, we must separately measure the legal sufficiency of the Fitzgerald group's free speech interests at each stage of the litigation. The merits phase of this action concerned the permissibility of baccalaureate services, invocations at graduation exercises, and certain English class assignments under the establishment clause. It also involved a challenge under the free speech clause and the Equal Access Act to the school's refusal to permit the formation of a student discussion group. Although all these issues asserted in the complaint were resolved by consent decree without any court proceedings, it is clear that the litigation of these questions and any court findings on liability would in no way have implicated the free speech rights of appellants.

More specifically, the school officials' practices were either lawful or unlawful, and a determination of this question would not impinge on appellants' ability to exercise their free speech rights at a graduation ceremony. In the words we employed ***1117** in *Harris,* the applicants for intervention "ha [ve] no role in the [school] management and cannot be held liable for any unlawful conditions, [and therefore do] not have the right to prevent the [school officials] from effectuating [their] reasoned judgment that it is best not to litigate the action." 820 F.2d at 600.

Turning to the remedy phase, we must here assess whether the consent decree approved by the district court alters any of the legal rights and responsibilities of the applicants for intervention. *See id.* The single section of the consent decree which appellants cite as infringing their rights is the first paragraph, which states:

> 1. Defendants, their successors, agents, employees, and those acting by their invitation shall not pray, proselytize with respect to religion, or engage in any religious ceremony or activity during the annual commencement exercises or any other official event at the Downingtown Senior High School. *Except with respect to students invited to speak at graduation, nothing in this agreement shall be interpreted to restrict any student's first amendment rights.*

Joint App. at A–61 (emphasis added).

As appellants point out, this consent decree provision, on its face, clearly permits an infringement of otherwise existing First Amendment rights of students. The question for our determination is whether there are any otherwise existing rights. Since the First Amendment does not require the government to permit unfettered access to its property, the answer depends upon whether or not the graduation ceremony at Downingtown Senior High School qualifies as a public forum.

1. *Whether the Graduation is a Public Forum*

[9] The Supreme Court has adopted a framework of forum analysis to assess whether a government entity must permit speech or expressive activity on its property. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), the Court set forth three types of forums that a government may establish. First, are "quintessential public forums" such as streets and parks in which the state can only enforce time, place, and manner restrictions, or content-based restrictions that are necessary to serve a compelling state purpose. *Id.* at 45, 103 S.Ct. at 954. Second, are "designated public forums," which the state creates by deliberately opening them to the public. As long as a government entity maintains such a forum, it is subject to the same restrictions as a quintessential public forum. *Id.* at 45–46, 103 S.Ct. at 954–56. Thus, in either type of public forum, a content-based restriction is only permissible if it can survive strict scrutiny.

[10] The third and final category is the "non-public forum." Here, the state may enforce not only time, place, and manner restrictions, but also any other reasonable restriction that is not based on an attempt to suppress a particular viewpoint. *Id.* at 46, 103 S.Ct. at 955. Thus, these restrictions may exclude certain categories of speech by subject matter and type of speaker, provided that the rules are reasonable and viewpoint neutral. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985).

[11] There is no question that the Downingtown Senior High School graduation ceremony is not a quintessential public forum. Rather, the present dispute centers on whether the commencement is a designated public forum or a non-public forum. The determination of whether the government has designated a public forum is based upon two factors: governmental intent and the extent of use granted. *Gregoire v. Centennial School Dist.,* 907 F.2d 1366, 1371 (3d Cir.), *cert. denied,* 498 U.S. 899, 111 S.Ct. 253, 112 L.Ed.2d 211 (1990). We must also bear in mind that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius,* 473 U.S. at 802, 105 S.Ct. at 3449.

To assess government officials' intent under the first factor, we focus on their ***1118** policies and practices, the nature of the property, and the compatibility of the property with expressive activity. *Cornelius,* 473 U.S. at 802, 105 S.Ct. at 3448. When examining the extent of use granted, we must be

mindful that a designated public forum "may be so designated for only limited uses or for a limited class of speakers." *Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors,* 776 F.2d 431, 436 (3d Cir.1985). Restrictions of this type do not mean that the forum is non-public, but show that the government has created a "limited public forum," a subset type of designated public forum, whose scope is circumscribed either by subject matter or category of speaker.

We are guided in this inquiry by several prior cases that have considered whether a given facility owned and operated by a public school constitutes a designated public forum. Most significantly, in *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), the Supreme Court held that a public high school's student newspaper was not a designated public forum. The student plaintiffs in *Hazelwood* alleged that the decision of school officials to censor and delete certain articles concerning the subjects of pregnancy and divorce, violated their First Amendment free speech rights.

En route to its holding in *Hazelwood* that the newspaper was a non-public forum, the Supreme Court distinguished its prior decision in *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which had permitted a broad scope for student free speech. *Tinker* held that a school's policy prohibiting junior and senior high school students from wearing black armbands to protest the Vietnam War, in the absence of any showing that the conduct would "materially and substantially interfere with the requirements of appropriate discipline," *id.* at 509, 89 S.Ct. at 737, or infringe the rights of other students, *id.* at 508, 89 S.Ct. at 737, violated the students' free speech rights. The *Hazelwood* court found that *Tinker* had simply raised the question of whether a school must tolerate certain expressive activity, whereas the case before it asked "whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood,* 484 U.S. at 270, 108 S.Ct. at 569. In the latter context, it held, forum analysis was appropriate.

The *Hazelwood* court grounded its conclusion that the newspaper was not a public forum upon findings that the newspaper was sponsored by the school as part of the regular educational curriculum, that the journalism teacher exercised a great deal of control over the final product, and that school officials had not opened the paper to indiscriminate use by the student body or even by the student reporters and editors. *Id.* 108 S.Ct. at 568–69. The Court also noted that the paper might reasonably be seen to bear the imprimatur of the school. *Id.* 108 S.Ct. at 569. Since the Court found that the newspaper was a non-public forum, it further held that any reasonable non-viewpoint-based restrictions were acceptable, provided that the school officials' regulations were "reasonably related to legitimate pedagogical concerns." *Id.* 108 S.Ct. at 571.

The Supreme Court also engaged in a type of public forum analysis in *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), which involved a university's policies for granting various student organizations access to its facilities. Although the case was decided before the Supreme Court fully articulated its public forum doctrine in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), the *Widmar* court framed the inquiry in public forum terms, as whether the university, having "opened its facilities for use by student groups ... can now exclude groups because of the content of their speech." 454 U.S. at 273, 102 S.Ct. at 276. The court held that because the university had recognized approximately 100 student groups and permitted them to meet on campus, it had created a public forum which it was also required to open to student religious organizations.

Our Court has also considered the public forum doctrine in the context of public ***1119** schools' access policies. Most recently, in *Gregoire v. Centennial School Dist.,* 907 F.2d 1366 (3d Cir.), *cert. denied,* 498 U.S. 899, 111 S.Ct. 253, 112 L.Ed.2d 211 (1990), we examined an unsuccessful attempt by a non-student religious organization to secure permission to use a public high school's auditorium. We observed that the school had opened its auditorium extensively to various groups including local labor unions and the Rotary Club, *id.* at 1374, and had even permitted religious speech in an afternoon student forum, *id.* at 1379, but had only denied access for an evening event by the particular non-student religious group. In this manner, the school had demonstrated its intent to open the auditorium to a wide variety of expressive activity, and had simply singled out the plaintiff group for discriminatory treatment. As a result, we held that the school had designated the auditorium as a public forum.

In reaching our conclusion in *Gregoire,* we relied in part on the Supreme Court's holding in *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), that religious groups must be included under open forum policies. We found that *Widmar* 's logic was not restricted to the university level, particularly because the high school's practices at issue in

Gregoire demonstrated that in other contexts the school had trusted the maturity of its students. 907 F.2d at 1377–78. In this respect, we also cited the Supreme Court's decision in *Board of Educ. v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990). *See* 907 F.2d at 1378. *Mergens* upheld the constitutionality of the Equal Access Act, 20 U.S.C. §§ 4071–74 (1988), which statutorily extended *Widmar* 's holding to public secondary schools. Furthermore, we pointed out in *Gregoire* that in examining school officials' intent, we must consider their acts, and not their argument in litigation that they had no desire to create a forum. 907 F.2d at 1374.

In *Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors,* 776 F.2d 431, 436 (3d Cir.1985), by contrast, we held that another public school's athletic field did not qualify as a public forum. In that case, the plaintiffs sought to hold a peace demonstration on the school's athletic field. As in *Gregoire,* many student and external organizations had been granted access, but we further found that authorization for use was not granted as a matter of course, 776 F.2d at 436, and many other groups had also been denied permission. *Id.* at 434. Thus, unlike the religious group denied access in *Gregoire,* the student peace group had not been singled out, and the school policies at issue in *Student Coalition for Peace* did not demonstrate an intent to designate the field as a public forum.

Under the analysis required by these precedents, it appears unlikely that the commencement exercises at Downingtown Senior High School have been designated as a public forum. The process for setting the format and contents of a graduation ceremony are more likely to resemble the tightly controlled school newspaper policies at issue in *Hazelwood* than the broad group access policies considered in *Widmar* and *Gregoire.* Moreover, at least one court has considered the issue of whether a high school graduation ceremony is a public forum, and found that the particular graduation at issue was a non-public forum. *See Lundberg v. West Monona Community School Dist.,* 731 F.Supp. 331 (N.D.Iowa 1989).

In *Lundberg,* a group of students sought an injunction to allow a minister to deliver a benediction at their commencement. Thus, although the case did not involve a motion to intervene, the plaintiffs' free speech claims were similar to those of the applicants for intervention in the present suit. The *Lundberg* court premised its conclusion that no public forum had been created on its findings that school officials organized and sponsored the graduation ceremony at issue and had "the sole discretion to dictate its content," and that "[w]hile the school [could] not dictate the actual words spoken, [it did] retain control over the type of speech admissible at the ceremony." *Id.* at 337. In addition, the court stated that "[g]raduation ceremonies have never served as forums for public ***1120** debate or discussions, or as a forum through which to allow varying groups to voice their views." *Id.* at 339. *Lundberg* also relied on the Supreme Court's decision in *Hazelwood,* noting that school officials were legitimately concerned that the content of the graduation bore the imprimatur of the state. *Id.* at 338–39.

Nonetheless, it is certainly possible that the commencement exercises at Downingtown Senior High School could qualify as a public forum, and nothing in the present record demonstrates otherwise. More specifically, although the terms of the consent decree suggest that the pool of potential graduation speakers is confined to members of the school community and invited guests, this simply indicates that any forum created is a limited one, and does not preclude a finding that the ceremony has been designated as a public forum. *See Hazelwood,* 484 U.S. at 267, 108 S.Ct. at 568 (school facilities may become public forums if " 'by policy or by practice' [school officials have] opened those facilities 'for indiscriminate use by ... some segment of the public, such as student organizations' ").

If, for example, school officials have authorized students to choose which of them will speak, and have permitted these speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum. Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in students' speeches. Moreover, we must reiterate our cautionary admonishment from *Gregoire,* that an assessment of school officials' intent should be governed by their acts, and not by their bald assertions that they had no desire to create a public forum. 907 F.2d at 1374.

Yet, given the procedural history of this case, there are no established facts in the record as to the nature and history of commencement ceremonies at Downingtown Senior High School. Public forum analysis is, however, highly fact-dependent, and this question cannot be decided without a factual record. The Brody group contends in its brief that the graduation ceremony is not a public forum, because school officials have closely regulated the content of graduation speeches by providing the topic for and editing these speeches. Appellee's Brief at 20–21. While we agree that if

true, such facts would suggest that the graduation has not been designated as a public forum, *see Hazelwood,* 484 U.S. at 267–70, 108 S.Ct. at 567–69; *Lundberg,* 731 F.Supp. at 337, there are no such facts in the record, and appellees' brief does not cite to any.

Rather, because the motion to intervene was decided on the motion papers which included no affidavits, and the underlying suit was resolved by consent decree without any development of facts, the factual record is barren. We have no information as to such critical facts as who selects the topics for graduation speeches and by what process, or how many graduation speakers address each commencement and by what method they are chosen. Nor do we know how broadly participatory the ceremonies have been or what issues and subjects have been discussed in the past.

As a result, the present record is insufficient to make any final decision on the public forum issue. In fact, counsel for the Brody group conceded this point at oral argument. (Tr. at 33). Consequently, this case must be remanded for development of the relevant facts and a decision by the district court as to whether the Downingtown Senior High School graduation ceremony constitutes a designated public forum. The outcome of this assessment on remand will determine which of two alternate paths must then be followed.

2. *Whether the Speech Restrictions are Permissible if the Graduation is a Designated Public Forum*

As we have noted above, if the district court determines that the graduation ceremony is a designated public forum, then any restrictions imposed on speech which falls within the scope of that forum must survive strict scrutiny through a showing that these restrictions are narrowly drawn to further a compelling state purpose. ***1121** *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45–46, 103 S.Ct. 948, 954–56, 74 L.Ed.2d 794 (1983). The allegedly compelling interest asserted by the Brody group and the school officials is that permitting religious speech at graduation would violate the establishment clause. If such a violation can be demonstrated, this would constitute a compelling interest. *See Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) ("We agree that the interest of the University in complying with its constitutional [establishment clause] obligations may be characterized as compelling."). Consequently, if the regulations are narrowly drawn to further this interest, restrictions against religious speech could be permissible even in a public forum.

If the speech limitations at issue can meet this test, there would be no basis upon which to attack the consent decree, and the Fitzgerald group would not possess a cognizable legal interest. If, however, the restrictions on speech could not survive strict scrutiny, then under the first prong of the intervention test, the Fitzgerald group would have a sufficient legal interest entitling them to intervene and participate as a party in the formation of a new settlement agreement.

The speech restrictions at issue here are those contained in paragraph one of the consent decree, as quoted above. These regulations were adopted by the school officials in negotiations with the Brody group. Although we recognize that the defendant school officials have expressly denied liability, Joint App. at 60, for purposes of analysis we may still view the consent decree as a proposed remedy for the establishment clause violations alleged in the Brody group's complaint. Thus, in order to determine whether the school officials possessed a compelling interest to adopt such restrictions, the district court must assess whether the prior policies permitting religious speech at graduation would pose problems under the establishment clause.

[12] For the past two decades, courts have applied the three pronged test of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), to determine whether a given practice violates the establishment clause.[6] Under *Lemon,* a government policy is constitutional if (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement of the government with religion. *Id.* at 612–13, 91 S.Ct. at 2111. This assessment, like the public forum analysis, is dependent on the particular undeveloped facts regarding how graduation ceremonies have been conducted at Downingtown Senior High School.

6 Although appellants have not made the argument, some courts have considered whether in assessing the permissibility of religious speech, courts should not apply the *Lemon* test, but instead apply the test from *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). In *Marsh,* the Court upheld the Nebraska legislature's practice of opening its sessions with a religious invocation by a chaplain. The Court did not apply *Lemon,* and instead based its decision upon the long

historical acceptance of this legislative practice. The Supreme Court, however, has never extended the *Marsh* test, *see Edwards v. Aguillard,* 482 U.S. 578, 583 n. 4, 107 S.Ct. 2573, 2577 n. 4, 96 L.Ed.2d 510 (1987), and other courts have also refused to do so. *See, e.g., Jager v. Douglas County School Dist.,* 862 F.2d 824, 828–29 (11th Cir.1989); *id.* at 835 (Peck, J., concurring).

Moreover, this term the Supreme Court may provide some further guidance on this issue in *Weisman v. Lee,* 908 F.2d 1090 (1st Cir.1990), *cert. granted,* 499 U.S. 918, 111 S.Ct. 1305, 113 L.Ed.2d 240 (1991), which held below that invoking the deity in a benediction and invocation at a public high school graduation violated the establishment clause. We recommend that if on remand the district court finds that a public forum exists, the court should wait for the Supreme Court's decision in *Weisman* before conducting its inquiry into whether the speech restrictions in the consent decree may survive strict scrutiny.

If upon completion of its analysis the district court determines that this is a designated forum and that no establishment clause problem exists, then the court must find that there is no compelling interest to ***1122** support the consent decree's speech restrictions, and the Fitzgerald group may be deemed to possess a legally cognizable interest in this dispute. Alternatively, should the district court find that school officials do have a compelling interest under the establishment clause, the district court must then consider whether the consent decree's provisions have been narrowly tailored to further this interest.

3. *Whether the Speech Restrictions are Permissible if the Graduation is a Non–Public Forum*

[13] Should the district court find that the Downingtown Senior High School commencement is a non-public forum, then school officials are free to enforce restrictions "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985). In the school context, limitations on speech in non-public forums are permissible if they "are reasonably related to legitimate pedagogical concerns." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 272, 108 S.Ct. 562, 570, 98 L.Ed.2d 592 (1988). Moreover, school officials must be permitted to "retain the authority to refuse ... to associate the school with any position other than neutrality on matters of political controversy." *Id.* 108 S.Ct. at 570.

A wide variety of policy justifications may pass muster under this test. More specifically, "reasonable" grounds for content based restrictions include the desire to avoid controversy, *Cornelius,* 473 U.S. at 811, 105 S.Ct. at 3453, and an interest in maintaining the appearance of neutrality, *Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors,* 776 F.2d 431, 437 (3d Cir.1985), provided that these are not simply pretexts for viewpoint discrimination. As the Supreme Court stated in *Cornelius,* "[a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." 473 U.S. at 811, 105 S.Ct. at 3453. Moreover, even though commencement exercises are arguably not part of the educational curriculum, *Hazelwood* stands for the proposition that school officials are to be accorded broad discretion in regulating speech in all school forums that are non-public.

Consequently, the speech restrictions at issue in the present case could easily meet this reasonableness standard. For example, school officials may wish to prohibit all religious speech at a graduation ceremony in order to avoid offending anyone in the audience, who may not share the speaker's religious beliefs. Officials might also aim to prevent controversy and to maintain neutrality as between religion and non-religion. Since the consent decree's provisions appear to exclude all religious speech and not just one particular viewpoint, such a limitation would constitute a permissible content-based restriction.

As a result, if the district court determines on remand that no public forum exists, it should consider whether the restrictions are in fact reasonable in light of the purpose served by the forum and whether they are viewpoint neutral. If the district court so finds, it need not proceed any further in the intervention as of right inquiry.

B. *Impairment of Any Legal Interest*

[14] Once an applicant for intervention has established that he or she possesses a sufficient legal interest in the underlying dispute, the applicant must also show that this claim is in jeopardy in the lawsuit. Under this element of the test, the Fitzgerald group must demonstrate that their legal interests "may be affected or impaired, as a practical matter by the disposition of the action." *Harris v. Pernsley,* 820 F.2d 592,

596 (3d Cir.), *cert. denied,* 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987). In making this determination, we are required to assess "the practical consequences of the litigation," and " 'may consider any significant legal effect on the applicant's interest.' " *Id.* at 601 (quoting *National Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n,* 578 F.2d 1341, 1345 (10th Cir.1978)).

[15] ***1123** It is not sufficient that the claim be incidentally affected; rather, there must be "a tangible threat" to the applicant's legal interest. *Harris,* 820 F.2d at 601. Yet, this factor may be satisfied if, for example, a determination of the action in the applicants' absence will have a significant stare decisis effect on their claims, or if the applicants' rights may be affected by a proposed remedy. *Id.*

[16] An applicant need not, however, prove that he or she would be barred from bringing a later action or that intervention constitutes the only possible avenue of relief. The possibility of a subsequent collateral attack does not preclude an applicant from demonstrating that his or her interests would be impaired should intervention be denied. Such a holding would reverse our policy preference which, as a matter of judicial economy, favors intervention over subsequent collateral attacks. *See Society Hill Civic Ass'n v. Harris,* 632 F.2d 1045, 1051 (3d Cir.1980) (permitting collateral attack on consent decree only because the district court "did not retain jurisdiction over the decree and thus direct intervention [wa]s no longer available"). Moreover, since in the present case even the amended version of the motion to intervene was filed within two weeks of the complaint, it would set a poor precedent to hold that the Fitzgerald group must resort to a collateral attack simply because the district court failed to consider their motion before entering the consent decree.

Thus, we find that if the Fitzgerald group can show that they possess a legal interest in this action, then it naturally follows that such an interest would be affected by this litigation. As stated above, the consent decree explicitly limits the First Amendment rights of students; consequently, if the students possess a cognizable legal interest in exercising free speech at Downingtown Senior High School graduation ceremonies, such an interest is clearly impaired by the terms of the consent decree.

C. *Adequacy of Representation*

[17] Under this final element of the test, "[t]he burden, however minimal ... is on the applicant for intervention to show that his interests are not adequately represented by the existing parties." *Hoots v. Pennsylvania,* 672 F.2d 1133, 1135 (3d Cir.1982). Representation will be considered inadequate on any of the following three grounds: (1) that although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit. *Id.*

[18] There is a presumption that if one party is a government entity charged by law with representing the interests of the applicant for intervention, then this representation will be adequate. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania,* 674 F.2d 970, 973 (3d Cir.1982). Other courts have held, particularly in the context of school desegregation cases, that this presumption applies when students seek to intervene in cases against school officials, because school officials are charged by law with representing the interests of students. *See, e.g., United States v. South Bend Community School Corp.,* 692 F.2d 623, 627 (7th Cir.1982).

In the present case, the Fitzgerald group does not allege that there has been any collusion between school officials and the Brody group, but they do assert that they have rebutted the presumption of representation because their interests diverge from those of the defendant school officials, and because the defendants have not diligently litigated this lawsuit. While the parties have vigorously contested the second of these arguments on this appeal, only the first has merit.

The contention that the school officials have not actively litigated this case must be rejected as a basis for finding inadequate representation. Although the record is unclear as to the extent of negotiations between the parties to the underlying suit, and as to whether the Fitzgerald group received adequate notice of the proposed settlement, we believe that this aspect of ***1124** the inquiry has received undue emphasis by the parties. Defendants are fully entitled to choose to negotiate a consent decree rather than litigate the case on the merits. As we have previously stated:

> a consent decree may be simply "the inescapable legal consequence of application of fundamental law to [the] facts. That [intervenors] would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the [defendants] did not adequately represent their interests in the litigation."

Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir.), *cert. denied,* 426 U.S. 921, 96 S.Ct. 2628, 49 L.Ed.2d 375 (1976) (quoting *United States v. Board of School Comm'rs,* 466 F.2d 573, 575 (7th Cir.1972), *cert. denied,* 410 U.S. 909, 93 S.Ct. 964, 35 L.Ed.2d 271 (1973)) (alterations in original).

The divergence of interests argument, however, is a strong one, at least as it pertains to the remedial stage of the litigation. We have already found that the Fitzgerald group has no legally cognizable interest in the merits phase. The school officials represented any interests they had in maintaining the school's prior policies, and an applicant for intervention "can have no interest is assuring [the perpetuation of] unconstitutional conditions." *Harris,* 820 F.2d at 601. In the remedial phase, however, the Fitzgerald group's interests have clearly diverged from those of school officials. Appellants seek to maximize their freedom of speech and to avoid censorship by the very school officials who are purported to represent their interests in this litigation. Since the Fitzgerald group's claims pit the interests of students in asserting control over the content of graduation speeches, directly against those of school officials in maintaining their authority over commencement ceremonies, we cannot expect school officials to be vigorous in defending the applicants' legal interests.

Thus, if the district court finds that the Fitzgerald group does possess a legally cognizable free speech interest at the remedial phase of this litigation, this interest is not adequately represented, and the applicants can meet this final prong of the test for intervention as of right.

V. PERMISSIVE INTERVENTION

[19] Should intervention as of right be denied, the Fitzgerald group has alternatively sought permissive intervention. Whether to grant permissive intervention under Rule 24(b), as the doctrine's name suggests, is within the discretion of the district court, and as noted above, this decision is reviewed only for abuse of discretion. *Harris,* 820 F.2d at 597. In the present case, the district court denied permissive intervention on the ground that "[t]he prejudice that would result in permitting the applicants to intervene outweighs any identifiable benefit to judicial economy." Slip op. at 16–17. Although the district court did not explain this finding, it appears that the court was referring to the fact that the consent decree had already been approved, and that permitting intervention would require reopening the negotiations. Since this state of affairs resulted from the district court's failure to decide the pending intervention motion before reviewing the proposed consent decree, we are troubled by the possibility that the district court based its holding on this ground.

Nonetheless, if the Fitzgerald group cannot meet the test for intervention as of right, then, under the circumstances of this case it would likely be within the district court's discretion to deny permissive intervention as well. More specifically, should the district court conclude on remand that the Downingtown Senior High School graduation ceremony is not a public forum, then appellants would have only a minimal interest in the litigation. Thus, if intervention as of right is not available, the same reasoning would indicate that it would not be an abuse of discretion to deny permissive intervention as well.

VI. CONCLUSION

Under Rule 24(a)(2), appellants are not entitled to intervene at the merits stage of this litigation. Yet, because the present record does not enable us to determine whether the applicants for intervention possess a legally cognizable interest in the remedial phase of this action, we must remand this case for further factual findings.

***1125** If the district court determines on remand that the commencement exercises at Downingtown Senior High School may be characterized as a non-public forum, then the district court must determine whether the speech restrictions imposed in the consent decree survive the reasonableness test applicable to non-public forums. If they do survive the test, the Fitzgerald group would have no legally cognizable interest in this litigation. If they do not survive, the Fitzgerald group would possess a sufficient legal interest in the controversy under the first prong of the intervention test.

On the other hand, if the district court determines that a public forum has been created, then it must consider whether the consent decree's speech restrictions can survive strict scrutiny. If the consent decree's provisions pass this test, this would also eliminate any cognizable legal interest asserted by the Fitzgerald group, and these applicants would not be entitled to intervene as of right. If, however, the district court finds that the speech restrictions in the consent decree cannot survive strict scrutiny, then appellants do possess a sufficient legal interest in this controversy under the first prong of the intervention test.

We have further found that if any such legal interest exists, it would be impaired by the consent decree and it has not been

adequately represented by the existing parties. Thus, under this final scenario, the Fitzgerald group could also meet each of the remaining elements of the Rule 24(a) test, and they would be entitled to intervene as of right.

Such intervention would be as a party defendant entitled to participate fully "in the formation of the terms of the settlement agreement in this case." *Harris v. Pernsley,* 820 F.2d 592, 600 (3d Cir.), *cert. denied,* 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987). The district court would therefore need to vacate the existing consent decree, and permit the parties to enter new negotiations. [7]

7 As we have determined in Part IV A, any such intervention by the Fitzgerald group would be at the remedy stage and not at the merits stage, should that ever reemerge.

Finally, if at any point on this decision tree the district court determines that intervention as of right is not available, then it should reconsider whether to grant permissive intervention under Rule 24(b). This inquiry should be conducted in light of our analysis above of the competing interests at stake in this case. Moreover, because the Fitzgerald group's intervention motion was filed so soon after the complaint, the district court should not consider the present potential for delay as a factor counseling against intervention.

We will thus remand this case for further proceedings consistent with this opinion.

All Citations

957 F.2d 1108, 73 Ed. Law Rep. 404

TAB 4

459 F.3d 582
United States Court of Appeals,
Fifth Circuit.

TEXAS DEMOCRATIC PARTY; Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party, Plaintiffs–Appellees,
v.
Tina J. BENKISER, in her capacity as Chairwoman of the Republican Party of Texas, Defendant–Appellant.

No. 06–50812.
|
Aug. 3, 2006.

Synopsis
Background: State Democratic Party brought action in state court, seeking declaratory and injunctive relief from state Republican Party's declaration that its incumbent candidate for United States Congress was ineligible based upon residency and would be replaced on ballot with a new candidate. Following removal, the United States District Court for the Western District of Texas, Sam Sparks, J., 2006 WL 1851295,granted injunction, and Republican Party appealed.

Holdings: The Court of Appeals, Benavides, Circuit Judge, held that:

[1] state Democratic Party had direct standing to seek injunction;

[2] state Democratic Party had associational standing on behalf of its candidate to seek injunction;

[3] application of Texas candidate ineligibility statute to disqualify incumbent candidate violated Qualifications Clause;

[4] Republican Party's application of Texas candidate ineligibility statute to disqualify incumbent candidate violated the Elections Clause;

[5] ineligibility of incumbent candidate was not "conclusively established," as required under Texas ineligibility statute; and

[6] Republican Party waived argument that Democratic Party had an adequate remedy at law.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (16)

[1] Federal Courts Elections, voting, and political rights

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3619 Substantive Matters
170Bk3631 Elections, voting, and political rights
(Formerly 170Bk776)

Court of Appeals reviews district court's interpretation of the Qualifications Clause *de novo*. U.S.C.A. Const. Art. 1, § 2, cl. 2.

[2] Federal Courts Statutes, regulations, and ordinances, questions concerning in general

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3574 Statutes, regulations, and ordinances, questions concerning in general
(Formerly 170Bk781)

Court of Appeals reviews questions of state statutory interpretation *de novo*..

1 Cases that cite this headnote

[3] Federal Courts "Clearly erroneous" standard of review in general

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3603 Findings
170Bk3603(2) "Clearly erroneous" standard of review in general
(Formerly 170Bk850.1)

Court of Appeals accepts a district court's findings of fact unless clearly erroneous.

[4] **Federal Courts** Injunction

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3612 Remedial Matters
170Bk3616 Injunction
170Bk3616(1) In general
(Formerly 170Bk814.1)

Court of Appeals reviews a district court's decision to grant a permanent injunction after its decision on the merits for abuse of discretion.

[5] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

To satisfy federal standing requirement, a plaintiff must show: (1) an injury in fact; (2) that is traceable to the defendant's challenged conduct; and (3) that is likely to be redressed by a favorable decision in the district court.

16 Cases that cite this headnote

[6] **Injunction** Persons entitled to apply; standing

212 Injunction
212V Actions and Proceedings
212V(A) In General
212k1505 Persons entitled to apply; standing
(Formerly 144k154(9) Elections)

State Democratic Party had direct standing to seek injunction to prevent state Republican Party from removing its incumbent Republican candidate's name from ballot and replacing candidate's name with a new candidate; state Democratic Party would need to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame, and replacement of Republican candidate with more viable candidate threatened Democratic candidate's chances of victory. U.S.C.A. Const. Art. 3, § 1 et seq.

15 Cases that cite this headnote

[7] **Associations** Suits on Behalf of Members; Associational or Representational Standing

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k276 Suits on Behalf of Members; Associational or Representational Standing
41k277 In general
(Formerly 41k20(1))

Associational standing, in which association has standing to bring suit on behalf of its members, is a three-part test: (1) the association's members would independently meet the standing requirements under Article III of the Constitution; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members. U.S.C.A. Const. Art. 3, § 2, cl. 1.

33 Cases that cite this headnote

[8] **Injunction** Persons entitled to apply; standing

212 Injunction
212V Actions and Proceedings
212V(A) In General
212k1505 Persons entitled to apply; standing
(Formerly 144k154(9) Elections)

State Democratic Party had associational standing on behalf of its candidate to seek injunction to prevent state Republican Party from removing name of incumbent Republican candidate, which it had declared ineligible, from the ballot and replacing the name with a new

Republican candidate; Democratic candidate independently had standing based on possible harm to his election prospects and campaign expenditures, state Democratic Party sought to protect its organizational interests by getting its candidates elected, and Democratic candidate's interests were fully-represented by the state Democratic Party. U.S.C.A. Const. Art. 3, § 2, cl. 1.

21 Cases that cite this headnote

[9] **United States** Eligibility and qualification

United States Relation to state law; preemption

393 United States
393I Status, Powers, and Functions in General
393I(B) Legislative Branch; Congress
393k212 Members of Congress; Senators and Representatives
393k214 Eligibility and qualification
(Formerly 393k7.1, 144k22 Elections)
393 United States
393I Status, Powers, and Functions in General
393I(B) Legislative Branch; Congress
393k212 Members of Congress; Senators and Representatives
393k217 Regulation of Election of Members
393k217(2) Relation to state law; preemption
(Formerly 393k7.1, 144k22 Elections)

Application of Texas candidate ineligibility statute to disqualify incumbent candidate for United States Congress who lived in Virginia approximately five months before the election violated the Qualifications Clause by creating a pre-election residency requirement; plain language of Qualifications Clause showed that a candidate had to be an inhabitant of the state "when elected," and there was no evidence regarding where candidate was going to live on election day. U.S.C.A. Const. Art. 1, § 2, cl. 2; V.T.C.A., Election Code § 145.003(f).

4 Cases that cite this headnote

[10] **Election Law** Power to Regulate Conduct

142T Election Law
142TVII Conduct of Election
142TVII(D) Time, Place, and Manner of Voting
142Tk361 Constitutional and Statutory Provisions
142Tk363 Power to Regulate Conduct
142Tk363(1) In general
(Formerly 144k24 Elections)

States' discretionary authority to regulate the time, place, and manner of elections pursuant to the Elections Clause must not violate other portions of the Constitution. U.S.C.A. Const. Art. 1, § 4, cl. 1.

2 Cases that cite this headnote

[11] **Election Law** Power to regulate

Election Law Power to Regulate Conduct

142T Election Law
142TVI Nominations
142Tk231 Constitutional and Statutory Provisions
142Tk233 Ballot Access
142Tk233(2) Power to regulate
(Formerly 144k22 Elections)
142T Election Law
142TVII Conduct of Election
142TVII(D) Time, Place, and Manner of Voting
142Tk361 Constitutional and Statutory Provisions
142Tk363 Power to Regulate Conduct
142Tk363(1) In general
(Formerly 144k24 Elections)

While states enjoy a wide latitude in regulating elections and in controlling ballot content and ballot access pursuant to the Elections Clause, they must exercise this power in a reasonable, nondiscriminatory, politically neutral fashion. U.S.C.A. Const. Art. 1, § 4, cl. 1.

1 Cases that cite this headnote

[12] **United States** Relation to state law; preemption

393 United States
393I Status, Powers, and Functions in General
393I(B) Legislative Branch; Congress
393k212 Members of Congress; Senators and Representatives
393k217 Regulation of Election of Members
393k217(2) Relation to state law; preemption
(Formerly 393k11, 144k22 Elections)

Texas Republican Party's application of Texas candidate ineligibility statute to disqualify incumbent candidate for United States Congress when he moved to Virginia approximately five months before election day violated the Elections

Clause; Party's declaration of ineligibility was not a mere predictive, ministerial act affecting the manner of the election, but rather, was a direct determination of the candidate's qualifications as a candidate. U.S.C.A. Const. Art. 1, § 4, cl. 1.

7 Cases that cite this headnote

[13] **United States** Relation to state law; preemption

393 United States
393I Status, Powers, and Functions in General
393I(B) Legislative Branch; Congress
393k212 Members of Congress; Senators and Representatives
393k217 Regulation of Election of Members
393k217(2) Relation to state law; preemption
(Formerly 393k11, 144k22 Elections)

Ineligibility of incumbent Republican candidate for United States Congress was not "conclusively established," as required under Texas ineligibility statute, where although candidate resided in Virginia approximately five months prior to election day, there was no proof regarding where candidate was going to reside on election day; although chair of Texas Republican Party relied on candidate's Virginia driver's license, his Virginia voter registration card, and his employment withholding form reflecting his Virginia residence, such documents did not conclusively establish whether candidate would or would not move back to Texas prior to election day. V.T.C.A., Election Code § 145.003.

4 Cases that cite this headnote

[14] **Injunction** Grounds in general; multiple factors

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1032 Grounds in general; multiple factors
(Formerly 212k9)

In addition to prevailing on the merits, a party requesting an injunction must establish that there is a substantial threat of irreparable injury, the threatened injury outweighs the potential injury to the opposing party, and the injunction will not disserve the public interest.

4 Cases that cite this headnote

[15] **Federal Courts** Failure to mention or inadequacy of treatment of error in appellate briefs

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)5 Waiver of Error in Appellate Court
170Bk3733 Failure to mention or inadequacy of treatment of error in appellate briefs
(Formerly 170Bk915)

State Republican Party waived argument that state Democratic Party seeking injunctive relief from Republican Party's declaration that its candidate was ineligible based on residency and would be replaced on ballot had an adequate remedy at law, where Republican Party raised argument for the first time in its reply brief.

10 Cases that cite this headnote

[16] **Amicus Curiae** Powers, functions, and proceedings

27 Amicus Curiae
27k3 Powers, functions, and proceedings

An amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal.

West Codenotes

Unconstitutional as Applied
V.T.C.A., Election Code § 145.003(f)

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Appeal from the United States District Court for the Western District of Texas.

Before BENAVIDES, DENNIS and CLEMENT, Circuit Judges.

Opinion

BENAVIDES, Circuit Judge:

The chair of the Republican Party of Texas ("RPT") declared Representative Tom DeLay ineligible for election to the 22nd Congressional District of Texas. After ***585** the RPT declared DeLay ineligible, but before the Secretary of State removed his name from the ballot, the Texas Democratic Party ("TDP") sought an injunction to prevent the removal of his name and to prevent the RPT from replacing DeLay with a new candidate. The district court granted the injunction, holding that the RPT, through its leadership, created an unconstitutional pre-election residency requirement. We AFFIRM on the constitutional grounds enumerated by the district court and also AFFIRM on the alternative state law ground that the declaration violated the Texas Election Code.

I. FACTS AND PROCEDURAL BACKGROUND

On June 7, 2006, Defendant Tina J. Benkiser, the chairwoman of the RPT, declared DeLay ineligible for reelection as the United States Representative for Texas's 22nd District. She acted under the Texas Election Code provision that allows a party chair to declare a candidate ineligible. TEX. ELEC.CODE ANN. § 145.003(f) (Vernon 2003). DeLay had represented the 22nd District since 1984 and had won the Republican primary in March 2006. DeLay, however, announced on April 3, 2006, that he would resign from Congress and not seek reelection. Benkiser declared DeLay ineligible after receiving a letter from him advising her that he had moved to Virginia.[1] The letter, dated May 30, 2006, included copies of DeLay's Virginia driver's license, Virginia voter registration, and employment withholding form reflecting Virginia as his residence. It is undisputed that Benkiser intended to replace DeLay on the ballot with a new candidate chosen by the RPT.

1 On May 26, 2006, Benkiser had received a draft of the same letter for her review.

The TDP filed this suit in Texas state court on June 8, 2006, seeking declaratory and injunctive relief. The RPT removed the case to federal court, where on June 26, 2006, the court held a hearing on the merits. After receiving post-hearing briefs from both parties, the district court held that Benkiser's declaration of DeLay's ineligibility violated the Qualifications Clause of the Constitution. The court granted a permanent injunction that barred Benkiser from declaring DeLay ineligible and certifying to the Texas Secretary of State any candidate for the 22nd District other than DeLay. The court also declared that DeLay is "not ineligible" to be the Republican Party nominee and voided Benkiser's previous declaration. Finally, it prohibited the Secretary of State from removing DeLay's name from the ballot for the general election unless DeLay withdraws. The RPT appeals, arguing that the TDP lacks standing and that the district court erred in granting the injunction against Benkiser.

II. STANDARD OF REVIEW

[1] **[2]** **[3]** **[4]** The district court's interpretation of the Qualifications Clause is reviewed *de novo*. *See United States v. Osborne,* 68 F.3d 94, 98 (5th Cir.1995). Other legal issues, including questions of state statutory interpretation, also are reviewed *de novo*. *See Stephens v. Witco Corp.,* 198 F.3d 539, 541 (5th Cir.1999). We accept the district court's findings of fact unless clearly erroneous. *Hughes Training Inc. v. Cook,* 254 F.3d 588, 592 (5th Cir.2001). Its decision to grant a permanent injunction after its decision on the merits is reviewed for abuse of discretion. *McClure v. Ashcroft,* 335 F.3d 404, 408 (5th Cir.2003).

III. DISCUSSION

A. The TDP Has Standing

[5] Before addressing the merits of this appeal, we must determine whether the TDP has standing to sue. To satisfy

***586** the standing requirement, a plaintiff must show: (1) an injury in fact; (2) that is traceable to the defendant's challenged conduct; and (3) that is likely to be redressed by a favorable decision in the district court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *McCall v. Dretke,* 390 F.3d 358, 361 (5th Cir.2004). We hold that the TDP has both direct and associational standing.

1. The TDP Has Direct Standing

[6] First, the TDP has direct standing because DeLay's replacement would cause it economic loss. The district court found that the TDP would suffer an injury in fact because it "would need to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." *Tex. Democratic Party v. Benkiser,* 2006 WL 1851295, *2 (W.D.Tex. July 6, 2006) (hereinafter "Dist. Ct. Op."). This finding of financial injury is not clearly erroneous because it is supported by testimony in the record. In addition, economic injury is a quintessential injury upon which to base standing. *E.g., Barlow v. Collins,* 397 U.S. 159, 163–64, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970). [2]

2 *See also Taxation with Representation of Washington v. Regan,* 676 F.2d 715, 723 (D.C.Cir.1982) ("[I]t is clearly evident that [the plaintiff] will be harmed if its contributors cease giving it money."), *rev'd on other grounds,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); *Buckley v. Valeo,* 519 F.2d 821, 871 n. 130 (D.C.Cir.1975) (holding that a political party had standing because "disclosure [of contributors' names] would cause loss of contributions from those who currently insist that their gifts remain confidential"), *aff'd in part, rev'd in part on other grounds,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

The RPT argues, however, that the TDP should be expected to absorb any additional costs that a replacement candidate would cause in order to promote the state's interest in voter choice. In addition, the RPT points out that its own candidate will have to put together a campaign in a short period of time. These fairness arguments have no place in the standing analysis. Indeed, the RPT's briefs confuse the issue of whether the TDP has shown an injury in fact with the different question of whether the TDP has a cause of action. The cases the RPT cites to support its fairness arguments were themselves decided on the merits. [3] In short, regardless of the equities in this case, injury to the TDP's proverbial pocketbook is an injury in fact for standing purposes.

3 *See California Democratic Party v. Jones,* 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000); *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *Democratic Party of the United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981).

Turning to causation and redressability, the RPT's declaration of ineligibility and replacement of DeLay with a different candidate would be a but-for cause of the TDP having to expend additional money on a new campaign strategy. And the district court's injunction prevents the declaration of ineligibility and replacement, thereby redressing the TDP's injury.

A second basis for the TDP's direct standing is harm to its election prospects. The TDP's witnesses testified below that if the RPT were permitted to replace DeLay with a more viable candidate, then its congressional candidate's chances of victory would be reduced. In addition, according to the TDP, "down-ballot" Democratic candidates, like county commissioners and judges, would suffer due to the change's effect on voter turnout and volunteer efforts. The RPT contends that these harms do not amount to an injury in fact.

***587** Voluminous persuasive authority shows otherwise. [4] We find these cases persuasive because a political party's interest in a candidate's success is not merely an ideological interest. Political victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party's interests. *See Storer v. Brown,* 415 U.S. 724, 745, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). While power may be less tangible than money, threatened loss of that power is still a concrete and particularized injury sufficient for standing purposes.

4 *See Smith v. Boyle,* 144 F.3d 1060, 1061–63 (7th Cir.1998) (Illinois Republicans had standing to challenge state voting rules that disadvantaged Republican candidates); *Schulz v. Williams,* 44 F.3d 48, 53 (2d Cir.1994) (Conservative Party official had standing to challenge opposing candidate's position on the ballot where the opponent "could siphon votes from the Conservative Party" candidate); *Owen v. Mulligan,* 640 F.2d

1130, 1132–33 (9th Cir.1981) (holding that "potential loss of an election" was an injury in fact sufficient to give Republican party official standing); *Democratic Party of the United States v. Nat'l Conservative Political Action Comm.,* 578 F.Supp. 797, 810 (E.D.Pa.1983) (three-judge panel) (holding that Democratic Party had Article III standing because challenged action "reduce[d] the likelihood of its nominee's victory"), *aff'd in part and rev'd in part on other grounds sub nom. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 489–90, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985); *Bay County Democratic Party v. Land,* 347 F.Supp.2d 404, 423 (E.D.Mich.2004) (holding that party had standing to challenge voting rules that could "diminish [its] political power").

Having found injury in fact in the TDP's threatened loss of political power, we also find causation and redressability. The injury threatened to the TDP's electoral prospects is fairly traceable to Delay's replacement and likely would be redressed by a favorable decision, which would preclude a Republican replacement candidate.

2. The TDP Has Associational Standing

[7] In addition, the TDP has associational standing on behalf of its candidate.[5] Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *See Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

5 The TDP contends it also has associational standing to sue on behalf of (1) the party's noncandidate members and (2) Democratic voters more broadly. Out-of-circuit authority supports at least the former contention. *See Gable v. Patton,* 142 F.3d 940, 946 (6th Cir.1998); *Smith v. Boyle,* 959 F.Supp. 982, 985–86 (C.D.Ill.1997), *aff'd as modified,* 144 F.3d 1060 (7th Cir.1998); *but cf., e.g., Gottlieb v. Fed. Election Comm'n,* 143 F.3d 618, 621–22 (D.C.Cir.1998) (holding that voters' interest in influencing the political process was too speculative a ground upon which to base standing). We need not finally resolve whether the TDP could sue on behalf of Democratic voters or noncandidate party members because we find that the TDP has standing on the grounds addressed.

[8] Here, Nick Lampson, the Democratic party's candidate for DeLay's House seat, would have standing for similar reasons that the TDP has direct standing. The RPT's actions threaten his election prospects and campaign coffers. Persuasive authorities establish that such injuries are sufficient to give a candidate standing to protest the action causing the harm. *See Krislov v. Rednour,* 226 F.3d 851, 857 (7th Cir.2000); *Fulani v. Hogsett,* 917 F.2d 1028, 1030 (7th Cir.1990); *Fulani v. League of Women Voters Educ. Fund,* 882 F.2d 621, 626–27 (2d Cir.1989). In short, ***588** the first element of associational standing is satisfied.

With respect to the second element of associational standing, the TDP undoubtedly seeks to protect its organizational interests. As the Supreme Court has noted, the goal of a political party is to gain control of government by getting its candidates elected. *See Storer,* 415 U.S. at 745, 94 S.Ct. 1274.

As to *Hunt*'s third element, nothing requires the participation of Lampson himself. Lampson's interests are fully represented by the TDP; after the primary election, a candidate steps into the shoes of his party, and their interests are identical. As well, the type of relief sought, *i.e.,* an injunction, will inure to Lampson's benefit. *See Int'l Union v. Brock,* 477 U.S. 274, 287–88, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986). In sum, the TDP has standing to sue on Lampson's behalf under *Hunt*.

For the foregoing reasons, the TDP had standing to raise its claims before the district court.[6]

6 We need not consider additional arguments raised by the TDP in support of its standing. We note, though, that Texas law provides that suits to challenge a declaration of ineligibility may be brought by that candidate's competitors. TEX. ELEC.CODE § 273.081 (providing a right of action to any "person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code"); *see In re Jones,* 978 S.W.2d 648, 651 (Tex.App.-Amarillo 1998, orig. pet.) (candidate had standing to challenge opponent's eligibility); *Nixon v. Slagle,* 885 S.W.2d 658 (Tex.App.-Tyler 1994, orig. pet.) (considering on the merits a Republican Party challenge to a Democratic Party declaration of ineligibility).

B. Benkiser's Acts Effectively Created a Pre–Election Inhabitancy Requirement and so Violated the Constitution

1. Constitutional and Statutory Provisions at Issue

The question before this Court centers on the Texas statute permitting a party officer to declare a candidate ineligible. TEX. ELEC.CODE ANN. § 145.003. An officer can do so if (1) a candidate's application for a place on the ballot indicates ineligibility or (2) "facts indicating that the candidate is ineligible are conclusively established by another public record." *Id.* at § 145.003(f).[7] If the public record establishes ineligibility, the officer "shall declare the candidate ineligible." *Id.* at § 145.003(g). If the candidate is declared ineligible on or before the 74th day before the election, the candidate's name is removed from the ballot. *Id.* at § 145.035. The party can fill the vacancy with a replacement candidate if the new candidate is certified to the secretary of state by 5:00 p.m. of the 70th day before the election. *Id.* at § 145.036(a), § 145.037. In situations such as the one before this Court, a replacement candidate cannot appear on the ballot if the original candidate merely withdraws. *See id.* at § 145.036(b).

7 It is undisputed that the present case concerns the second method for declaring a candidate ineligible.

The district court held that the ineligibility statute as applied in the present case violates the Constitution's Qualifications Clause by creating a pre-election residency requirement.[8] *See* U.S. CONST. art. 1, § 2, cl. 2. The Qualifications Clause states:

8 The district court did not explicitly state whether it held the statute facially unconstitutional or unconstitutional as applied. Much of its language, however, implies an as-applied analysis. *See* Dist. Ct. Op. at *8 ("[C]onstruing the Texas Election Code to permit such a declaration of ineligibility based on inhabitancy at this time would be an unconstitutional application of state law."). Given that the statute also governs the ineligibility of state candidacies, an as-applied holding is appropriate. *See Women's Medical Prof. Corp. v. Voinovich,* 130 F.3d 187, 193 (6th Cir.1997) ("If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances.").

> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven ***589** Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Id. The RPT argues that the statute is constitutional under the Elections Clause because it merely acts as a procedural regulation. *See id.* at art. 1, § 4, cl. 1. The Elections Clause states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Id.

2. Benkiser's Declaration Is Unconstitutional as Applied Under the Qualifications Clause

[9] As the parties agree, the Qualifications Clause is exclusive and cannot be enlarged by the states.[9] *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 806, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) ("[T]he text and structure of the Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system' all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution."). The plain language of the inhabitancy requirement of the Qualifications Clause shows that a candidate for the House of Representatives must only be an inhabitant of the state "when elected." U.S. CONST. art. 1, § 2, cl. 2.

9 There is no dispute that when Benkiser applied the ineligibility statute to DeLay she did so as a state actor. *See Smith v. Allwright,* 321 U.S. 649, 663, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (holding that in conducting a primary, a Texas political party is "an agency of the state").

Moreover, there is ample evidence suggesting that the Framers deliberately chose to use the "when elected" language. As explained by the district court, records from the constitutional convention show that the Framers debated whether to include lengthy inhabitancy requirements. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 217–19 (Max Farrand ed., 1911). Delegates considered seven-year, three-year, and one-year requirements and rejected all three. *Id.* The position is further buttressed by an 1808 case in which Congress considered the election of a Representative who moved to Maryland a mere two weeks before the election. CASES OF CONTESTED ELECTIONS IN CONGRESS 224 (M. Clarke & D. Hall eds. 1834) (discussing *Sundry Electors v. Key,* case XXVIII). Congress found that the Representative was qualified, given that he was an inhabitant of the state as of election day. *Id.* at 233.

When Benkiser reviewed the public records sent by DeLay and concluded that his residency in Virginia made him ineligible, she unconstitutionally created a pre-election inhabitancy requirement. The Qualifications Clause only requires inhabitancy when that candidate is elected. Given this language, Benkiser could not constitutionally find that DeLay was ineligible on June ***590** 7, the date she made her decision. [10] Therefore, her application of the ineligibility statute to DeLay was unconstitutional. [11]

10 Benkiser's testimony acknowledges this fact:
Q: [T]here's no way you can represent to this court where [DeLay's] going to live on November 7th?
A: I can't represent anything that's going to happen on November 7th.

11 That DeLay may have no interest in remaining a candidate does not alter this constitutional analysis; a candidate's subjective interest, or lack thereof, in competing for elective office does not speak to whether the candidate is qualified to do so under the Constitution.

Our conclusion conforms with the Texas principle that "[a]ny constitutional or statutory provision which restricts the right to hold office must be strictly construed against ineligibility." *Wentworth v. Meyer,* 839 S.W.2d 766, 767 (Tex.1992). In addition, it is supported by decisions in the Ninth and Tenth Circuits that struck down pre-election day residency requirements. *Schaefer v. Townsend,* 215 F.3d 1031, 1039 (9th Cir.2000); *Campbell v. Davidson,* 233 F.3d 1229, 1235 (10th Cir.2000). In *Schaefer,* relying on *U.S. Term Limits* and evidence of the Framers' intent, the Ninth Circuit held that a one-year pre-election residency requirement "violates the Constitution by handicapping the class of nonresident candidates who otherwise satisfy the Qualifications Clause." 215 F.3d at 1037. The Tenth Circuit, in *Campbell,* struck down a Colorado law that, *inter alia,* required candidates to be residents of the state for at least thirty days. 233 F.3d at 1231–35. Like the Ninth Circuit, it relied on *U.S. Term Limits*and evidence of the Framers' intent. *Id.* at 1233 (citing THE FEDERALIST NO. 52 (James Madison)). [12]

12 Contrary to the RPT's assertion, *Schaefer* and *Campbell* do apply to the present case. While it is true that they concerned facially unconstitutional statutes, the reasoning holds for an as-applied challenge. Both emphatically hold that a pre-election residency requirement is unconstitutional and do not limit their holdings to their particular facts.

The RPT does not dispute that the Qualifications Clause requires inhabitancy on election day. Instead, the RPT argues that such a determination can be made prospectively in a procedural manner allowed by the Elections Clause.

3. The RPT's Arguments for Finding Benkiser's Declaration Constitutional Under the Elections Clause Fail

[10] **[11]** **[12]** States, through the Elections Clause, exercise some regulatory authority over federal elections because "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer,* 415 U.S. at 730, 94 S.Ct. 1274. This authority, however, is not unlimited. Any regulation of time, place, and manner must not violate other portions of the Constitution. *See, e.g., Smith v. Allwright,* 321 U.S. 649, 661–62, 64 S.Ct. 757, 88 L.Ed. 987 (1944) ("Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution ...."). In addition, "while states enjoy a wide latitude in regulating elections and in controlling ballot content and ballot access, they must exercise this power in a reasonable, nondiscriminatory, politically neutral fashion." *Miller v. Moore,* 169 F.3d 1119, 1125 (8th Cir.1999). There is evidence that Benkiser did not act reasonably and with political neutrality when she declared DeLay ineligible.

Indeed, the district court's description of the events ***591** surrounding the letter sent by DeLay imply, at the very least, a lack of neutrality. Dist. Ct. Op. at *5 n.5 (explaining that Benkiser had personally revised a previous draft of DeLay's letter).

More to the point, even had Benkiser acted "with political neutrality," her actions would not fall within the limited authority delegated to the states under the Elections Clause. The "manner" [13] of elections "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.' " *Cook v. Gralike,* 531 U.S. 510, 523–24, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) (quoting *Smiley v. Holm,* 285 U.S. 355, 366, 52 S.Ct. 397, 76 L.Ed. 795 (1932)). Benkiser's determination of ineligibility does not fall within this definition of the "manner" of elections.

13 The RPT does not suggest that Benkiser's actions affect the time or place of elections.

The RPT argues that the determination did affect merely the "manner" of elections because the act was procedural and predictive. Assuming the RPT's argument is correct, the problem with the theory is that the TDP makes an as-applied challenge. Despite the RPT's attempt to classify the declaration as merely predictive, the evidence shows that it was not. [14] Benkiser's declaration was based on DeLay's current residence, not his inhabitancy on election day. Simply put, her declaration of ineligibility was not a mere predictive, ministerial act affecting the "manner" of the election. It was a direct determination of DeLay's qualifications as a candidate. As such, the declaration was unconstitutional and cannot be saved by the Elections Clause.

14 Q: [N]othing that you have in these public documents indicates to you where Mr. DeLay will be on election day, does it?
A [Benkiser]: No, it doesn't.

The RPT also contends that the declaration of ineligibility is a permissible "manner" regulation because DeLay is a frivolous candidate and removing "frivolous" candidates from the ballot constitutes "protection of voters" under Supreme Court precedent. This argument fails. Whenever the Supreme Court has discussed the states' authority to prevent "frivolous" candidates from appearing on the ballot, it has been in the context of a candidate that will only receive minimal support in an election. *See U.S. Term Limits,* 514 U.S. at 834, 115 S.Ct. 1842; *Storer,* 415 U.S. at 743, 94 S.Ct. 1274. There is no evidence that DeLay, the incumbent candidate of a dominant political party, will receive only minimal support. Here, we fail to see how removing DeLay from the ballot would protect the voters, inasmuch as it was the voters themselves who selected DeLay as the Republican candidate for the general election.

Even if Benkiser's declaration could be construed as a "manner" regulation, it would only survive a constitutional challenge if it would not "exclude classes of candidates from federal office." *U.S. Term Limits,* 514 U.S. at 832–33, 115 S.Ct. 1842; *see also Schaefer,* 215 F.3d at 1035 (asking whether state action has "the likely effect of handicapping an otherwise qualified class of candidates"). Given that Benkiser's method of application would exclude, or at a minimum handicap, the pool of nonresident prospective candidates, it is unconstitutional under *U.S. Term Limits.* [15]

15 The Secretary of State asks this Court to find the ineligibility statute constitutional by applying the canon of avoidance. As explained above, this is an as-applied challenge to Benkiser's specific acts. Therefore, the canon of avoidance is not an appropriate analytical vehicle. In addition, courts facing similar questions did not even consider the canon. *See Schaefer,* 215 F.3d at 1039; *Campbell,* 233 F.3d at 1235.

***592** *C. The RPT Failed to Meet the Standards of the Ineligibility Statute*

Apart from the federal constitutional questions, this case presents a state-law statutory question. For the purposes of this section, we assume *arguendo* that it would be constitutional for a state actor to make pre-election, prospective judgments about residency and that Benkiser in fact made such a judgment. Even granting those assumptions, the RPT's declaration of ineligibility would violate Texas law because DeLay's future residency was not conclusively established by public record.

1. The "Conclusively Established" Standard

The governing standard, "conclusively established," bears emphasis. Something is "conclusive" when, by virtue of "reason," it "put[s] an end to debate or question," usually because of its "irrefutability." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED

(2002).[16] Accordingly, Texas courts have explained that public records must leave no factual dispute concerning the conclusiveness of ineligibility. *See In re Jackson,* 14 S.W.3d 843, 848–49 (Tex.App.-Waco 2000, orig. pet.) (holding that a state actor under § 145.003 has "no fact-finding authority;" instead, she may "administratively declare that a candidate is ineligible only when the record *conclusively establishes* the candidate's ineligibility") (emphasis in original); *Culberson v. Palm,* 451 S.W.2d 927, 929 (Tex.Civ.App.-Houston [14th Dist.] 1970, orig. pet.) (holding that ineligibility was not conclusively established where there remained "a fact question"). Thus refined, the issue is whether, based on the evidence properly before Benkiser on June 7, 2006, there remained "a fact question" as to whether DeLay would reside in Texas on election day, November 7, 2006. *Palm,* 451 S.W.2d at 929.

16 *See also* BLACK'S LAW DICTIONARY 308 (8th ed.2004) (defining "conclusive" as "authoritative," "decisive," or "convincing").

The intersection of § 145.003, which requires that proof of ineligibility be *conclusive,* and the Qualifications Clause, which requires inhabitancy only "when elected," presents an extraordinary burden to declaring a candidate ineligible on residency grounds prior to the election. This is because it is almost always possible for a person to change their residency: to move to the state in question before the election, thereby satisfying the Qualifications Clause.[17]

17 Though we do not decide this issue, the "conclusively established" standard might be met by party officials in less uncertain contexts. A candidate's age, for example, can be established conclusively prior to the election. The problem of inherent uncertainty is not an issue in most applications of the statute; it is a function of the particular requirement in question here, future inhabitancy.
As to inhabitancy "when elected," the conclusively established burden may be insurmountable. Although we need not create a *per se* rule to decide this case, we cannot conceive of a situation in which it could be met.

2. DeLay's Future Inhabitancy Was Not "Conclusively Established"

[13] Although the public records relied on by Benkiser may have conclusively established DeLay's present residency in Virginia, they did not conclusively establish whether he will inhabit Texas on election day. Proof of DeLay's present residency may *suggest* where he will be in the future; however, it does not put the matter beyond dispute or question.

***593** Benkiser relied on three public records to declare DeLay ineligible:

1) DeLay's Virginia driver's license;

2) DeLay's Virginia voter registration; and

3) An employment withholding form reflecting DeLay's Virginia residence.

Dist. Ct. Op. at *5. These documents do not *conclusively* establish whether DeLay will be an inhabitant of Texas on November 7, 2006. DeLay could be a current resident of Virginia, as the documents above provide, and nonetheless move back to Texas before November 7. Indeed, Benkiser admitted in her testimony that the public records could not prove DeLay's residency on election day and that DeLay could move back to Texas before election day.

Information that was before Benkiser showing DeLay's eligibility supports this conclusion. Benkiser had before her DeLay's original candidacy application, in which he swore that he was eligible for office. In terms of the Qualifications Clause, such a declaration necessarily contained an implicit promise that DeLay would be an inhabitant of Texas on election day. It is also likely that Benkiser knew—because the RPT confirmed his eligibility in prior elections—that DeLay had been an inhabitant of Texas for decades. Under these circumstances, the public records provided by DeLay could not have conclusively established his future residency. Predicting DeLay's future inhabitancy would have required a finding of fact, which the RPT had no authority to make. *See, e.g., In re Jackson,* 14 S.W.3d at 848–49.

The RPT argues against this analysis on several grounds, none of which is persuasive. First, relying on the language of the statute ("*another* public record"), the RPT contends that "one ... public record is sufficient for a declaration of ineligibility." If this is true, the RPT contends, surely three public records are sufficient. This argument ignores § 145.003's second requirement: that ineligibility must be conclusively established. Put another way, any number of public records may be sufficient only if they meet the "conclusively established" burden. Such is not the case here.

Second, the RPT relies on *Nixon v. Slagle,* 885 S.W.2d 658, 659 (Tex App.-Tyler 1994, orig. pet.), for the proposition that a prospective candidate's voter registration form showing residence outside the jurisdiction in question is sufficient to conclusively establish ineligibility. The RPT's argument ignores a key difference between *Nixon*and the case at bar. *Nixon*involved Texas's state residency qualification for a state senate seat, which required a candidate to be a resident of the relevant district for a year preceding the election. *See* Tex. Const. art. III, § 6. Therefore, the question in *Nixon* was the location of the candidate's current residence for state constitutional purposes, 885 S.W.2d. at 662, not (as here) DeLay's future inhabitancy for federal constitutional purposes. The latter issue is speculative and cannot be proven conclusively by a voter-registration form showing current residence.

Third, the RPT cites *Jones v. Bush,* 122 F.Supp.2d 713 (N.D.Tex.2000). Its reliance on that case ignores that *Jones* did not involve Texas's state-law "conclusively established" standard. In addition, the RPT's use of *Jones* obscures that *Jones*'s discussion of inhabitancy was in reference to present, not future, inhabitancy. *Jones*'s definition of the term "inhabitant" cannot make the RPT's effort to predict DeLay's future any more definitive. Contrary to the RPT's suggestion, this Court cannot "presume that DeLay will remain an inhabitant of Virginia;" rather, the fact ***594** must be conclusively established by public record under Texas law. It is not. [18]

18 Likewise, *Jones* does not provide a remedy for the constitutional deficiencies in Benkiser's actions. In relying on *Jones,* the RPT points this Court to dicta in a nonbinding decision from a lower court. In *Jones,* the district court held that the plaintiff lacked standing, and only as an alternative holding, in anticipation of appeal, did it address the merits. What it did address concerned "inhabitancy" under the Twelfth Amendment, not the "when elected" language of the Qualifications Clause. The case is plainly inapposite.

In conclusion, DeLay's future inhabitancy could not be determined conclusively without a finding of fact. His election-day inhabitancy outside Texas was not beyond dispute or question. Thus, Benkiser violated § 145.003 by declaring DeLay ineligible.

D. The Injunction Was An Appropriate Remedy

[14] Apart from this case's constitutional and statutory merits, the RPT argues that the district court erred in granting the TDP injunctive relief. In addition to prevailing on the merits, a party requesting an injunction must establish that there is a substantial threat of irreparable injury, the threatened injury outweighs the potential injury to the opposing party, and the injunction will not disserve the public interest. *ICEE Distribs. Inc. v. J&J Snack Foods Corp.,* 325 F.3d 586, 597 n. 34 (5th Cir.2003) (citing *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 392, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)).

1. The RPT Waived its "Irreparable Harm" Argument

In its opening brief, the RPT ties its irreparable harm argument to its standing argument. It argues that the TDP cannot possibly show irreparable harm because it has shown no harm at all. The RPT's lack-of-harm arguments have been addressed above, *see* Part III.A., and found meritless.

[15] For the first time in its reply brief, the RPT argues that the TDP has not shown irreparable harm because it has an adequate remedy at law. We need not consider this argument because the RPT effectively waived it by failing to raise it in its opening brief. *See, e.g., Linbrugger v. Abercia,* 363 F.3d 537, 541 n. 1 (5th Cir.2004). In any event, the legal remedies proposed in the RPT's reply brief would not make the TDP whole. We therefore reject the RPT's irreparable-harm arguments.

2. The RPT Does Not Make A "Comparative Harm" Argument

The RPT's argument concerning the appropriateness of the injunction centers on the public interest element. In fact, it never makes on argument concerning the requirement that the TDP's threatened injury must outweigh any potential injury to the RPT. Given that it has failed to raise an argument on this element, it has certainly not proven that the district court abused its discretion by implicitly finding that the TDP would suffer greater harm.

3. An Injunction Would Not Disserve the Public Interest

The RPT and the TDP make conflicting public interest arguments. The RPT claims that the district court's injunction reduces voter choice, requiring that an ineligible or unwilling major-party candidate remain on the ballot and prohibiting his replacement with an eligible candidate who would be willing

to serve if elected. The TDP responds that the injunction prevents the RPT from perpetrating, in the district court's phrase, "a fraud on the voters."

***595** It is beyond dispute that the injunction serves the public interest in that it enforces the correct and constitutional application of Texas's duly-enacted election laws.[19] The RPT's arguments are not sufficiently persuasive to overcome this conclusion. The RPT has not shown that the injunction disserves the public interest and certainly has not proven that the district court abused its discretion. Therefore, the RPT has not met its burden.

19 This conclusion also conforms with legislative intent. Records from the 68th Texas Legislature show that the current withdrawal provision in the Election Code, § 145.036, was drafted to prevent unwarranted replacement candidacies. *See In re Bell,* 91 S.W.3d 784, 785 (Tex.2002) (holding that "courts may consider the legislative history and the object sought to be attained in construing statutes" and using such history to interpret the Election Code) (internal quotation marks omitted). Under the former system, a candidate who won the primary could merely decline the nomination, allowing a replacement candidate to run in the general election. Hearing testimony shows that members of the legislature believed that the former provision allowed a flourishing of "stalking horses." *Hearing on S.B. 122 Before the Senate State Affairs Comm.,* 68th Leg., R.S. 9:15–10:4 (Feb. 7, 1983). The current withdrawal statute resolves that problem. While a candidate can withdraw at any time, the party can only provide a replacement candidate under very limited circumstances. *See* § 145.036(b).

E. We Will Not Consider Whether the District Court Erred by Enjoining the Secretary of State

[16] As an amicus curiae in support of the RPT, Texas's Secretary of State complains that the district court lacked jurisdiction to enjoin him because he is not a party to this suit. The RPT, however, does not challenge the scope of the district court's injunction, focusing instead on standing and the merits of the constitutional issue before the court. "[A]n amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." *Garcia–Melendez v. Ashcroft,* 351 F.3d 657, 663 n. 2 (5th Cir.2003) (internal quotation omitted). Therefore, we will not consider this issue.

IV. CONCLUSION

For the reasons stated above, the district court did not err when it held that the Texas ineligibility statute was unconstitutional as applied. In addition, Benkiser failed to meet the standards of the statute because the public records did not conclusively establish DeLay's ineligibility. Finally, the injunction was an appropriate remedy. For these reasons, we AFFIRM.

Appellant's motion for partial stay pending appeal is DENIED AS MOOT. Appellant's second motion for partial stay pending appeal or, in the alternative, motion for full stay is also DENIED.

All Citations

459 F.3d 582, 38 A.L.R. Fed. 2d 681

TAB 5

467 F.Supp.3d 718
United States District Court, D. Minnesota.

Madeline PAVEK, Ethan Sykes, DSCC, and DCCC, Plaintiffs,
v.
Steven SIMON, in his official capacity as the Minnesota Secretary of State, Defendant.

Case No. 19-cv-3000 (SRN/DTS)
|
Signed 06/15/2020

Synopsis

Background: Voters and political party committees brought action against Minnesota Secretary of State, alleging various claims, including § 1983 claims for undue burden on the right to vote in violation of the First and Fourteenth Amendments, arising from Minnesota statute requiring that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election. Voters and committees moved for preliminary injunction, and Secretary moved to dismiss.

Holdings: The District Court, Susan Richard Nelson, J., held that:

[1] as a matter of apparent first impression, on a motion for preliminary injunction, more proof is required than mere allegations of Article III standing, but less than would be required on motion for summary judgment;

[2] committees sufficiently established injury in fact as required for Article III standing;

[3] voters and committees stated claims alleging an undue burden on the right to vote;

[4] voters and committees established irreparable harm, as required for grant of preliminary injunction;

[5] voters and committees showed a likelihood of success on claims, as required for grant of preliminary injunction;

[6] public interest weighed in favor of grant of preliminary injunction; and

[7] balance of harms weighed in favor of grant of preliminary injunction.

Ordered accordingly.

Procedural Posture(s): Motion for Preliminary Injunction; Motion to Dismiss for Failure to State a Claim.

West Headnotes (85)

[1] Injunction Findings and conclusions

212 Injunction
212V Actions and Proceedings
212V(G) Determination
212k1596 Findings and conclusions

With respect to a motion for a preliminary injunction, the district court makes preliminary factual findings and conclusions of law based on the limited record before it. Fed. R. Civ. P. 65.

1 Cases that cite this headnote

[2] Injunction Operation and effect

212 Injunction
212V Actions and Proceedings
212V(G) Determination
212k1598 Operation and effect

Findings and conclusions made by the district court in deciding a motion for preliminary injunction are not final determinations of disputed matters binding in later stages of litigation, as it is a general rule that findings of fact and conclusions of law made by a court at the preliminary injunction stage are not binding at trial on the merits. Fed. R. Civ. P. 65.

1 Cases that cite this headnote

[3] Federal Civil Procedure In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The district court has an independent obligation to assure that Article III standing exists,

regardless of whether it is challenged by any of the parties. U.S. Const. art. 3, § 2, cl. 1.

[4] **Federal Civil Procedure** In general; injury or interest

Federal Courts Case or Controversy Requirement

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2101 In general

For a legal dispute to qualify as a "genuine case or controversy" under Article III, at least one plaintiff must have standing to sue. U.S. Const. art. 3, § 2, cl. 1.

[5] **Federal Civil Procedure** In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The Article III standing doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong and confines the federal courts to a properly judicial role. U.S. Const. art. 3, § 2, cl. 1.

[6] **Federal Civil Procedure** In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

As a jurisdictional requirement, Article III standing to litigate cannot be waived or forfeited. U.S. Const. art. 3, § 2, cl. 1.

[7] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

To establish Article III standing, a plaintiff must: (1) present an injury that is concrete, particularized, and actual or imminent; (2) fairly traceable to the defendant's challenged behavior; and (3) likely to be redressed by a favorable ruling. U.S. Const. art. 3, § 2, cl. 1.

2 Cases that cite this headnote

[8] **Federal Civil Procedure** In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The first requirement for Article III standing, often referred to as an "injury in fact," requires the plaintiff to show an invasion of a legally protected interest which is both concrete and particularized and actual or imminent, not conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

[9] **Federal Civil Procedure** Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

The second requirement for Article III standing, that the plaintiffs' injury in fact be fairly traceable to the defendant's conduct, requires

a showing of a causal connection between the injury and the conduct complained of, such that the injury is not the result of the independent action of some third party not before the court. U.S. Const. art. 3, § 2, cl. 1.

[10] **Federal Civil Procedure** Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

The third requirement for Article III standing, whether the injury is redressable, requires a showing that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision for the plaintiff. U.S. Const. art. 3, § 2, cl. 1.

[11] **Federal Civil Procedure** In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The litigant invoking the district court's jurisdiction must do more than simply allege a nonobvious harm; to cross the Article III standing threshold, the litigant must explain how the elements essential to standing are met. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The degree of proof required of the litigant to demonstrate Article III standing depends on the stage of litigation at which the case rests. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

A party invoking federal jurisdiction must support each of the Article III standing requirements with the same kind and degree of evidence at the successive stages of litigation as any other matter on which a plaintiff bears the burden of proof. U.S. Const. art. 3, § 2, cl. 1.

[14] **Federal Civil Procedure** Pleading

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.5 Pleading

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct will suffice to establish Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[15] **Federal Civil Procedure** Burden of proof

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 Burden of proof

At summary judgment, a plaintiff must set forth by affidavit or other evidence specific facts, which for the purposes of the summary judgment motion will be taken as true, to establish Article III standing because allegations alone are insufficient to survive a summary judgment motion. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 56.

[16] **Injunction** Standard of proof in general

212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1567 Weight and Sufficiency

212k1569 Standard of proof in general

On a motion for preliminary injunction, more proof is required from the plaintiffs than mere allegations of Article III standing, but less than would be required in the face of a motion for summary judgment. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 56, 65.

1 Cases that cite this headnote

[17] **Associations** Suits on organization's own behalf; organizational standing in general

Associations Suits on Behalf of Members; Associational or Representational Standing

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k272 Suits on organization's own behalf; organizational standing in general
41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k276 Suits on Behalf of Members; Associational or Representational Standing
41k277 In general

An organization can have Article III standing on its own behalf or on behalf of its members. U.S. Const. art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[18] **Associations** Injury or interest in general

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k273 Injury or interest in general

In determining whether an organization has Article III standing to sue on its own behalf, courts conduct the same inquiry as in the case of an individual, and ask whether the organizations alleged such a personal stake in the outcome of the controversy as to warrant their invocation of federal-court jurisdiction. U.S. Const. art. 3, § 2, cl. 1.

[19] **Associations** Injury or interest in general

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k273 Injury or interest in general

An organization can show an injury-in-fact for Article III standing purposes if it can show a concrete and demonstrable injury to its activities which drains its resources and is more than simply a setback to its abstract social interests. U.S. Const. art. 3, § 2, cl. 1.

[20] **Associations** Elections and voting rights

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k289 Particular Claims and Contexts
41k297 Elections and voting rights

Where a law injures a political party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote, such a devotion of resources constitutes an injury for the purposes of the party's Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[21] **Associations** Elections and voting rights

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k289 Particular Claims and Contexts
41k297 Elections and voting rights

Even if the added cost to a political party by a new law, which is being challenged, has not been estimated and may be slight, such imprecision does not affect the party's Article III standing, which requires only a minimal showing of injury. U.S. Const. art. 3, § 2, cl. 1.

[22] **Federal Civil Procedure** In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

At bottom, the Article III standing limitation prevents a plaintiff from bringing a federal suit to resolve an issue of public policy if success does not give the plaintiff some relief other than the satisfaction of making the government comply with the law. U.S. Const. art. 3, § 2, cl. 1.

[23] **Civil Rights** Injury and Causation

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1333 Injury and Causation
78k1333(6) Other particular cases and contexts

Political party committees sufficiently established a direct injury consisting of diversion-of-resources, so as to establish, on motion for preliminary injunction, injury in fact as required for Article III standing to bring claims against Minnesota Secretary of State, including § 1983 claim alleging undue burden on right to vote in violation of First and Fourteenth Amendments, arising from Minnesota statute requiring that major political party candidates must be listed on ballot in reverse order based on average number of votes their party received in last election; committees' evidence showed that first-listed candidates on ballots were granted clear and discernable advantage in form of higher vote share, and that statute required committees to commit additional resources to political party. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

1 Cases that cite this headnote

[24] **Associations** Injury or interest in general

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k273 Injury or interest in general

So long as the economic effect on an organization is real, the organization does not lose Article III standing simply because the proximate cause of that economic injury is the organization's noneconomic interest in encouraging a particular policy preference or outcome. U.S. Const. art. 3, § 2, cl. 1.

[25] **Associations** Injury or interest in general

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k273 Injury or interest in general

At a stage in the litigation which is prior to summary judgment and trial, precise measurements of the diverted amount of resources are not necessary to show an injury, for purposes of an organization's Article III standing. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 56.

[26] **Associations** Elections and voting rights
Election Law Persons entitled to bring contest

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k289 Particular Claims and Contexts
41k297 Elections and voting rights
142T Election Law
142TVII Conduct of Election
142TVII(H) Actions and Proceedings; Election Contests
142Tk530 Persons entitled to bring contest

Under the competitive standing theory of Article III standing, the direct injury that results from the purported illegal structuring of a competitive election is inflicted not only on political candidates who are at a disadvantage, but also on the political parties who seek to elect those candidates to office. U.S. Const. art. 3, § 2, cl. 1.

[27] **Civil Rights** Injury and Causation

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1333 Injury and Causation

78k1333(6) Other particular cases and contexts

Political party committees sufficiently established concrete and particularized injury to electoral prospects, so as to support finding, on motion for preliminary injunction, injury in fact as required for Article III standing based on competitive standing theory, in order to bring claims against state Secretary of State, including § 1983 claim alleging undue burden on right to vote in violation of First and Fourteenth Amendments, arising from Minnesota statute requiring that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election; committees established that statute created primacy effect where candidates listed first could expect a higher vote share, and party's candidates were to be listed last because statute required it. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

1 Cases that cite this headnote

[28] Civil Rights Injury and Causation

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1333 Injury and Causation
78k1333(6) Other particular cases and contexts

Political party committees' alleged injury to electoral prospects was imminent, so as to support finding, on motion for preliminary injunction, injury-in-fact as required for direct Article III standing based on competitive standing theory, in order to bring claims against Minnesota Secretary of State, including § 1983 claims alleging undue burden on right to vote in violation of First and Fourteenth Amendments, arising from Minnesota statute requiring that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election; committees established a substantial risk that ballot order would harm the committees, including that ballot order affected votes virtually everywhere effect was studied, and committees' party would be listed last. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

2 Cases that cite this headnote

[29] Federal Civil Procedure Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

An injury is fairly traceable to a challenged statute, for purposes of Article III standing, when there is a causal connection between the two. U.S. Const. art. 3, § 2, cl. 1.

[30] Civil Rights Injury and Causation

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1333 Injury and Causation
78k1333(6) Other particular cases and contexts

Political party committees sufficiently established that their injuries, consisting of diversion of resources and harm to electoral prospects, were fairly traceable to statute and Minnesota Secretary of State, as required to establish, on motion for preliminary injunction, direct Article III standing to bring claims against Secretary, including § 1983 claims alleging undue burden on right to vote in violation of First and Fourteenth Amendments, arising from Minnesota statute requiring that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election; statute benefited one political party over all others which directly inflicted the injuries, and Secretary possessed the authority to enforce statute. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

[31] Civil Rights Injury and Causation

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue

78k1333 Injury and Causation
78k1333(6) Other particular cases and contexts

Political party committees sufficiently established that their injuries, consisting of diversion of resources and harm to electoral prospects, were redressable by favorable decision, as required to establish, on motion for preliminary injunction, direct Article III standing to bring claims against Minnesota Secretary of State, including § 1983 claim alleging undue burden on right to vote in violation of First and Fourteenth Amendments, arising from Minnesota statute requiring that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election; grant of injunction from implementing or enforcing statute would render it so that benefits of ballot order would no longer be arbitrarily assigned to one political party's candidates. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

[32] **Federal Civil Procedure** Matters considered in general

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1832 Matters considered in general

When considering a motion to dismiss for failure to state a claim, the district court generally must ignore materials outside the pleadings. Fed. R. Civ. P. 12(b)(6).

[33] **Federal Civil Procedure** Matters considered in general

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1832 Matters considered in general

Courts may, on a motion to dismiss for failure to state a claim, consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record. Fed. R. Civ. P. 12(b)(6).

[34] **Civil Rights** Nature and elements of civil actions

78 Civil Rights
78III Federal Remedies in General
78k1304 Nature and elements of civil actions

To state a claim under § 1983, a plaintiff must allege that: (1) a right secured by the Constitution or laws of the United States was violated; and (2) the alleged violation was committed by a person acting under the color of state law. 42 U.S.C.A. § 1983.

[35] **Constitutional Law** Political Rights and Discrimination

Constitutional Law Voting rights and suffrage in general

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1460 In general
92 Constitutional Law
92XVII Political Rights and Discrimination
92k1466 Voting rights and suffrage in general

The right to vote, as well as the right to associate for the purpose of promoting candidates that align with citizens' views, are recognized rights under the First and Fourteenth Amendments. U.S. Const. Amends. 1, 14.

[36] **Constitutional Law** Elections, Voting, and Political Rights

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 In general

The Fourteenth Amendment's Equal Protection Clause undoubtedly protects the right to participate in elections on an equal basis with other citizens in the jurisdiction. U.S. Const. Amend. 14.

[37] **Constitutional Law** Elections, Voting, and Political Rights

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 In general

Once the franchise to vote is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. Amend. 14.

[38] **Constitutional Law** Political Rights and Discrimination

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1460 In general

The First Amendment right to freedom of association includes the ability to associate for the advancement of common political goals and ideas, and the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. U.S. Const. Amend. 1.

[39] **Constitutional Law** Ballots and ballot access

Election Law Order and arrangement of tickets and names

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1467 Ballots and ballot access
142T Election Law
142TVII Conduct of Election
142TVII(C) Ballots
142Tk317 Official Ballots
142Tk319 Order and arrangement of tickets and names

Voters and political party committees plausibly alleged that Minnesota statute, which required that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election, arbitrarily assigned benefits to one political party's candidates based on party affiliation, as required to state § 1983 claims against Minnesota Secretary of State alleging an undue burden on the right to vote and the right to associate in violation of the First and Fourteenth Amendments; statute elevated candidates to top of ballot based solely on party affiliation, and granted such candidates an advantage. U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

3 Cases that cite this headnote

[40] **Constitutional Law** Ballots and ballot access

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1467 Ballots and ballot access

For purposes of the First Amendment right to freedom of association, where a statute automatically elevates political candidates to the top of the ballot based on their party affiliation, the harm at issue is the favoritism of any one party over another, regardless of whether it is the incumbent or not. U.S. Const. Amend. 1.

[41] **Constitutional Law** Elections in general

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1461 Elections in general

Although states may, as a practical matter, engage in substantial regulation of elections in order to ensure they remain fair and honest, such authority is always subject to the limitation that it must not be exercised in a way that violates other specific provisions of the Constitution.

[42] **Constitutional Law** Ballots in general

Election Law Order and arrangement of tickets and names

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3651 Conduct of Elections
92k3654 Ballots in general
142T Election Law

142TVII Conduct of Election
142TVII(C) Ballots
142Tk317 Official Ballots
142Tk319 Order and arrangement of tickets and names

Political party of voters and political committees was a "major political party" as defined under statute, so that it was similarly situated in all relevant aspects to other parties impacted by Minnesota statute, which required that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election, as required for voters and committees to state § 1983 claim for disparate treatment in violation of Fourteenth Amendment's Equal Protection Clause against Minnesota Secretary of State; statute applied to all parties that met statutory definition of "major political party," and it was solely based on such political party affiliation that the statute applied. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. §§ 200.02(7)(a), 204D.13(2).

[43] **Injunction** Grounds in general; multiple factors

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 Grounds in general; multiple factors

When determining whether to grant a preliminary injunction, the district court weighs four familiar factors: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant if the injunction is not granted; (3) the balance between that harm and the harm that granting the injunction will inflict on the other parties; and (4) the public interest.

1 Cases that cite this headnote

[44] **Injunction** Presumptions and burden of proof

212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1563 Presumptions and burden of proof

Because a preliminary injunction is an extraordinary remedy, the party seeking injunctive relief bears the burden of proving these factors weigh in its favor.

1 Cases that cite this headnote

[45] **Injunction** Preservation of status quo
Injunction Equitable considerations in general

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1074 Preservation of status quo
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1099 Equitable considerations in general

The core question on a motion for preliminary injunction is whether the equities so favor the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.

[46] **Injunction** Discretionary Nature of Remedy

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1077 Discretionary Nature of Remedy
212k1078 In general

The decision to issue a preliminary injunction rests within the district court's discretion.

[47] **Civil Rights** Preliminary Injunction

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) Other particular cases and contexts

Voters and political party committees had no adequate remedy at law for claims, including § 1983 claim alleging an undue burden on right to vote in violation of First and

Fourteenth Amendments, as required for grant of preliminary injunction against Minnesota Secretary of State, seeking to enjoin enforcement of Minnesota statute, which required that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election; neither the accrual of the benefits to one party due to the ballot order, nor the potential loss of an election that could result, was compensable through an award of damages. U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

1 Cases that cite this headnote

[48] **Injunction** Adequacy of remedy at law

Injunction Recovery of damages

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1110 Availability and Adequacy of Other Remedies
212k1113 Adequacy of remedy at law
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1110 Availability and Adequacy of Other Remedies
212k1114 Recovery of damages

Before a district court can grant a preliminary injunction, the movant must establish that it had no adequate remedy at law because its injuries could not be fully compensated through an award of damages.

[49] **Injunction** Irreparable injury

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 Irreparable injury

The threshold inquiry when considering a motion for a preliminary injunction is whether the movant has shown the threat of irreparable injury.

[50] **Injunction** Irreparable injury

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 Irreparable injury

Failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction, because the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.

[51] **Injunction** Irreparable injury

Injunction Adequacy of remedy at law

Injunction Recovery of damages

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 Irreparable injury
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1110 Availability and Adequacy of Other Remedies
212k1113 Adequacy of remedy at law
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1110 Availability and Adequacy of Other Remedies
212k1114 Recovery of damages

Irreparable harm, as required for grant of motion for a preliminary injunction, occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.

1 Cases that cite this headnote

[52] **Injunction** Clear, likely, threatened, anticipated, or intended injury

Injunction Irreparable injury

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1104 Clear, likely, threatened, anticipated, or intended injury
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 Irreparable injury

In determining whether a preliminary injunction is warranted, irreparable harm must be likely in the absence of an injunction; great, and of such imminence that there is a clear and present need for equitable relief.

[53] **Injunction** Unclear, unlikely, doubtful or speculative injury

Injunction Irreparable injury

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1103 Unclear, unlikely, doubtful or speculative injury
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 Irreparable injury

Possible or speculative harm is not sufficient to establish irreparable harm, as required for grant of a preliminary injunction.

[54] **Injunction** Irreparable injury

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 Irreparable injury

Any irreparable harm, as required for grant of a preliminary injunction, must be actual and immediate, as opposed to a future risk.

[55] **Civil Rights** Preliminary Injunction

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) Other particular cases and contexts

Voters and political party committees established irreparable harm, as required for grant of preliminary injunction seeking to enjoin enforcement of Minnesota statute, which required that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election, in action against Minnesota Secretary of State alleging, inter alia, § 1983 claim for undue burden on right to vote in violation of First and Fourteenth Amendments; voters and committees alleged violation of constitutional rights, and potential abridgment of the constitutional rights stemmed from statute's effect on an election and could not be adequately compensated post-election, and election was only several months away. U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

1 Cases that cite this headnote

[56] **Civil Rights** Preliminary Injunction

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(1) In general

The denial of a constitutional right is a cognizable injury and an irreparable harm, as required for grant of a preliminary injunction.

1 Cases that cite this headnote

[57] **Civil Rights** Preliminary Injunction

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction

78k1457(1) In general

When the constitutional right is protected by the Fourteenth Amendment, the denial of that right is an irreparable harm, as required for grant of a preliminary injunction, regardless of whether the plaintiff seeks redress under the Fourteenth Amendment itself or under a statute enacted via Congress's power to enforce the Fourteenth Amendment. U.S. Const. Amend. 14.

[58] **Injunction** Time for Proceedings

212 Injunction
212V Actions and Proceedings
212V(A) In General
212k1511 Time for Proceedings
212k1512 In general

A delay in bringing a motion for a preliminary injunction can undermine the strength of a party's request for injunctive relief.

[59] **Injunction** Injunctions Against Enforcement of Laws and Regulations

212 Injunction
212IV Particular Subjects of Relief
212IV(E) Governments, Laws, and Regulations in General
212k1251 Injunctions Against Enforcement of Laws and Regulations
212k1252 In general

Where a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute, district courts must make a threshold finding that a party is likely to prevail on the merits.

[60] **Election Law** Constitutionality and validity

142T Election Law
142TIII Voters
142TIII(A) In General; Right of Suffrage
142Tk50 Statutory Provisions Conferring or Defining Right
142Tk52 Constitutionality and validity

The *Anderson-Burdick* test, for analyzing the constitutionality of a state statute, requires the district court to weigh the character and magnitude of the burden the state's rule imposes on the constitutional rights against the interests the state contends justify the burden, and consider the extent to which the state's concerns make the burden necessary.

[61] **Election Law** Constitutionality and validity

142T Election Law
142TIII Voters
142TIII(A) In General; Right of Suffrage
142Tk50 Statutory Provisions Conferring or Defining Right
142Tk52 Constitutionality and validity

Under the *Anderson-Burdick* test, for analyzing the constitutionality of a state statute, regardless how slight the state burden on constitutional rights may appear, it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.

[62] **Election Law** Constitutionality and validity

142T Election Law
142TIII Voters
142TIII(A) In General; Right of Suffrage
142Tk50 Statutory Provisions Conferring or Defining Right
142Tk52 Constitutionality and validity

Under the *Anderson-Burdick* test, for analyzing the constitutionality of a state statute, there is no automatic litmus-paper test that will separate valid state election laws from invalid restrictions.

[63] **Election Law** Constitutionality and validity

142T Election Law
142TIII Voters
142TIII(A) In General; Right of Suffrage
142Tk50 Statutory Provisions Conferring or Defining Right
142Tk52 Constitutionality and validity

In a constitutional challenge to a state election law, courts use the *Anderson-Burdick* test to determine the appropriate standard of review, and whether the challenged statute is

constitutional under that standard, on a case-by-case basis.

[64] **Injunction** Elections, Voting, and Political Rights

212 Injunction
212IV Particular Subjects of Relief
212IV(J) Elections, Voting, and Political Rights
212k1341 In general

In evaluating whether the plaintiffs are likely to succeed on the merits on a claim alleging that a state election law violates First and Fourteenth Amendment associational rights, as required for grant of a preliminary injunction, the district court applies the *Anderson-Burdick* test to the statute, and considers: (1) the character and magnitude of the burden that the statute imposes on the plaintiffs' First and Fourteenth Amendment associational rights; (2) the state's asserted interests for any such burden, as well as the legitimacy and strength of each of those interests; and (3) whether the state's interests justify that burden, which also requires consideration of the extent to which the state's concerns make that burden necessary. U.S. Const. Amends. 1, 14.

[65] **Election Law** Nature and source of right

Election Law Political Activity and Associations

142T Election Law
142TIII Voters
142TIII(A) In General; Right of Suffrage
142Tk41 Nature and source of right
142T Election Law
142TIV Political Activity and Associations
142TIV(A) In General
142Tk140 In general

Although voting is crucial to the democratic system, it does not follow that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. U.S. Const. Amend. 1.

[66] **Constitutional Law** Elections in general

Constitutional Law Voting rights and suffrage in general

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1461 Elections in general
92 Constitutional Law
92XVII Political Rights and Discrimination
92k1466 Voting rights and suffrage in general

Election laws will invariably impose some burden on voting and associational rights under the First and Fourteenth Amendment because every state election law inevitably affects, at least to some degree, the individual's right to vote and his right to associate with others for political ends. U.S. Const. Amends. 1, 14.

[67] **Injunction** Candidates and ballot access

212 Injunction
212IV Particular Subjects of Relief
212IV(J) Elections, Voting, and Political Rights
212k1345 Candidates and ballot access

Voters and political party committees showed a likelihood of success on claims that Minnesota's ballot order statute, which required major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election, infringed upon their right to vote and freedom of political association, as required to obtain a preliminary injunction against enforcement of statute; plaintiffs showed likely character of burden imposed by statute was discriminatory as awarding the primacy effect vote to candidates based solely and uniquely on their political affiliation and that it was likely that the state's purported interest of promoting political diversity, discouraging single-party rule, and counteracting an "incumbency" effect were not legitimate. U.S. Const. Amends. 1, 14.

1 Cases that cite this headnote

[68] **Constitutional Law** Political parties in general

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1465 Political parties in general

Where a restriction on an election does not affect a political party's ability to perform its primary functions, such as organizing, recruiting members, and choosing and promoting a candidate, the burden on First Amendment rights typically is not considered severe, for purposes of the *Anderson-Burdick* test to determine the constitutionality of the statute. U.S. Const. Amend. 1.

[69] **Constitutional Law** Political Rights and Discrimination

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1460 In general

While the burden imposed by a state statute on the First Amendment right to vote and freedom to political association may not be severe, the district court, in applying the *Anderson-Burdick* test to determine the constitutionality of the statute, cannot ignore the effect of the statute on the voters, the parties and the candidates and evidence of the real impact the restriction has on the political process. U.S. Const. Amend. 1.

[70] **Election Law** Constitutionality and validity

142T Election Law
142TIII Voters
142TIII(A) In General; Right of Suffrage
142Tk50 Statutory Provisions Conferring or Defining Right
142Tk52 Constitutionality and validity

In conducting a realistic appraisal of the state election statute at issue, in applying the *Anderson-Burdick* test to determine the constitutionality of the statute, doing so necessarily requires consideration of the practical burden the statute imposes on the plaintiffs' constitutional rights.

[71] **Election Law** Constitutionality and validity

142T Election Law
142TIII Voters
142TIII(A) In General; Right of Suffrage
142Tk50 Statutory Provisions Conferring or Defining Right
142Tk52 Constitutionality and validity

While the severity of a state election statute's effects on the plaintiffs' constitutional rights is an objective question, in applying the *Anderson-Burdick* test to determine the constitutionality of the statute, the realistic context surrounding the statute's operation is important to the district court's analysis.

[72] **Constitutional Law** Elections, Voting, and Political Rights

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 In general

The Fourteenth Amendment's Equal Protection Clause requires all political candidates, newcomers and incumbents alike, to be treated equally by the state. U.S. Const. Amend. 14.

[73] **Constitutional Law** Political parties in general

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3636 Political parties in general

The Constitution, under the Fourteenth Amendment's Equal Protection Clause, does not allow a state to put its thumb on the scale of an election and award an electoral advantage to any party, irrespective of whether the party is in power or new to the political arena. U.S. Const. Amend. 14.

[74] **Injunction** Balancing or weighing hardship or injury

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General

212k1101 Injury, Hardship, Harm, or Effect
212k1109 Balancing or weighing hardship or injury

Balancing the harms, for purposes of determining whether a preliminary injunction is warranted, involves assessing the harm the movant would suffer absent an injunction, as well as the harm other interested parties would experience if the injunction issued.

4 Cases that cite this headnote

[75] Injunction Balancing or weighing hardship or injury

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1109 Balancing or weighing hardship or injury

The balance-of-harms analysis, for determining whether grant of a preliminary injunction is warranted, requires the district court to flexibly weigh the case's particular circumstances to determine whether justice requires the court to intervene to preserve the status quo.

3 Cases that cite this headnote

[76] Injunction Public interest considerations

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1100 Public interest considerations

The public interest factor, for determining whether grant of a preliminary injunction is warranted, requires the district court to consider the interest of the public when deciding whether a preliminary injunction should issue.

1 Cases that cite this headnote

[77] Civil Rights Preliminary Injunction

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) Other particular cases and contexts

Public interest weighed in favor of grant of preliminary injunction enjoining enforcement of Minnesota statute, which required that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election, in action brought by voters and political committees against Minnesota Secretary of State alleging, inter alia, § 1983 claim for undue burden on right to vote in violation of First and Fourteenth Amendments; plaintiffs were likely to succeed on merits of claims, and statute was likely unconstitutional. U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

1 Cases that cite this headnote

[78] Civil Rights Preliminary Injunction

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) Other particular cases and contexts

Balance of harms weighed in favor of grant of preliminary injunction enjoining enforcement of Minnesota statute, which required that major political party candidates be listed on ballot in reverse order based on average number of votes their party received in last election, in action brought by voters and political committees against Minnesota Secretary of State alleging, inter alia, § 1983 claim for undue burden on right to vote in violation of First and Fourteenth Amendments; absent an injunction, plaintiffs were likely to suffer irreparable harm because statute forced them to compete and vote on an uneven playing field, and state would not suffer harm as statute was likely unconstitutional. U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

[79] Injunction On ground of invalidity

212 Injunction
212IV Particular Subjects of Relief
212IV(E) Governments, Laws, and Regulations in General
212k1251 Injunctions Against Enforcement of Laws and Regulations

212k1253 On ground of invalidity

For purposes of the "balance of harms" factor for determining whether grant of a preliminary injunction is warranted, a state has no interest in enforcing laws that are unconstitutional, and an injunction preventing the state from enforcing the challenged statute does not irreparably harm the state.

1 Cases that cite this headnote

[80] **Injunction** Preservation of status quo

Injunction Irreparable injury

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1074 Preservation of status quo
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 Irreparable injury

The purpose of preliminary injunctive relief is to preserve the status quo and prevent the identified irreparable harm until the merits of the dispute can be resolved.

[81] **Injunction** Injury, Hardship, Harm, or Effect

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1102 In general

A party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint.

1 Cases that cite this headnote

[82] **Injunction** Scope and duration of relief

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1081 Scope and duration of relief

The preliminary injunction itself should be narrowly tailored to remedy only the specific harms shown by the plaintiffs.

[83] **Injunction** Scope and duration of relief

Injunction Public interest considerations

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1081 Scope and duration of relief
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1100 Public interest considerations

Because issuing a preliminary injunction is an exercise of discretion, the district court need not act mechanically, but can choose from a range of potentially permissible options for the injunction, keeping in mind its obligation to mould each decree to the necessities of the particular case while giving particular regard for the public consequences in employing the extraordinary remedy of injunction.

[84] **Injunction** On ground of invalidity

212 Injunction
212IV Particular Subjects of Relief
212IV(E) Governments, Laws, and Regulations in General
212k1251 Injunctions Against Enforcement of Laws and Regulations
212k1253 On ground of invalidity

Where a preliminary injunction will upend a framework democratically enacted by the people, the district court must strive to preliminarily enjoin only those requirements that plaintiffs have shown are likely unconstitutional, rather than use the injunctive process to impose a framework that appears preferable.

[85] **Civil Rights** Preliminary Injunction

78 Civil Rights

78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) Other particular cases and contexts

Use of "lottery approach," requiring Minnesota Secretary of State to implement lottery procedure for appearance of candidates in every partisan race in upcoming election, was appropriate method to implement, through preliminary injunctive relief, non-discriminatory system that would give similarly-situated major political party candidates equal opportunity to be first on ballot, for purposes of action brought by voters and political party committees alleging, inter alia, § 1983 claim for undue burden on right to vote in violation of First and Fourteenth Amendments; harm inflicted by statute was one of political favoritism as state arbitrarily assigned electoral boost based on party affiliation, so that requiring system where first-listed major political party candidate was selected randomly avoided favoritism. U.S. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Minn. Stat. Ann. § 204D.13(2).

West Codenotes

Validity Called into Doubt
Minn. Stat. Ann. § 204D.13(2)

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MEMORANDUM OPINION AND ORDER

SUSAN RICHARD NELSON, United States District Judge

This matter comes before the Court on Defendant Secretary of State Steve Simon's (Defendant or "Secretary") Motion to Dismiss (Doc. No. 13) and Plaintiffs Madeline Pavek's, Ethan Sykes's, DSCC's, and DCCC's Motion for a Preliminary Injunction (Doc. No. 22). Both motions have been fully briefed and were jointly argued to the Court. [1] Additionally, the Court has also received briefing from amicus curiae Honest Elections Project in support of Defendant's opposition to Plaintiffs' preliminary injunction motion (*see* HEP Mem. [Doc. No. 50]), to which Plaintiffs have responded. (*See* Pls.' Opp'n to HEP's Mem. (Pls.' HEP Opp'n Mem.) [Doc. No. 52].) For the following reasons, the Court grants Plaintiffs' Motion for a Preliminary Injunction, and denies Defendant's Motion to Dismiss.

1 (*See* Pls.' Prelim. Inj. Mem. (Pls.' PI Mem.) [Doc. No. 24]; Def.'s Prelim. Inj. Opp'n Mem. (Def.'s PI Opp'n Mem.) [Doc. No. 32]; Pls.' Prelim. Inj. Reply Mem. (Pls.' PI Reply Mem.) [Doc. No. 43]; Def.'s Mot. to Dismiss Mem. (Def.'s MTD Mem.) [Doc. No. 15]; Pls.' Mot. to Dismiss Opp'n Mem. (Pls.' MTD Opp'n Mem.) [Doc. No. 18]; Def.'s Mot. to Dismiss Reply Mem. (Def.'s MTD Reply Mem.) [Doc. No. 20].)

I. BACKGROUND

This election law dispute arises out of Minn. Stat. § 204D.13, subd. 2 (2018), referred to as the "Ballot Order" statute. (*See* Compl. [Doc. No. 1] ¶¶ 1, 4, 6.) By its terms, the statute requires that in Minnesota general elections, major political party candidates must be listed, on the ballot, in reverse order based on the average number of votes that their party received in the last state general election. (*Id.* ¶ 3.) Because the Democratic-Farmer-Labor Party ("DFL") received the highest average vote share in the most recent Minnesota general election, it appears that the Ballot Order statute requires all DFL-affiliated candidates to be listed last after all other major political party candidates on the ballot for the 2020 General Election, while the poorest performing major political party candidates are listed first. (*Id.* ¶ 4.)

Such an arrangement, Plaintiffs claim, impermissibly conveys an "arbitrary, across-the-board advantage" to the poorest ***729** performing major political party candidates solely on the basis of party affiliation. At the same time, Plaintiffs allege it inflicts an "increasing electoral disadvantage" to party candidates listed later on the ballot, through a phenomenon known as the "primacy effect," whereby first-listed candidates receive more votes solely as a result of their first-listed position. (*Id.* ¶ 1.) Plaintiffs contend that in doing so, the Ballot Order statute places an undue burden on the right to vote as well as the right to political association in violation of the First and Fourteenth Amendments to the United States Constitution. They ask the Court to declare the statute unconstitutional and enjoin the Secretary from enforcing it. (*Id.* ¶¶ 6, 41–54.)

A. The Parties

[1] **[2]** Plaintiffs consist of two individual Minnesota voters, and two Democratic party political committees.[2] Plaintiff Madeline Pavek is a resident of, and registered voter in, Minneapolis, Minnesota, who has voted consistently for DFL party candidates in the past and intends to do so again in the upcoming 2020 general election. (Compl. ¶ 12; *see also* Pavek Decl. [Doc. No. 27] ¶¶ 1–3.) Pavek is actively involved in efforts to help elect DFL candidates in Minnesota and is the statewide Political Director for the Minnesota Young DFL and the Stonewall DFL (the DFL's LGBTQ caucus). (Pavek Decl. ¶ 3.)

2 In setting forth the facts of this case, the Court notes that its consideration of the record necessarily differs for each motion at issue. With respect to Defendant's motion to dismiss, the Court "assumes as true all factual allegations in the pleadings, interpreting them most favorably to [Plaintiffs], the nonmoving party." *Campbell v. Transgenomic, Inc.*, 916 F.3d 1121, 1128 (8th Cir. 2019).
With respect to Plaintiffs' motion for a preliminary injunction under Fed. R. Civ. P. 65, the Court makes preliminary factual findings and conclusions of law based on the limited record before it. *See CPI Card Grp., Inc. v. Dwyer*, 294 F. Supp. 3d 791, 798 (D. Minn. 2018). Such findings and conclusions, however, "are not final determinations of disputed matters binding in later stages of litigation[,]" as it is a " 'general rule' " that findings of fact and conclusions of law made by a court at the preliminary injunction stage are not binding at trial on the merits. *Id.* (citation omitted); *see also Cambria Co. LLC v. Schumann*, No. 19-cv-3145 (NEB/TNL), 2020 WL 373599, at *3 (D. Minn. Jan. 23, 2020) (acknowledging discovery could ultimately change the likelihood of success on the merits).

Plaintiff Ethan Sykes is a resident of, and registered voter in, Butterfield, Minnesota, who will be voting for the first time in November 2020, and who intends to vote for DFL candidates. (Compl. ¶ 13; *see also* Sykes Decl. [Doc. No. 25] ¶¶ 1–2.) Sykes is actively engaged in efforts to elect DFL candidates in Minnesota and serves as a member of the Minnesota State University Mankato College Democrats. (Sykes Decl. ¶ 2.)

Plaintiff DSCC is the national senatorial committee of the Democratic Party, as defined by 52 U.S.C. § 30101(14) (2018), and works to elect candidates of the Democratic Party to the U.S Senate, including in Minnesota. (Compl. ¶ 14; *see also* Schaumburg Decl. [Doc. No. 28] ¶ 2.) In the past, DSCC has made significant contributions and incurred significant expenditures to persuade and mobilize voters in support of DFL Senate candidates and intends to do so for the general election this fall. (Compl. ¶ 14; Schaumburg Decl. ¶ 11.)

Plaintiff DCCC is the national congressional committee of the Democratic party, as defined by 52 U.S.C. § 30101(14), and works to elect candidates of the Democratic Party to the U.S. House of Representatives, including in Minnesota. (Compl. ¶ 15; *see also* Guinn Decl. [Doc. No. 26] ¶ 2.) Much like the DSCC, the DCCC has made significant contributions and incurred significant expenditures to persuade and mobilize ***730** voters in support of DFL congressional candidates and intends to do so for the general election this fall. (Guinn Decl. ¶¶ 2, 4–5, 17, 20.)

Steve Simon is the Secretary of State of Minnesota and is named as Defendant in his official capacity. (*Id.* ¶ 16.) As Minnesota's chief elections officer, the Secretary is responsible for the administration and implementation of election laws in Minnesota, including the Ballot Order Statute, and any other rules for preparing the state general election ballot. (*Id.* (citing Minn. Stat. § 204D.13, subd. 2; Minn. Stat. § 204D.11, subd. 1 (2018) (requiring local election officials to prepare state general election ballot subject to rules of secretary of state)).) This includes creating the ballot—and the order of partisan candidates' names—to be used in Minnesota's elections pursuant to state law. *See*

Minn. Stat. § 204D.09, subd. 1 (2018) (requiring Secretary to supply local election officials with copy of example ballot to be used in state primary and general elections and requiring that official ballot conform to example ballot); Minn. R. 8250.1810, subp. 9 (2018) (requiring the Secretary to "certify to the county auditors the order in which the names of the candidates representing the [major] political parties ... must appear for every partisan office on the ballot"); *Id.*, subp. 18 (2018) (requiring official ballot to conform "in all respects to the example ballot" provided by the Secretary).

Non-party amicus curiae, the Honest Elections Project ("HEP"), is a self-described nonpartisan organization "devoted to supporting the right of every lawful voter to participate in free and honest elections." (HEP Mem. at 1.) It contends that it "defends the fair, reasonable measures that voters put in place to protect the integrity of the voting process" through "public engagement, advocacy, and public interest litigation."[3] (*Id.*)

3 On March 26, 2020, the Court permitted HEP to file an amicus brief in opposition to Plaintiffs' motion for a preliminary and permanent injunction. (*See* Doc. No. 49); *Pavek v. Simon*, No. 19-cv-3000 (SRN/DTS), 2020 WL 1467008 (D. Minn. Mar. 26, 2020) (explaining procedural history of, and basis for granting, HEP's motion).

B. Minnesota's Ballot Order Statute

The "Ballot Order" statute, set forth at Minn. Stat. § 204D.13, subd. 2, provides in relevant part:

> The first name printed for each partisan office on the state general election ballot shall be that of the candidate of the major political party that received the smallest average number of votes at the last state general election. The succeeding names shall be those of the candidates of the other major political parties that received a succeedingly higher average number of votes respectively. For the purposes of this subdivision, the average number of votes of a major political party shall be computed by dividing the total number of votes counted for all of the party's candidates for statewide office at the state general election by the number of those candidates at the election.

Under the statute, candidates for partisan office on the state general election ballot that have been nominated by a "major political party" that received the *smallest* average number of votes appear first on the general-election ballot, followed by major political party candidates that received the second-smallest average number, and so on. *Id.* The statute has existed in that format since 1981. *Compare* Minn. Stat. § 204D.13, subd. 2 (Supp. 1981), *with* Minn. Stat. § 204D.13, subd. 2 (2018).

By its terms, the Ballot Order statute's requirements apply only to candidates of "major" political parties in partisan races. *See* Minn. Stat. § 204D.13, subd. 2. Relevant here, one method of becoming a "major ***731** political party" in Minnesota is to present at least one candidate for election to a statewide office in a general election who subsequently receives at least five percent of the total number of votes cast for that particular election. *See* Minn. Stat. § 200.02, subd. 7(a) (2018). Once a party becomes a "major political party," it retains that status for at least two general election cycles, even if the party fails to maintain that same level of support in future elections. *See* Minn. Stat. § 200.02, subd. 7(d) (2018).

C. Minnesota's 2018 General Election Results & Effect On Ballot Order for Minnesota's November 2020 General Election

Minnesota's most recent general election was in 2018. According to the Secretary's website, DFL-affiliated candidates received the highest average number of votes for statewide office positions in Minnesota's 2018 General Election, followed by Republican-affiliated candidates.[4] Two smaller Minnesota parties, the Grassroots-Legalize Cannabis Party and the Legal Marijuana Now Party, each gained "major" party status for the first time because each party ran a candidate for statewide office that received more than five percent of the statewide vote for that particular office.[5] Accordingly, for Minnesota's November 2020 General Election, there are four "major" political parties subject to the Ballot Order statute: the Democratic-Farmer-

Labor party, the Republican party, the Legal Marijuana Now party, and the Grassroots-Legalize Cannabis party.[6] Both Plaintiffs and Defendant acknowledge that if the Legal Marijuana Now party (which received less votes than the Grassroots-Legalize Cannabis party in the last general election) puts forth a partisan candidate for statewide office, that candidate will be listed first on the ballot, followed by any candidate offered by the Grassroots-Legalize Cannabis party, then Republican party candidates, and finally, DFL candidates.[7] (*See* Compl. ¶¶ 4, 27; Def.'s MTD Mem. at 2–3; Dep. Tr. of David Maeda as Rule 30(b)(6) Deponent for Minnesota Secretary of State (Maeda Dep. Tr.) [Doc. No. 53-1] at 21 (acknowledging partisan candidate order for Minnesota's 2020 General Election ballot.)

4 *See generally 2018 General Election Results* (henceforth, MN 2018 General Election Results), Minn. Secretary of State (last visited June 15, 2020), https://www.sos.state.mn.us/elections-voting/election-results/2018/2018-general-election-results/ (showing that DFL statewide candidates received an average of 1,359,707 votes, and Republican statewide candidates received an average of 1,081,464 votes). The Court takes judicial notice of Minnesota's election results published by the Minnesota Secretary of State on its website. *See Green Party of Ark. v. Martin*, 649 F.3d 675, 679 (8th Cir. 2011) (taking judicial notice of election results on Arkansas Secretary of State website).

5 *See* MN 2018 General Election Results *supra* n.4 (indicating that the Legal Marijuana Now party candidate for Minnesota State Auditor received 5.28% of the total vote for that election, and that the Grassroots-Legalize Cannabis party candidate for Minnesota Attorney General received 5.71% of the total vote for that election).

6 *See Political Parties*, Minn. Secretary of State (last visited June 15, 2020), https://www.sos.state.mn.us/elections-voting/how-elections-work/political-parties (listing forth the four current major political parties and three minor political parties in Minnesota).

7 The Secretary has already created an example ballot, published on its website, showing this anticipated order in conformance with the Ballot Order statute's requirements. *See 2020 Example Ballot*, Minn. Secretary of State (last visited June 15, 2020), https://www.sos.state.mn.us/media/4092/2020-primary-general-and-judicial-example-ballots.pdf.

D. The Primacy Effect

Plaintiffs contend that this order of candidates conveys an "arbitrary, across-the-board ***732** advantage" to the candidates of whichever major political party garnered the least support in the most recent general election because of something known as "position bias" and the "primacy effect." (Compl. ¶ 1.) The "primacy effect" is the theory that candidates listed first on a ballot receive an electoral advantage over all candidates listed below them, solely as a result of being listed first. (*Id.*) Plaintiffs offer—without challenge or refutation—two expert reports discussing the effect.

1. Dr. Rodden's Report on the Primacy Effect in Minnesota

The first report, from Dr. Jonathan Rodden, analyzes whether there is evidence of an electoral advantage associated with "ballot primacy" in Minnesota's past elections. (*See* Velez Decl. Ex. 1 Expert Report of Dr. Jonathan Rodden (Rodden Rpt.) [Doc. No. 29-1] at 2.) Dr. Rodden is a Professor of Political Science at Stanford University, and the director of the Stanford Spatial Social Science Lab, which conducts research and analysis on the use of geo-spatial data in the social sciences. (*Id.* at 6.) He has significant experience working on large "fine-grained geo-spatial data sets" and has previously testified as an expert in election cases. (*Id.* at 5–7.) He holds a Bachelor of Arts degree in political science from the University of Michigan, and obtained his doctorate in political science from Yale University. (*Id.* at 5–6.)

Dr. Rodden notes that a large body of social science literature has attempted to explore the "subtle psychological bias toward selecting the first option from among a set of options that is presented in visual form." (*Id.* at 8.) The bias, he notes, has been documented in research on consumer choice, test-taking, survey response and, most notably, in elections. (*Id.*) Numerous studies on the issue have confirmed that first-listed candidates on a ballot have an advantage over later-listed candidates. (*Id.* at 8–9.)

To determine whether the "primacy effect" exists in Minnesota, Dr. Rodden collected county-level data on Minnesota's general election results and ballot order, along with a variety of other demographic and political indicators, from 1982 through 2018. (*Id.* at 2.) After analyzing the data using a series of regression models that controlled for numerous factors (*see id.* at 17–23), Dr. Rodden concluded that, all other things being equal, party candidates listed first on a ballot can expect a "clear and discernable" electoral advantage in the form of higher vote share than if they were listed lower on the ballot. (*Id.* at 5, 17.) His analysis sets forth average primacy effect boosts for the various Minnesota major political parties. For example, Dr. Rodden observes, when DFL candidates were listed first on the ballot,[8] they received approximately 1% more of the vote share than when listed later on the ballot, and approximately 3% more in elections with no incumbent. (*Id.* at 4.) Republican candidates received approximately 2.6% more of the vote share when listed first, and approximately 2.9% more in elections with no incumbent. (*Id.*) The Reform and Independence parties, which at various points in time have been "major political parties" in Minnesota, received about 4.2% more of the vote share when listed first, and 5.5% more in elections with no incumbent. (*Id.*) And the Green Party, also occasionally a "major political party," received about 1.3% more of the vote share when listed first, and about 1.5% more in elections with no incumbent. (*Id.*)

8 DFL candidates are seldom first on Minnesota's ballot because Republican party candidates have only received more votes than DFL candidates four times since 1982. (Rodden Rpt. at 12–13.)

Dr. Rodden also notes that recent evidence from North Carolina provides a useful ***733** example of the significance of the primacy effect. (*Id.* at 23–24.) Prior to 2018, North Carolina listed all general-election candidates by order of the partisan vote share their party received in the most recent gubernatorial election. (*Id.* at 24.) Under this practice, if, for example, a Republican candidate was elected as governor in North Carolina in 2012, all Republican candidates would be listed first on the entire ballot for two subsequent election cycles. (*Id.*) In 2018, this practice was replaced by a modified alphabetical ordering system—in which a letter of the alphabet is selected by random drawing and candidate names are listed on the ballot in alphabetical order beginning with the drawn letter—which resulted in Republican and Democrat candidates being listed first on only around half of the ballots in North Carolina's 2018 general election. (*Id.* at 24–25.)

Since Republican candidates were listed first on all ballots in 2016, North Carolina's new ballot order practice in 2018 inadvertently created a "treatment" and "control" group. (*Id.*) Researchers could compare prior election results under the old "primacy" system (in 2016), in which Republicans were listed first on all ballots, against election results under the new modified alphabetical system (in 2018), in which Republican and Democrat candidates were listed first an approximately equal number of times, to see if there was a noticeable change in vote share. (*Id.* at 25–26.)

The results of such a comparison were "striking." While the average contested precinct in North Carolina experienced a 3.2% shift towards Democratic candidates overall in 2018, the shift was about 1.5% higher in precincts where Republican candidates were no longer listed first. (*Id.* at 26.) Moreover, in elections with no incumbent—which lack informational cues for voters such as an incumbent's name and history—Democrat candidates' vote share increased *by over 8%* in precincts where Republicans were no longer listed first on the ballot. (*Id.* at 27.) Even where the same two candidates from the prior general election ran again, there was still a 4% increase in vote share for Democrat candidates where Republican candidates were no longer listed first. (*Id.* at 28.) Put simply, Dr. Rodden concludes, "the North Carolina quasi-experiment provides a clear demonstration of the advantage associated with ballot order primacy." (*Id.*)

2. Dr. Krosnick's Report on Scholarly Research Regarding the Primacy Effect

The second report offered by Plaintiffs, from Dr. Jon A. Krosnick, analyzes whether the Ballot Order statute is likely to have any impact on vote shares in Minnesota elections based on a review of extensive literature on the primacy effect in elections. (*See* Velez Decl. Ex. 2 Expert Report of Dr. Jon A. Krosnick (Krosnick Rpt.) [Doc. No. 29-1] at 2.) Dr. Krosnick is the Frederic O. Glover Professor of Humanities and Social Sciences, and a Professor of Communication and Political Science, at Stanford University. (*Id.* at 3.) He is also a research scientist for the United States Census Bureau, a research advisor for Gallup, and an accomplished author in his field. (*Id.*) He holds a Bachelor of Arts degree in psychology from Harvard University, and has earned a Masters' degree and Ph.D. in social psychology from the

University of Michigan. (*Id.*) He has conducted research on candidate name ordering effects for the past twenty-five years, and has testified as an expert witness on name order in four cases, as well as before the Nevada legislature. (*Id.*)

For his report, Dr. Krosnick reviewed 70 years of scholarly research on candidate name order, including his own work. (*Id.* at 5.) In doing so, he categorized the scholarly research by election type and geographic ***734** location (*Id.* at 10–27), assessed unusual or outlier results (*Id.* at 15–17), analyzed the consistency of the literature's conclusions in order to confirm that the research was not unanimous as a result of chance (*Id.* at 24–25), and explained *why* name order effects occur, *when* they are expected to occur, and *where* the effects are typically most significant. (*Id.* at 28–35.) Dr. Krosnick offers four opinions:

(1) Listing a candidate's name first on the ballot "almost always" accords that person a "primacy effect" advantage in gaining votes;

(2) Candidate name order effects have been extensively studied in different electoral settings for decades, and the body of accumulated evidence illustrates that the "primacy effect" on first-listed candidates is based *solely* on their first-listed position;

(3) Name order effects are typically observed where voters lack information about, or feel ambivalent towards, candidates and are "nudge[d]" towards the first candidate on a ballot as a result; and

(4) Because primacy effects have been found virtually everywhere that candidate name order effects have been studied, it is "extremely likely" that primacy effects have occurred and will occur in Minnesota.

(*Id.* at 2 (emphasis added).) It is worth noting that when analyzing the consistency of the research at issue, Dr. Krosnick found that out of 1,061 statistically significant tests conducted on name order effects, 91% indicated primacy effects. (*Id.* at 25.)

E. Procedural History

On November 27, 2019, Plaintiffs filed their complaint against Defendant seeking to invalidate the Ballot Order Statute, Minn. Stat. § 204D.13, subd. 2, as unconstitutional. (*See* Compl. ¶¶ 1, 4, 6.) Plaintiffs contend because the Ballot Order statute requires a fixed ballot order that places the poorest performing major party first on the ballot, the statute confers—by virtue of the primacy effect—a "state-mandated, systemic, and entirely arbitrary advantage," to "a single political party and all of the candidates who affiliate with it, for no other reason than their political affiliation." (*Id.* ¶ 3; *see also id.* ¶ 23.) Moreover, Plaintiffs contend, the "entirely arbitrary advantage" of the primacy effect specifically harms Plaintiffs, who all either plan to vote for DFL-affiliated candidates or financially support their campaigns and election prospects. (*Id.* ¶ 4.) Because the DFL received the highest average vote share in the last state general election, the Ballot Order statute requires all DFL-affiliated candidates to be listed last on the 2020 General Election ballot. (*Id.* ¶¶ 3–4.)

Plaintiffs' complaint sets out two counts. Count One, brought pursuant to 42 U.S.C. § 1983 (2018) and 28 U.S.C. §§ 2201–2202 (2018), alleges that the Ballot Order statute constitutes an undue burden on the right to vote in violation of the First and Fourteenth Amendments to the United States Constitution. (Compl. at p. 15.) Plaintiffs allege that the mandate of the Ballot Order statute burdens the right to vote of those voters—including the individual voting Plaintiffs and the constituents of the organizational Plaintiffs—who support candidates of other similarly situated major political parties "because it dilutes their vote relative to the votes for the favored political party candidates that the [Ballot Order] [s]tatute requires be listed earlier on the ballot." (*Id.* ¶ 44.) Specifically, they assert that the "weight and impact" of their votes are "consistently and arbitrarily decreased—and the weight and impact of the votes *for the statutorily favored party's candidates, increased*—by the votes accruing to the earlier-listed candidates ***735** solely due to their earlier position on the ballot" under the Ballot Order statute. (*Id.* ¶ 45 (emphasis added).) Plaintiffs contend that such vote dilution is not justified by any legitimate state interest, that the Ballot Order statute is unconstitutional and, accordingly, they demand declaratory and injunctive relief. (*Id.* ¶¶ 46–48.)

Count Two, brought under the same statutory provisions, alleges that the mandate of the Ballot Order statute results in disparate treatment in violation of Plaintiffs' right to equal protection under the Fourteenth Amendment to the United States Constitution. (Compl. at p. 17.) In support, Plaintiffs allege that the Ballot Order statute treats one major political party—and its candidates, members, constituencies, and the voters and organizations who support it—differently from other major political parties by giving it an unfair and arbitrary advantage based solely on the poor performance of

that party's candidates in the last state general election. (*Id.* ¶ 52.) Put simply, Plaintiffs allege that the Ballot Order statute is state-sanctioned "favoritism" of one major political party over all others. (*Id.* ¶ 53.)

Ultimately, Plaintiffs request that the Court (1) declare the Ballot Order statute unconstitutional; (2) preliminarily and permanently enjoin the Secretary from implementing or enforcing it; and (3) award Plaintiffs costs, disbursements and attorneys' fees incurred in bringing this action. (Compl. at p. 19.)

On December 27, 2019, Defendant moved to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (*See* Def. Mot. to Dismiss [Doc. No. 13]; Def.'s MTD Mem. at 3.) After briefing was completed, Plaintiffs filed a motion for a preliminary and permanent injunction pursuant to Fed. R. Civ. P. 65, seeking to enjoin Defendant from implementing or enforcing the Ballot Order Statute, and requiring the implementation of a non-discriminatory system that gives similarly-situated major-party candidates an equal opportunity to be first on the ballot. (*See* Pls.' Mot. for a Prelim. Inj. (Pls.' PI Mot.) [Doc. No. 22] at 1–2.; Pls.' PI Mem.) The Court heard oral argument on both motions on April 24, 2020. (*See* Minute Entry [Doc. No. 54].)

Shortly after oral argument, HEP submitted a notice of supplemental authority, namely, the Eleventh Circuit's recent decision reversing and remanding a similar case finding plaintiffs in that case lacked standing. (*See* Notice of Supp'l Authority [Doc. No. 56] (discussing *Jacobson v. Fla. Secretary of State*, 957 F.3d 1193 (11th Cir. 2020)); *see also* Pls.' Response to Supp'l Authority (Pls.' Supp'l Auth. Mem.) [Doc. No. 61].) Additionally, at the direction of the Court, the parties also submitted a post-hearing joint stipulation addressing what technically feasible actions the Secretary could take in advance of Minnesota's November 2020 general election should the Court rule that the Ballot Order statute is unconstitutional. (*See* Parties Joint Stip. re: Potential Relief [Doc. No. 63].)

II. DISCUSSION

[3] While neither party raised any Article III standing issues in either pending motion, amicus curiae HEP asserts that Plaintiffs lack standing to sue. Moreover, the Court "has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986)). Accordingly, the Court first addresses whether the Plaintiffs have standing to bring this suit. Because the Court finds that at least one of the Plaintiffs has standing, it then considers Defendant's ***736** Motion to Dismiss, followed by Plaintiffs' Motion for a Preliminary Injunction.

A. Standing

[4] **[5]** **[6]** Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. For a legal dispute to qualify as a "genuine case or controversy," at least one plaintiff must have "standing" to sue. *Dep't of Commerce v. New York*, ––– U.S. ––––, 139 S. Ct. 2551, 2565, 204 L.Ed.2d 978 (2019). The standing doctrine " 'limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong' and 'confines the federal courts to a properly judicial role.' " *Id.* (quoting *Spokeo, Inc. v. Robins*, ––– U.S. ––––, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016)). As a jurisdictional requirement, "standing to litigate cannot be waived or forfeited." *Virginia House of Delegates v. Bethune-Hill*, ––– U.S. ––––, 139 S. Ct. 1945, 1951, 204 L.Ed.2d 305 (2019).

[7] **[8]** **[9]** **[10]** To establish Article III standing, "a plaintiff must [1] 'present an injury that is concrete, particularized, and actual or imminent; [2] fairly traceable to the defendant's challenged behavior; and [3] likely to be redressed by a favorable ruling.' " *Dep't of Commerce*, 139 S. Ct. at 2565 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)). The first requirement, often referred to as "injury in fact," requires the plaintiff to show "an invasion of a legally protected interest which is [both] concrete and particularized[ ] and [ ] actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted) (internal quotation marks omitted). The second requirement—that the plaintiffs' injury-in-fact be "fairly traceable" to the defendant's conduct—requires a showing of a "causal connection between the injury and the conduct complained of" such that the injury is " 'not ... th[e] result [of] the independent action of some third party not before the court.' " *Id.* at 560–61, 112 S.Ct. 2130 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). The third requirement—whether the injury is redressable—requires a showing that it is " 'likely,' as opposed to merely 'speculative,' that the injury

will be 'redressed by a favorable decision' " for the plaintiff. *Id.* at 561, 112 S.Ct. 2130 (quoting *Simon*, 426 U.S. at 38, 43, 96 S.Ct. 1917).

[11] [12] [13] [14] [15] As to standing, "the litigant invoking the court's jurisdiction must do more than simply allege a nonobvious harm. To cross the standing threshold, the litigant must explain how the elements essential to standing are met." *Id.* (citations omitted); *see also Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 ("The party invoking federal jurisdiction bears the burden of establishing these elements." (citation omitted)). Moreover, the degree of proof required of the litigant to demonstrate standing depends on the stage of litigation at which the case rests. *Id.* "A party invoking federal jurisdiction must support each of the standing requirements with the same kind and degree of evidence at the successive stages of litigation as any other matter on which a plaintiff bears the burden of proof." *Constitution Party of South Dakota v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011) (citing *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130). Accordingly, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct" will suffice to establish Article III standing. *Id.* (citing *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130). At summary judgment, a plaintiff must " 'set forth by affidavit or other evidence specific facts, which for the purposes of the summary judgment motion ***737** will be taken as true[,]' " to establish standing because "allegations alone are insufficient to survive a summary judgment motion[.]" *Id.* (quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130).

Here, HEP argues that Plaintiffs must "prove standing under 'the heightened standard for evaluating a motion for summary judgment[ ]' " (HEP Mem. at 4.) HEP relies almost entirely on *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 912–913 (D.C. Cir. 2015), for this proposition. (HEP Mem. at 4.) In *Vilsack*, the D.C. Circuit observed that because a party must show, among other things, "a substantial likelihood of success on the merits" in order to obtain a preliminary injunction—which necessarily includes showing a likelihood of success on both substantive theories and jurisdiction—"a party who seeks a preliminary injunction must show a substantial likelihood of standing" at the preliminary injunction stage. *Id.* at 913 (citations omitted) (internal quotation marks omitted). Plaintiffs disagree. (Pls.' HEP Opp'n Mem. at 5–6.)

The Supreme Court does not appear to have explicitly addressed the level of proof necessary to establish standing with respect to a motion for a preliminary injunction. Similarly, the Eighth Circuit has not explicitly addressed the issue. Recently, *without* discussing what standard should be used, the Eighth Circuit applied a pleading standard when analyzing standing on appeal from a grant of a preliminary injunction in a campaign finance case. *See Jones v. Jegley*, 947 F.3d 1100, 1103–1105 (8th Cir. 2020) (applying pleading standard for evaluating standing, then noting that "[h]aving dealt with standing, [the court's] next task is to address whether [the plaintiff] was entitled to a preliminary injunction"). Similarly, in another recent case involving a First Amendment challenge to a state anti-loitering law that resulted in the district court granting a statewide preliminary injunction in favor of the plaintiffs, the Eighth Circuit applied a pleading standard (again, without discussion) in finding that the plaintiffs "ha[d] standing to seek a preliminary injunction." *Rodgers v. Bryant*, 942 F.3d 451, 454–55 (8th Cir. 2019); *see also Heartland Academy Community Church v. Waddle*, 335 F.3d 684, 689 (8th Cir. 2003) (applying pleading standard in reviewing whether plaintiffs had standing to seek a preliminary injunction). Still, at least two of those cases[9] involved preliminary injunction motions that came prior to the commencement of discovery in the underlying case, or at least prior to any significant discovery or record development.[10]

9 *See* Transcript of Prelim. Inj. Hr'g, *Jones v. Jegly*, 4:19-cv-00234-JM (Doc. No. 28) (E.D. Ark.) at 23–25 (indicating that the record lacked evidence that may be useful later in litigation, with the government acknowledging that at "this stage" it had offered what it could); Complaint & Motion for Prelim. Inj., 4:17-cv-00501-BRW (Doc. Nos. 1, 2) (E.D. Ark.) (reflecting that both the complaint and motion for preliminary injunction were filed contemporaneously).

10 Other circuits vary in their approach to this issue. *See, e.g.*, *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 255–56 (6th Cir. 2018) (citing the D.C. Circuit and drawing distinction between failure to show likelihood of associational standing for purposes of preliminary injunction, and a failure to show standing at all for purposes of allowing the case to continue); *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (requiring "clear showing" of standing at preliminary injunction stage), *cert. denied*, 563 U.S. 989, 131 S.Ct. 2456, 179 L.Ed.2d 1211 (2011).

[16] In cases where at least some discovery has commenced, the Eighth Circuit has acknowledged the need for increased proof of standing where a challenge to standing comes at later stages in litigation. *See Constitution Party of South Dakota*, 639 F.3d at 420–21 (noting the increasing ***738** degrees of proof of standing necessary for each "successive" stage of litigation). And the Eighth Circuit has acknowledged that standing contests at the summary judgment stage require specific affidavit evidence. *See Disability Support Alliance v. Heartwood Enterprises, LLC*, 885 F.3d 543, 545 (8th Cir. 2018). Based on this precedent, the Court concludes that the Eighth Circuit would require more from the Plaintiffs than mere allegations of standing, but less than would be required in the face of a motion for summary judgment.

It does not follow, however, that the Eighth Circuit would require proof of a "substantial likelihood" of standing at this stage in the litigation. Where parties seek to enjoin a duly-enacted state statute, the Eighth Circuit has only required the litigant to show it is "likely" to prevail on the merits, and has expressly declined to adopt "substantial probability" or "substantial likelihood" tests due to the uncertain history surrounding the meaning of the phrases. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 730 & 732 n.4 (8th Cir. 2008). Moreover, unlike a motion for summary judgment —which can be dispositive—a preliminary injunction motion is by nature non-dispositive. Requiring litigants to prove standing at a preliminary injunction stage with the same degree of proof required at the summary judgment stage ignores both the likelihood of an incomplete record and the fact that any findings of fact or conclusions of law made by the Court for a preliminary injunction motion are not final. *See CPI Card Grp., Inc.*, 294 F. Supp. 3d at 798. As the Court discusses below, this lack of clarity in the law as to the level of proof required at this stage of the proceedings is really academic as Plaintiffs have provided ample affidavit evidence to support standing in this case.

1. The DSCC and DCCC Have Direct Standing

[17] An organization can have standing on its own behalf or on behalf of its members. *See ARRM v. Piper*, 367 F. Supp. 3d 944, 953 (D. Minn. 2019) (citing *Bowman v. W. Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993)); *see also Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (noting that associations may have standing on their own right, or standing solely as the representative of its members). Here, the organizational Plaintiffs—the DSCC and DCCC—assert that they have both direct and associational standing to sue. (*See* Pls.' HEP Opp'n Mem. at 6.) As is discussed below, because the Court finds that the DSCC and DCCC have direct standing, it need not reach the question of associational standing.

The DSCC and DCCC assert that they have direct standing based on two independently sufficient harms: (1) the Ballot Order statute requires them to divert significant financial resources to counteract the unconstitutional impact of the statute in Minnesota; and (2) the Ballot Order statute directly harms the electoral prospects of both committees and the candidates they seek to have elected. (*See* Pls.' HEP Opp'n Mem. at 6–9.) While HEP does not appear to offer argument as to whether either organization's purported harm to its electoral prospects confers standing, it does argue that both the DSCC and DCCC have failed to show a drain of resources sufficient to establish standing because they (1) have not quantified the resources they will divert to counteract the Ballot Order statute, (2) have not explained when they will have to spend those resources; and (3) have not explained who will receive them. (HEP Mem. at 7.) HEP also contends that the organizations would have spent the resources in Minnesota anyway such that the funds cannot ***739** fairly be described as having been "diverted" from their intended use. (*Id.* at 8, 10.)

[18] In determining whether an organization has standing to sue on its own behalf, courts "conduct the same inquiry as in the case of an individual: Ha[ve] the [organizations] 'alleged such a personal stake in the outcome of the controversy as to warrant [their] invocation of federal-court jurisdiction'?" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (citation omitted) (internal quotation marks omitted)). Accordingly, either the DSCC or the DCCC must "[1] 'present an injury that is concrete, particularized, and actual or imminent; [2] fairly traceable to the defendant's challenged behavior; and [3] likely to be redressed by a favorable ruling.' " *Dep't of Commerce*, 139 S. Ct. at 2565 (quoting *Davis*, 554 U.S. at 733, 128 S.Ct. 2759).

a. Injury-In-Fact

The Court finds that the DSCC and DCCC have made a sufficient showing of injury-in-fact in the form of both a diversion of resources, and harm to electoral prospects.

i. Diversion of Resources

[19] The Court first addresses the DSCC's and DCCC's claims that they suffered direct injury in the form of diversion of resources to counteract the effects of the Ballot Order statute. An organization can show injury-in-fact for standing purposes if it can show a "concrete and demonstrable injury to [its] activities which drains its resources and is more than simply a setback to its abstract social interests." *Nat'l Fed'n. of the Blind v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999) (citing *Coleman*, 455 U.S. at 379, 102 S.Ct. 1114 (noting that harm to an organizations' non-abstract interests accompanied by a perceptible drain in resources is a "concrete and demonstrable injury" to the organization)); *see also Jacobson*, 957 F.3d at 1205 (" '[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.' " (citation omitted)).

[20] **[21]** **[22]** Where a "law injures [a political party] by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote[,]" such a devotion of resources constitutes an injury for the purposes of Article III standing. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 189 n.7, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (agreeing with the "unanimous view" of the Seventh Circuit that the political party at issue had standing to challenge the law). Even if the "added cost has not been estimated and may be slight," such imprecision does not affect standing, "which requires only a minimal showing of injury." *Crawford*, 472 F.3d at 951 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 180–84, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). Indeed, "[a]t bottom[,] the Article III standing limitation prevents a plaintiff from bringing a federal suit to resolve an issue of public policy if success does not give the plaintiff ... some relief other than the satisfaction of making the government comply with the law." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014). "If a voter can get to the polls more easily by winning the lawsuit, *or a political party can marshal its forces more effectively by winning its lawsuit,* that ought to be enough for Article III." *Id.* (emphasis added); *see also* ***740** *Democratic Nat'l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 764, (W.D. Wis. Mar. 20, 2020) (finding standing where Democratic Party of Wisconsin and Democratic National Committee alleged that various elections laws required them to " 'expend additional resources to assist their members and constituents to overcome [the law's effects] to exercise their right to vote' " (citation omitted)).

[23] The Court finds that the DSCC and DCCC have made a sufficient showing of a "diversion-of-resources" direct injury sufficient to meet Article III standing requirements at this stage in the litigation. First, they have established—through undisputed evidence—that the Ballot Order statute creates a concrete and demonstrable injury to each organizations' non-abstract interests. *Cross*, 184 F.3d at 979. Each organization's mission is to elect DFL candidates to office in either the U.S. House of Representatives or U.S. Senate, including from Minnesota. (Guinn Decl. for DCCC ¶ 2; Schaumburg Decl. for DSCC ¶ 2.) Electing DFL candidates is "not merely an ideological interest," *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586–87 (5th Cir. 2006). Indeed, losing an election is more than "simply a setback to the organization's abstract social interests" *Coleman*, 455 U.S. at 379, 102 S.Ct. 1114, because "[p]olitical victory accedes power to the winning party, enabling it to better direct the machinery of government towards the party's interests." *Benkiser*, 459 F.3d at 587 (citing *Storer v. Brown*, 415 U.S. 724, 745, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)). Plaintiffs' undisputed evidence shows that the Ballot Order statute—and the primacy effect it gives to the poorest performing major political party's candidates—grants first-listed candidates on Minnesota ballots a "clear and discernable" advantage in the form of a higher vote share. (Rodden Rpt. at 5, 17.) For the majority of the past 36 years, the undisputed evidence demonstrates that DFL opponents have received—when listed first on the ballot—anywhere from 1.3% to 5.5% more of the vote *solely* because of their first-listed position. (*Id.* at 4.) And because DFL candidates will be listed last on Minnesota's 2020 General Election ballot, DFL candidates will be required to obtain more votes than they would otherwise need to overcome the first-listed advantage granted to their opponents, which is a particularly disadvantageous position to be in given the uncontroverted expectation that several elections will be competitive this fall. (*See* Guinn Decl. for DCCC ¶¶ 16–18.) Indeed, the Secretary expressly concedes that the Ballot Order statute gives an advantage to parties that are not in power and acknowledges that even a .5% boost in vote share from a statute would constitute a statutorily-conferred benefit for the first-listed party. (*See* Maeda Dep. Tr. at 31–32, 70.)

[24] **[25]** Second, the DSCC and DCCC have sufficiently established diversion of their resources at this stage in the

litigation. Each has indicated that it intends to commit resources to support DFL candidates in Minnesota, and that the Ballot Order statute (and accompanying primacy effect) requires them to divert resources into Minnesota that would normally be spent in other states around the country. (Guinn Decl. for DCCC ¶¶ 20–21; Schaumburg Decl. for DSCC ¶¶ 11–12.) Doing so means that each organization has fewer resources to support other DFL candidates in states around the country. (Guinn Decl. for DCCC ¶ 21; Schaumburg Decl. for DSCC ¶ 12.) While the organizations have not provided detailed quantification of their diverted resources, even if the diversion is "slight," standing is still satisfied. *Crawford*, 472 F.3d at 951 (citation omitted). Moreover, "so long as the economic effect on an organization is real, the organization does not lose standing simply because the proximate cause of that economic ***741** injury is 'the organization's noneconomic interest in encouraging [a particular policy preference or outcome].' " *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (quoting *Coleman*, 455 U.S. at 379 n.20, 102 S.Ct. 1114). And at this stage in the litigation—notably, prior to summary judgment and trial—precise measurements of the diverted amount of resources are not necessary to show an injury. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (requiring specific facts be set forth supporting standing at *summary judgment*, further supported by adequate evidence *at trial*); *see also Ark. ACORN Fair Housing, Inc. v. Greystone Dev., Ltd.*, 160 F.3d 433, 434 (8th Cir. 1998) (requiring specific facts quantifying resource drain at *summary judgment* stage in litigation).

HEP's arguments to the contrary are unavailing. HEP's contention that standing is lacking because the DSCC and DCCC have not precisely quantified their diverted resources fails because such precision is unnecessary at this stage in the litigation. *See Greystone Dev., Ltd.*, 160 F.3d at 434. Moreover, HEP's argument that the DSCC and DCCC cannot rely on a "diversion of resources" because they would have spent the resources in Minnesota anyway ignores the nature of the DSCC's and DCCC's alleged injury.[11] Each committee notes that its injury is not the expenditure of resources on electing Minnesota DFL candidates—which each organization acknowledges will occur regardless of the Ballot Order statute (*see* Guinn Decl. for DCCC ¶ 20; Schaumburg Decl. for DSCC ¶ 11)—but rather the *diversion* of resources from other states that were *not* originally going to be used to promote Minnesota-specific DFL candidates. (*See* Guinn Decl. for DCCC ¶ 21; Schaumburg Decl. for DSCC ¶ 12.) Thus, contrary to HEP's argument, the diverted resources at issue *would not* have been spent in Minnesota *but for* the Ballot Order statute's effects.

11 The cases HEP cites in support of this proposition are also distinguishable. *See Husted*, 770 F.3d at 460 (finding lack of Article III standing at summary judgment because purported injury was harm to "abstract social interest" of "maximizing voter turnout"); *Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 76–77 (3d Cir. 1998) (finding naked assertion of diversion of funds insufficient *at summary judgment* where organization could not establish "any connection between the [purported source of harm] and the need for [diversion of resources for] a remedial educational campaign"); *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1397 (10th Cir. 1992) (concluding that Libertarian Party lacked injury for Article III standing where allegations of increased expenditures at *summary judgment* stage lacked anything other than speculative connection to governor's purported misuse of public funds).

Finally, HEP's notice of supplemental authority—the Eleventh Circuit's recent decision in *Jacobson*, 957 F.3d at 1205–1207, where a similar challenge to Florida's "Ballot Order" statute was raised—does not alter the Court's ruling. The Eleventh Circuit found that the DCCC lacked standing based on inadequate evidence of the diversion of resources, *see id.* at 1205–06, after a bench trial, not that diversion of resources cannot legally support standing. *Id.* at 1198. Accordingly, the DCCC's failure to support standing in *Jacobson* by " 'adequate[ ] ... evidence adduced at trial' " does not necessitate the same finding here, where the posture of the case has not even reached summary judgment. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (requiring successively more precise forms of proof of standing as litigation commences).

Moreover, the case is also factually distinguishable. The Eleventh Circuit's ruling rested in part on the DCCC's (and other organizational plaintiffs) failure to present evidence at trial as to the activities the ***742** funds at issue were being diverted away from in order to spend those funds on combatting the primacy effect in Florida. *Jacobson*, 957 F.3d at 1206. Here, however, both the DSCC and DCCC have remedied that problem—at least enough to establish standing at this stage in the litigation—by explaining that the diverted resources are coming *from* their resource expenditures that would normally be used in other states to elect non-Minnesota

DFL candidates to Congress. (*See* Guinn Decl. for DCCC ¶ 21; Schaumburg Decl. for DSCC ¶ 12.) Accordingly, unlike in *Jacobson*, both the DSCC and DCCC have adequately explained at this stage of the proceedings, "what activities, if any, might be impaired by [the DCCC's] decision to allocate 'additional resources' " to Minnesota. *Jacobson*, 957 F.3d at 1206.

ii. Electoral Prospects

In the alternative, but independently sufficient to show injury-in-fact, the Court finds that the DSCC and DCCC have made a sufficient showing that their candidates' electoral prospects have been harmed. In the election context, several circuits have recognized what has come to be known as an Article III "competitive standing" theory whereby a candidate or his political party can show direct injury if the defendant's actions hurt the candidate's or party's chances of prevailing in an election.[12] *See, e.g.*, *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011) (upholding "competitive standing" theory that "potential loss of election" was injury-in-fact sufficient to give local candidate and party officials supporting that candidate standing), *cert. denied*, 567 U.S. 906, 132 S.Ct. 2748, 183 L.Ed.2d 616 (2012); *Benkiser*, 459 F.3d at 586–87 (finding persuasive the argument that a political party has suffered injury-in-fact when "its congressional candidate's chances of victory would be reduced" by defendant's actions because "a political party's interest in a candidate's success is not merely an ideological interest"); *Smith v. Boyle*, 144 F.3d 1060, 1062–63 (7th Cir. 1998) (holding Illinois Republican Party and its chairman had standing to challenge Illinois Constitution's method for selecting state supreme court justices that "denie[d] [its] members ... a fair opportunity to elect candidates of their choice"); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (noting the "well-established concept of competitors' standing" gave representative of Conservative Party sufficient Article III standing because party "stood to suffer a concrete, particularized, actual injury—competition on the ballot from candidates that ... were able to 'avoid complying with the Election Laws' and a resulting loss of votes").

12 The Eighth Circuit does not appear yet to have addressed this theory of standing.

Indeed, "[t]he inability to compete on an equal footing due to the application of allegedly biased criteria has been recognized in many contexts as an injury in fact sufficient to support constitutional standing." *Nat. Law Party v. Fed. Election Comm'n*, 111 F. Supp. 2d 33, 44 (D.D.C. 2000) (citing *Ne. Fla. Chapter v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (finding general contractors had standing to challenge city ordinance giving preferential treatment in award of city contracts to minority-owned businesses because injury in fact was "inability to compete on an equal footing" not the loss of the contract)); *see also Fulani v. Brady*, 935 F.2d 1324, 1327 (D.C. Cir. 1991) (citations omitted) (noting that "competitor standing" is usually recognized in circumstances "where a defendant's actions benefitted a plaintiff's competitors, and thereby caused the plaintiff's subsequent disadvantage"), *cert. denied*, 502 U.S. 1048, 112 S.Ct. 912, 116 L.Ed.2d 812 (1992). The D.C. Circuit has described the principle succinctly: "when regulations illegally structure a ***743** competitive environment—whether an agency proceeding, a market, or a reelection race—parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III." *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 87 (D.C. Cir. 2005).

[26] Moreover, as noted above, the direct injury that results from the purported illegal structuring of a competitive election is inflicted not only on candidates who are at a disadvantage, but also on the political parties who seek to elect those candidates to office. *See Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981) ("[The candidate] *and* the Republic[an] Committee members seek to prevent their opponent from gaining an unfair advantage in the election process through abuses of mail preferences which 'arguably promoted his electoral prospects.' The plaintiffs have a continuing interest in preventing such practices and, thus, have standing." (citation omitted) (emphasis added)); *see also Benkiser*, 459 F.3d at 586–87 (noting that "a political party's interest in a candidate's success is not merely an ideological interest").

[27] Here, both the DSCC and DCCC—official committees of the Democratic Party—have sufficiently established that the Ballot Order statute inflicts a concrete, particularized, imminent injury-in-fact on each committee because the statute impedes the election prospects of the Democratic candidates that each committee is attempting to support in Minnesota's 2020 General Election. The undisputed expert evidence offered by Plaintiffs establishes that the Ballot Order statute creates a primacy effect in Minnesota where, all other things being equal, party candidates listed first on a ballot can expect a "clear and discernable" advantage in the form of

higher vote share than if they were listed lower on the ballot. (Rodden Rpt. at 5, 17.) Moreover, it is undisputed that *all* DFL candidates in Minnesota's 2020 General Election will be listed last on the ballot *because* the Ballot Order statute requires such an order. *See supra* § 1(C).

The resultant harm inflicted on the DSCC and DCC by the Ballot Order statute is concrete and particularized—namely, a " 'real,' and not 'abstract[,]' " injury affecting each committee distinctly and directly, even though it is not "tangible[,]" *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1548–49, 194 L.Ed.2d 635 (2016) (citations omitted)—because a political party's interest in its candidates' electoral prospects is "not merely an ideological interest." *Benkiser*, 459 F.3d at 587. Indeed, "[p]olitical victory accedes power to the winning party, enabling it to better direct the machinery of government towards the party's interests. While power may be less tangible than money, threatened loss of that power is still a concrete and particularized injury sufficient for standing purposes." *Id.* (citing *Storer*, 415 U.S. at 745, 94 S.Ct. 1274). In fact, the Secretary *concedes* that the Ballot Order statute makes it more difficult for one party to maintain power over several election cycles, and asserts that it has a valid interest in making it harder for the party in power—currently, the DFL party—to maintain its status. (*See* Maeda Dep. Tr. at 70.) In other words, the Secretary concedes that the Ballot Order statute harms DFL candidates because it makes it harder for them to be elected.

[28] The injury is also undoubtably imminent. The Supreme Court has held that "[a]n allegation of future injury may suffice" to satisfy the imminence requirements of the injury-in-fact prong of Article III standing "if the threatened injury is 'certainly impending,' *or* there is a 'substantial risk that the harm will occur.' " ***744** *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (quoting *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (internal citations omitted) (internal quotation omitted)) (emphasis added). While the Court cannot know with absolute certainty whether the primacy effect will in fact influence the results of the 2020 Minnesota General Election, the Court is persuaded that there is a very substantial risk that it will harm the DSCC and DCCC as a result of the Ballot Order statute for several reasons.

First, not only do the Plaintiffs offer undisputed expert evidence from Dr. Rodden that the primacy effect exists and has benefitted every major political party in Minnesota over the last 36 years (*see* Rodden Rpt. at 2, 5, 17–23), they have also offered undisputed expert evidence from Dr. Krosnick that the primacy effect "almost always" occurs for the first-listed candidate *solely* as a result of their first-listed position. (Krosnick Rpt. at 2 (emphasis added).) Second, it is undisputed that because primacy effects have been found virtually everywhere that candidate name order effects have been studied, it is "extremely likely" to occur in Minnesota's 2020 General Election, including in its races for the U.S. House and U.S. Senate. (*Id.*) Finally, because DFL candidates will certainly be listed last among major political parties on Minnesota's 2020 General Election ballot pursuant to the Ballot Order statute, *see supra* § I(C), the primacy effect can only benefit DFL candidate's opponents. Consequently, not only is there a substantial risk that the primacy effect will occur in Minnesota's 2020 General Election, the effect can only harm DFL candidates, and by extension, the DSCC and DCCC. As a result, the Court finds that the DSCC and DCCC have made a "clear showing" of a concrete, particularized, imminent injury-in-fact. [13]

13 The Eleventh Circuit's decision in *Jacobson* does not alter the analysis here because it expressly *declined* to address this form of injury. 957 F.3d at 1206 (declining to decide whether a political party has standing to challenge an electoral practice that harmed one of its candidate's electoral prospects in a particular election).

b. Traceability

[29] The Court turns to the traceability requirement of standing. As the Eighth Circuit has noted, "[a]n injury is 'fairly traceable' to a challenged statute when there is a 'causal connection' between the two." *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 779 (8th Cir. 2019) (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). Moreover, the Eighth Circuit has "typically ... considered an injury to be 'fairly traceable' where the 'named defendant[ ] ... possess[es] the authority to enforce the complained-of provision.' " *Id.* (quoting *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) (internal quotation marks omitted)).

[30] The Court finds that the DSCC and DCCC have sufficiently established that their injuries—diversion of resources and harm to electoral prospects—are fairly traceable to the Ballot Order statute and the Secretary. As

discussed above, the Ballot Order statute causes the primacy effect to benefit one political party over all others—notably, not the DFL—which in turn directly inflicts the injuries each committee contends it will imminently suffer: diversion of resources to counter the statute's effects, and harm to each committee's electoral prospects. Moreover, the Secretary possesses the authority to enforce the statute. Pursuant to Minn. Stat. § 204D.11, subd. 1, state general election ballots "shall be prepared by the county auditor *subject to the rules of the secretary of state.*" The Secretary is also responsible for "certify[ing] to the county auditors the order in which the names of the candidates representing the [major] political parties ***745** ... must appear for every partisan office on the ballot." Minn. R. 8250.1810, subp. 9. Once that order is determined, the Secretary must "supply each auditor with a copy of an example ballot *to be used* at the state primary and state general election" that must "illustrate the form required for the ballots used in the primary and general elections *that year.*" Minn. Stat. § 204D.09, subd. 1 (emphasis added). Importantly, "[t]he official ballot" used by the county auditors "must conform in all respects to the example ballot" provided by the Secretary. *Id.*; *see also* Minn. R. 8250.1810, subp. 18 (same). Indeed, the Secretary has already created an example ballot for Minnesota's 2020 General Election [14] which lists the candidates in the order that each committee contends is causing them the injuries they seek to avoid. Accordingly, the DSCC's and DCCC's injuries—resource diversion and harm to electoral prospects—are fairly traceable to the Ballot Order statute and the Secretary. [15]

14 *See* 2020 Example Ballot *supra* n.7.

15 HEP's assertions—and supplemental authority—regarding traceability are unavailing. First, HEP contends that neither organization gets "credit" for resources spent on races with a "third-party candidate" such a Legal Marijuana Now party candidate because such candidates (although the beneficiary of the primacy effect) have no chance of winning. (HEP Mem. at 8.) Even assuming that assertion (which is entirely speculative) is true, it ignores the undisputed contention that at least some races this fall will be competitive and require resources to be diverted into those races to counteract the primacy effect.
Second, the Court notes that HEP's supplemental authority, *Jacobson*, is distinguishable on traceability grounds. In *Jacobson*, the Eleventh Circuit concluded that any injury from Florida's ballot order statute was not traceable to or redressable by the Florida Secretary of State because Florida law gave the authority to print the names of candidates on the ballot to independent election supervisors, not the Secretary. 957 F.3d at 1207. Here, however, the order of the candidates on Minnesota's general election ballot is set by the Secretary of State pursuant to Minnesota law. *See supra* § II(A)(1)(b).

c. Redressability

[31] Finally, the Court finds that the DSCC and DCCC have established redressability. To establish redressability, the DSCC and DCCC need to show that it is "likely" as opposed to "merely speculative" that their injury "will be redressed by a favorable decision." *City of Kennett v. Envtl. Protection Agency*, 887 F.3d 424, 432 (8th Cir. 2018) (citations omitted) (internal quotation marks omitted). Plaintiffs request that the Court declare the Ballot Order statute unconstitutional, enjoin the Secretary from implementing or enforcing the statute, and require the Secretary to implement a non-discriminatory system giving similarly-situated major political party candidates an equal opportunity to be first on the ballot. (Compl. at p. 19; Pls.' PI Mot. at 1–2.) If such relief is granted, the Ballot Order statute will no longer be in effect, and the benefits of the primacy effect will no longer be arbitrarily assigned to one political party's candidates based on political party affiliation. Indeed, the parties have stipulated that such relief is possible, and capable of being implemented, although they disagree on the precise method of implementation. (*See* Parties Joint Stip. re: Potential Relief at 1–2.) Accordingly, the Court finds that redressability has been satisfied here. If the statute here were declared unconstitutional, and an injunction granted, it "would ensure exactly the relief the [Plaintiffs] request. That is enough to satisfy Article III." *Food Mktg. Inst. v. Argus Leader Media*, —— U.S. ——, 139 S. Ct. 2356, 2362, 204 L.Ed.2d 742 (2019) (citation omitted).

In sum, the Court finds that the DSCC and DCCC have established direct Article III standing under both a diversion of ***746** resources theory and harm to electoral prospects theory. Accordingly, because only one plaintiff need have standing for the Court to possess jurisdiction over the case, *see Dep't of Commerce*, 139 S. Ct. at 2565, the Court need not address whether the two organizations have associational standing, or whether the individual voter plaintiffs have standing.

B. Defendant's Motion to Dismiss

Defendant moves to dismiss Plaintiffs' complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) (*see* Def.'s Mot. to Dismiss [Doc. No. 13]), because "Plaintiffs' lawsuit finds no basis in law[.]" (Def.'s MTD Mem. at 4.) When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court assumes the facts in the complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the plaintiff. *Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013). In doing so, however, the Court is not required to defer to legal conclusions or "formulaic recitation[s] of the elements of a cause of action." *Lustgraaf v. Behrens*, 619 F.3d 867, 873 (8th Cir. 2010).

[32] **[33]** To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Neubauer v. FedEx Corp.*, 849 F.3d 400, 404 (8th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Facial plausibility exists when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). While the plausibility standard is "not akin to a probability requirement," it necessarily requires a complaint to present "more than a sheer possibility that a defendant has acted unlawfully." *Id.* When considering a motion to dismiss under Rule 12(b)(6), "the court generally must ignore materials outside the pleadings." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). Courts may, however, "consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011) (citation omitted) (internal quotation marks omitted).

1. Count One – Undue Burden on Right to Vote

[34] The Court first addresses whether Plaintiffs have stated a claim that the Ballot Order statute places an undue burden upon the right to vote in violation of the First and Fourteenth Amendments, under 42 U.S.C. § 1983, as set forth in Count One of their complaint. (*See* Compl. ¶¶ 41–48.) Plaintiffs bring their undue burden claim under 42 U.S.C. § 1983, which states that "[e]very person who, under color of any statute ... of any State ... subjects, or causes to be subjected, any citizen of the United States or other person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...." To state a claim under 42 U.S.C. § 1983, "a plaintiff must allege that: (1) a right secured by the Constitution or laws of the United States was violated; and (2) the alleged violation was committed by a person acting under the color of state law." *Minn. Voters Alliance v. Ritchie*, 890 F. Supp. 2d 1106, 1111 (D. Minn. 2012), *aff'd*, 720 F.3d 1029 (8th Cir. 2013).

[35] **[36]** **[37]** **[38]** Here, there is no serious dispute that Plaintiffs have plausibly alleged a violation of a right secured by the Constitution, and that the purported violation ***747** was committed by the Secretary acting under the color of state law. The right to vote, as well as the right to associate for the purpose of promoting candidates that align with citizens' views, are recognized rights under the First and Fourteenth Amendments. The Fourteenth Amendment undoubtably protects the right "to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Indeed, "once the franchise [to vote] is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). Similarly, "[w]hile the freedom of association is not explicitly set out in the [First] Amendment," *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment ... as an indispensable means of preserving other individual liberties," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). This right includes the ability "to associate ... for the advancement of common political goals and ideas," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), and "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views," *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000).

[39] Plaintiffs allege that each of these rights—the right to vote and the right to associate to promote candidates who espouse their political views—are burdened by the

Ballot Order statute because the statute arbitrarily assigns the benefits of the primacy effect to one political party's candidates based on party affiliation, which subsequently dilutes the votes for any non-first-listed candidate (including DFL candidates, who will be listed last on Minnesota's 2020 General Election ballot). (Compl. ¶¶ 44–45.) Such allegations are legally cognizable, having been recognized by courts within this circuit and elsewhere. *See McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (holding ballot order statute that granted incumbents first-listed position on ballot "burdens the fundamental right to vote possessed by supporters of the last-listed candidates, in violation of the [F]ourteenth Amendment" and collecting cases); *see also Jacobson v. Lee*, 411 F. Supp. 3d 1249, 1275 (N.D. Fla. 2019) (concluding that ballot order statute granting incumbents first-listed advantage on ballot to be unconstitutional "thumb on the scale in favor of the party in power"), *vacated on other grounds*, 957 F.3d 1193 (vacating district court order for lack of standing); *Graves v. McElderry*, 946 F. Supp. 1569, 1578–79 (W.D. Okla. 1996) (concluding that Oklahoma statute giving incumbent first-listed position on ballot and accompanying positional advantage "infringes upon the careful and thoughtful voters' rights of free speech and association by negating the weight or impact of those citizen's votes for candidates for public office"); *Gould v. Grubb*, 14 Cal.3d 661, 122 Cal.Rptr. 377, 536 P.2d 1337, 1343 (1975) ("[A] statute, ordinance or election practice which reserves [a first-listed ballot position] advantage for a particular class of candidates inevitably dilutes the weight of the vote of all those electors who cast their ballots for a candidate who is not included within the favored class." (citation omitted)).

The Secretary argues that Plaintiffs' claims have no basis in law because while numerous courts have struck down incumbent-favoring ballot order statutes, Minnesota's Ballot Order statute does the opposite: it is "facially designed to make ***748** [the] level of single-party power over the levers of Minnesota's government *more difficult* [for incumbents] to maintain." (Def.'s MTD Mem. at 4 (emphasis added); *Id.* at 10–14.) "A state-law provision advantaging incumbents," the Secretary asserts, "is categorically different that a provision *dis*advantaging incumbents" because such "anti-incumbent" provisions function as a "check on [an incumbent party's political] power," while "incumbent-protection [statutes] ... have the opposite effect ... [of] insulat[ing] elected officials from the need to secure the consent of the governed ...." (*Id.* at 12.) Because the two types of statutes are "self-evidently not equivalent," and because Plaintiffs have purportedly cited "no precedent (nor is the Secretary aware of any) holding that it is impermissible for states to promote political diversity and moderation by making re-election marginally harder for incumbents to obtain," the Secretary contends that dismissal as a matter of law is appropriate. (*Id.*) The Secretary also asserts that a more appropriate context in which to view the Ballot Order statute is by comparison to state-law provisions imposing term limits on individuals holding office in state governments because they place a burden on an incumbent candidates' ability to run for re-election. (*Id.* at 12–13.)

The Court finds the Secretary's arguments to be unavailing. While it is true that the cases cited by Plaintiffs appear to primarily involve incumbent-first statutes that granted positional advantages to the party in power, that does not mean that the legal principles discussed in those cases —or the resultant harms stemming from a state statute favoring one party's candidates over another—are not legally cognizable when applied to an allegedly "anti-incumbent" ballot order statute.[16] None of the reasoning in those cases supports a finding that a statute that intentionally favors non-incumbents is valid; rather, those cases properly focus on the constitutional infirmity that results from the State putting its thumb on the scale at all.

16 The Court also notes that the Secretary's characterization of the statute as an "anti-incumbent" statute is misplaced. The Ballot Order statute grants the benefits associated with the first-listed position on the ballot to whichever candidate is associated with the poorest-performing major political party in the last Minnesota general election. Such an arrangement can actually boost an incumbent's chances depending on whether the poorest performing major political party offers a candidate for a given office. For example, in the election for President of the United States this fall, if the Legal Marijuana Now party or the Grassroots-Legalize Cannabis party do not offer a candidate, the Republican candidate and *incumbent*, Donald J. Trump, will be given the benefits of the primacy effect by operation of the Ballot Order statute.

[40] In fact, the "common thread" that runs through these cases is that "[c]ourts are deeply averse to state laws, regulations, and schemes that threaten political associations by favoring one association—or political party—over others." *Hand v. Scott*, 285 F. Supp. 3d 1289, 1296 (N.D. Fla. 2018), *vacated sub. nom. as moot, Hand v. Desantis*, 946

F.3d 1272 (11th Cir. 2020). Where a statute "automatically elevates candidates to the top of the ballot based on their party affiliation," the harm at issue is the favoritism of *any* one party over another, regardless of whether it is the incumbent or not. *Nelson v. Warner*, 446 F. Supp. 3d 119, 123, (S.D. W. Va. Mar. 17, 2020) (internal citations omitted) (internal quotation marks omitted). Indeed, although "[t]he party benefitting from [Minnesota's Ballot Order statute] may shift over time, [ ] this does not mean the [s]tatute is nonpartisan" because it still elevates one party over others on the basis ***749** of party affiliation. *Id.* Even the Eighth Circuit's decision in *McLain*, which struck down a North Dakota ballot order statute favoring incumbents, rested on the state's admission that the statute was designed to serve one class of voters over another—state-sanctioned "favoritism" that burdened the fundamental right to vote possessed by supporters of the last-listed candidates. 637 F.2d at 1167.

The Secretary's comparison to term limits is equally inapposite. Generally, a term limit imposes upon a *particular candidate* a broad bar to serve in a *particular office* where, for example, they have already served in that position for a certain number of years or terms. *See, e.g.*, U.S. Const. amend. XXII, § 1 (imposing term limits on the office of the President of the United States). In contrast, the Ballot Order statute does not bar any particular individual from running for office, much less specifically an incumbent party candidate. Rather, the statute's alleged harm to voting and associational rights is inflicted on *all* major party candidates, incumbent or otherwise, who do not benefit from the operation of the statute's plain terms (i.e., being listed first). *See* Minn. Stat. § 204D.13, subd. 2. Accordingly, the Court considers the Secretary's comparison to be inapt.

In sum, the Court finds that Plaintiffs have stated a plausible, legally cognizable claim that the Ballot Order statute inflicts an undue burden on the right to vote and the right to associate for the purpose of promoting candidates that align with citizens' views in violation of the First and Fourteenth Amendment. As such, the Court denies the Secretary's Motion to Dismiss as to Count One.

2. Count Two – Disparate Treatment

The Court next addresses whether Plaintiffs have stated a claim that the Ballot Order statute causes DFL-affiliated candidates to be treated differently than other similarly-situated major-political-party-affiliated candidates. (*See* Compl. ¶¶ 49–53.) Again, Plaintiffs' claim is brought under 42 U.S.C. § 1983, which requires them to allege that "(1) a right secured by the Constitution or laws of the United States was violated; and (2) the alleged violation was committed by a person acting under the color of state law." *Ritchie*, 890 F. Supp. 2d at 1111.

[41] The Court finds that Plaintiffs have adequately alleged a claim for disparate treatment, and that such treatment occurred under the direction of the Secretary acting under color of state law. The Fourteenth Amendment states that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection clause undoubtably protects the right "to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336, 92 S.Ct. 995. "[O]nce the franchise [to vote] is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper*, 383 U.S. at 665, 86 S.Ct. 1079. Accordingly, although states may "as a practical matter, [engage in] substantial regulation of elections" in order to ensure they remain "fair and honest," *Storer*, 415 U.S. at 730, 94 S.Ct. 1274, such authority is "always subject to the limitation that [it] must not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *see also Sangmeister v. Woodard*, 565 F.2d 460, 465 (7th Cir. 1977) ("It has become well established that the power of the state to regulate elections must be exercised consistent with the dictates of the equal protection clause of the Fourteenth Amendment." (citations omitted)).

***750** Plaintiffs contend that the Ballot Order statute violates the Equal Protection clause because it "treats one major political party—and its candidates, members, constituencies, and the voters and organizations who support it—differently from the other major political parties" based solely on the performance of that party's candidates in the last state general election. (Compl. ¶ 52.); *see also supra* § I(B)–(C) (discussing the Ballot Order statute, its operation, and resulting outcome for Minnesota's General Election). Other courts, including the Eighth Circuit Court of Appeals, have recognized that such a claim is legally cognizable. *See McLain*, 637 F.2d at 1167 (noting that North Dakota statute giving incumbents first-listed position on ballot "gives rise to [an] equal protection question whether the inequality [the statute creates] offends the [F]ourteenth [A]mendment" and holding that the provision ran afoul of the Equal Protection

clause); *see also Netsch v. Lewis*, 344 F. Supp. 1280, 1280–81 (N.D. Ill. 1972) (holding that state law granting "priority in listing on the election ballot by reason of incumbency and seniority" violated non-incumbent plaintiff's "right to equal protection pursuant to the Fourteenth Amendment"); *Mann v. Powell* ("*Mann I*"), 314 F. Supp. 677, 679 (N.D. Ill. 1969) (granting preliminary injunction barring incumbent-favoring tie breaking practices for ballot placement as a "purposeful and unlawful invasion of plaintiffs' Fourteenth Amendment right to fair and evenhanded treatment" and requiring either "drawing of candidates' names by lot or other nondiscriminatory means by which each of such candidates shall have an equal opportunity to be placed first on the ballot"), *aff'd*, 398 U.S. 955, 90 S.Ct. 2169, 2170, 26 L.Ed.2d 539 (1970). Moreover, that the Ballot Order statute at issue here is not an "incumbent-first" statute does not alter the legal validity of Plaintiffs' claim. *See supra* § II(B)(1).

The Secretary's primary argument against Plaintiffs' disparate treatment claim is that Plaintiffs are not similarly situated to the major political party that will be favored by operation of the Ballot Order statute—the Legal Marijuana Now party—because unlike that party, the DFL currently holds "every statewide office in Minnesota and therefore controls the vast majority of the levers of power in state government." (Def.'s MTD Mem. at 14–15.) It is "absurd," the Secretary contends, for Plaintiffs to assert that they "are being deprived of their electoral and associational rights" because the DFL holds most state offices in Minnesota, while the Legal Marijuana Now party to which they claim to be similarly situated "has never elected a single person to state office and has little to no political power whatsoever." (*Id.* at 15.)

In response, Plaintiffs contend that the Secretary's position is wrong on both the law and the facts. (Pls.' MTD Opp'n. Mem. at 16–17.) They argue that it is Minnesota law—not Plaintiffs—that renders the Minnesota DFL, Legal Marijuana Now party, Grassroots-Legalize Cannabis party, and Minnesota Republican party similarly situated because Minnesota law defines each group as a "major political party." (*Id.*); *see also* Minn. Stat. § 200.02, subd. 7(a)–(e) (setting forth state definition of "major" political party). Moreover, the Plaintiffs note that the Ballot Order statute's ordering provisions apply only to "major political parties" as defined under state law, and that accordingly, the only parties to which they even could be considered "similarly situated" are other major political parties in the state. *See* Minn. Stat. § 204D.13, subd. 2. Finally, as to the facts, Plaintiffs contend that they are at least similarly situated to the Republican Party, which is the party that often benefits from the primacy effect anyway because the Legal Marijuana Now or Grassroots-Legalize Cannabis ***751** parties have historically run only a few candidates. (Pls.' MTD Opp'n Mem. at 17.)

The Court finds the Secretary's argument to be unpersuasive. While the Eighth Circuit has generally observed that to establish disparate treatment, plaintiffs must show they are " 'similarly situated in all *relevant* respects' " to another that did not suffer from the purported disparate treatment, *Carter v. Pulaski Cty. Special Sch. Dist.*, 956 F.3d 1055, 1058 (8th Cir. 2020) (quoting *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994)) (emphasis added), it has not required that a plaintiff and potential comparator be identical in every respect. Rather, the Eighth Circuit has described the test as requiring only that the comparator " 'possess[ ] all the *relevant* characteristics the plaintiff possesses except for the characteristic about which the plaintiff alleges discrimination.' " *Mitchell v. Dakota Cty. Soc. Services*, 959 F.3d 887, 899 (8th Cir. 2020) (citation omitted) (emphasis added).

[42] Here, the Ballot Order statute—the sole target of Plaintiffs' disparate treatment claim—applies to all political parties that fit the definition of "major political party" outlined by Minnesota law, regardless of the party's current representation in government, its size, base of support, or given chances for a successful election. *See* Minn. Stat. §§ 200.02, subd. 7(a)–(c); 204D.13, subd. 2. Indeed, the only relevant characteristic under the statute determining the statute's applicability is a party's qualification as a "major political party." Therefore, Minnesota's current four major political parties—the DFL, Minnesota Republican party, Legal Marijuana Now party, and Grassroots-Legalize Cannabis party—are similarly situated in all *relevant* respects, that is, each is a "major political party" rendering it subject to the statute's ordering requirements. It necessarily follows, then, that the Legal Marijuana Now party's candidates—who will be listed first on Minnesota's 2020 General Election ballot, *see supra* § I(C)—" 'possess[ ] all the *relevant* characteristics the plaintiff[s] possess[ ][,]' " namely, being a major political party under state law, " 'except for the characteristic about which the plaintiff alleges discrimination,' " *Mitchell*, 959 F.3d at 899 (citation omitted) (emphasis added), namely, association with the DFL as opposed to the Legal Marijuana Now party. Moreover, it is on this difference—party affiliation—that the Ballot Order statute automatically awards the benefits of the first-listed position. [17] Accordingly, ***752** the Secretary's argument that

Plaintiffs are not similarly situated to the Legal Marijuana Now party fails.

17 It is worth addressing another of the Secretary's arguments at this juncture. The Secretary contends that Plaintiffs' claimed remedy—rotation of all major political party candidate names so that the primacy effect is distributed evenly—would be unconstitutional because it does not take into account the fact that minor political parties and independent candidates would not be given an opportunity to obtain the primacy effects' benefits. (Def.'s MTD Mem. at 16–17.)

However, this case involves only major political parties, a distinct group separate and apart from "minor political parties," which have their own definition under Minnesota law. *See* Minn. Stat. §§ 200.02, subd. 23(a)–(e) (2018) (defining minor political party); 204D.13, subd. 3 (requiring non-major political party candidates to be listed after the names of major political party candidates in an order determined by lot). Moreover, the Minnesota Supreme Court has upheld Minnesota's laws that require minor party and independent candidates to be listed after major party candidates as constitutional. *See Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978) (noting that "many statutes classify persons and provide for *unequal treatment as between the classifications*"), *cert. denied sub. nom., Berg. v. Growe*, 436 U.S. 927, 98 S.Ct. 2822, 56 L.Ed.2d 770 (1978). Put simply, Plaintiffs' proposed remedy treats dissimilar entities—major and minor political parties—dissimilarly, which does not amount to disparate treatment. *See United States v. Whiton*, 48 F.3d 356, 358 (8th Cir. 1995) ("[D]issimilar treatment of dissimilarly situated persons does not violate equal protection." (citation omitted) (internal quotation marks omitted)), *cert. denied*, 516 U.S. 886, 116 S.Ct. 227, 133 L.Ed.2d 156 (1995).

In sum, the Court finds that Plaintiffs have stated a plausible, legally cognizable claim that the Ballot Order statute unconstitutionally treats one major political party's candidates differently from other similarly-situated major political party's candidates, including the Plaintiffs, in violation of the First and Fourteenth Amendment. As such, the Court also denies the Secretary's Motion to Dismiss as to Count Two.

C. Plaintiffs' Motion for a Preliminary Injunction

The Court now turns to Plaintiffs' Motion for a Preliminary Injunction seeking to enjoin the Secretary from "implementing or enforcing Minn. Stat. § 204D.13(2)" and requiring him to "implement a non-discriminatory [ ] system that gives similarly-situated major-party candidates an equal opportunity to be placed first on the ballot." (Pls.' Mot. for Prelim. Inj. [Doc. No. 22] at 1–2.)

[43] **[44]** **[45]** **[46]** When determining whether to grant a preliminary injunction, the Court weighs four familiar factors: "(1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant if the injunction is not granted; (3) the balance between that harm and the harm that granting the injunction will inflict on the other parties; and (4) the public interest." *Virtual Radiologic Corp. v. Rabern*, No. 20-cv-0445, 2020 WL 1061465, at *1 (D. Minn. Mar. 5, 2020) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)). Because " '[a] preliminary injunction is an extraordinary remedy,' " the party seeking injunctive relief " 'bears the burden of proving' these factors weigh in its favor." *Mgmt. Registry, Inc. v. A.W. Co., Inc.*, 920 F.3d 1181, 1183 (8th Cir. 2019) (quoting *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003)). "The core question is whether the equities 'so favor[ ] the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.' " *Am. Mortg. & Equity Consultants, Inc. v. Everett Fin., Inc.*, No. 20-cv-426 (ECT/KMM), 2020 WL 968354, at *3 (D. Minn. Feb. 28, 2020) (quoting *Dataphase*, 640 F.2d at 113 (footnote omitted)). The decision to issue a preliminary injunction rests within the Court's discretion. *CDI Energy Servs., Inc. v. West River Pumps, Inc.*, 567 F.3d 398, 401 (8th Cir. 2009).

[47] **[48]** Before a court can grant a preliminary injunction, the movant must establish "that it had 'no adequate remedy at law' because 'its injuries [could not] be fully compensated through an award of damages.' " *Id.* (quoting *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009)). While neither party appears to directly address this point, the Court is satisfied that Plaintiffs have no adequate remedy at law because neither the accrual of the benefits of the primacy effect to one political party, nor the potential loss of an election that can result, is compensable through an award of damages. *See Peer v. Lewis*, No. 06-60146-CIV, 2008 WL 2047978, at *10 (S.D. Fla. May 13, 2008) (concluding that "as a matter of law, [ ] an individual cannot recover damages

for a lost election" and collecting cases to that effect), *aff'd*, No. 08-13465, 2009 WL 323104 (11th Cir. Feb. 10, 2009). As such, the Court turns to the other preliminary injunction factors.

1. Threat of Irreparable Harm

[49] **[50]** **[51]** **[52]** **[53]** **[54]** The "threshold inquiry when considering a motion for a preliminary injunction ***753** "is whether the movant has shown the threat of irreparable injury." *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). Failure to show irreparable harm "is, by itself, a sufficient ground upon which to deny a preliminary injunction, [because] '[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.' " *Id.* (quoting *Sampson v. Murray*, 415 U.S. 61, 88, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) (internal citations omitted) (internal quotation marks omitted)). "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Gen. Motors Corp.*, 563 F.3d at 319. The irreparable harm must be "likely in the absence of an injunction," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (citations omitted), "great[,] and of such imminence that there is a clear and present need for equitable relief," *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996) (citation omitted). "Possible or speculative harm is not sufficient." *Anytime Fitness, Inc. v. Family Fitness of Royal, LLC*, No. 09-cv-3503 (DSD/JSM), 2010 WL 145259, at *2 (D. Minn. Jan. 8, 2010). Put another way, any irreparable harm must be actual and "immediate," as opposed to a "future risk[.]" *Berkley Risk Adm'rs Co. v. Accident Fund Holdings, Inc.*, No. 16-cv-2671 (DSD/KMM), 2016 WL 4472943, at *4 (D. Minn. Aug. 24, 2016) (citation omitted) (internal quotation marks omitted).

Plaintiffs argue that they will suffer irreparable injury absent an injunction because (1) the benefits of the primacy effect stemming from the statute will hamper the DSCC and DCCC's commitment of resources to DFL candidates "up and down the ticket" in Minnesota, a loss of resources that cannot be remedied post-election; and (2) the Ballot Order statute systematically dilutes votes for DFL candidates by giving "voters who support the Legal Marijuana Now [p]arty, or, if it runs no candidate, the Grassroots-Legalize Cannabis [p]arty, or, if it runs no candidate, the Republican [p]arty, more voting power—another injury which no relief after the election can remedy." (Pls.' PI Mem. at 24–25.) Because such harms "strike at the very heart of the functioning of a fair and democratic society," Plaintiffs contend, they "cannot be remedied post-election" and are consequently irreparable. (*Id.* at 26.)

In response, the Secretary argues that Plaintiffs have not demonstrated that there is a risk of any immediate injury because the election in question is several months away, during which time extensive legal proceedings could be conducted. (Def.'s PI Opp'n Mem. at 7.) Curiously, however, the Secretary also argues that Plaintiffs filed their request for injunctive relief too late, and accordingly, the force of Plaintiffs' allegations of irreparable harm are minimized. (*Id.*) The Secretary notes that despite the anticipated ballot order for Minnesota's 2020 General Election being a matter of public record since November 2018, Plaintiffs did not file this suit until November 2019, and did not move for an injunction until February 2020, a delay that counsels against Plaintiffs' assertions of irreparable injury. (*Id.* at 7–8.) Finally, the Secretary argues that Plaintiffs have not attempted to show that they are at risk of irreparable harm if an injunction is not granted; rather, their harm arguments are directed at the harm they will allegedly suffer in the November election if they do not get the final relief they seek. (*Id.* at 8.) Such an argument, the Secretary contends, is an improper attempt to use a preliminary injunction motion to accelerate final resolution of the case. (*Id.*)

***754** **[55]** **[56]** **[57]** The Court finds that Plaintiffs have demonstrated a threat of irreparable harm, and accordingly, this factor weighs in their favor. First and foremost, the harm to Plaintiffs' constitutional rights under the First and Fourteenth Amendment are themselves routinely recognized as irreparable injuries for the purposes of a preliminary injunction motion. "The denial of a constitutional right is a cognizable injury ... and an irreparable harm." *Portz v. St. Cloud Univ.*, 196 F. Supp. 3d 963, 973 (D. Minn. 2016) (citations omitted). Indeed, the Supreme Court has noted that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury." (citations omitted)) (collecting cases), *cert. denied*, 575 U.S. 950, 135 S.Ct. 1735, 191 L.Ed.2d

702 (2015); *Marcus v. Iowa Public Television*, 97 F.3d 1137, 1140–41 (8th Cir. 1996) ("If [Plaintiffs' allegations that their First Amendment rights have been violated] are correct ... [such a violation] constitutes an irreparable harm." (citation omitted)). Similarly, "when the constitutional right is protected by the Fourteenth Amendment," such as Plaintiffs' equal protection claim here, "the denial of that right is an irreparable harm regardless of whether the plaintiff seeks redress under the Fourteenth Amendment itself or under a statute enacted via Congress's power to enforce the Fourteenth Amendment." *Portz*, 196 F. Supp. 3d at 973. And because the potential abridgment of Plaintiffs' constitutional rights stems from its effect on voting and associational rights in connection with an election, it is certainly irreparable in the sense that it cannot be adequately compensated post-election: "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters [and, relevant here, political party committees] is real and completely irreparable if nothing is done to enjoin [the Ballot Order statute]." *League of Women Voters of N.C.*, 769 F.3d at 247.

The Secretary's argument that Plaintiffs' irreparable harm is not immediate is unavailing. That the 2020 General Election is months away does not undercut the undisputed evidence showing that absent an injunction, the harm is nearly certain to occur. *See supra* § I(D)(1)–(2). In fact, in light of that undisputed and unrefuted evidence, there is essentially no dispute that Plaintiffs' alleged harm is "likely in the absence of an injunction," *Winter*, 555 U.S. at 22, 129 S.Ct. 365 (citations omitted). Moreover, if the Plaintiffs are ultimately successful on the merits, there is no guarantee that this case will be resolved quickly enough to ensure that any relief the Court orders could be implemented in time for this fall's general election, particularly in light of the required timeline for preparing ballots. *See* Minn. R. 8250.1810, subp. 1 (2018) (requiring ballots to be prepared "no [ ] less than 46 days before an election unless otherwise specified in statute"); *see also Mann v. Powell* ("*Mann II*"), 333 F. Supp. 1261, 1267 (N.D. Ill. 1969) (finding irreparable harm based on verbal threat of discriminatory ballot action by state official based in part on the "difficulty of fashioning relief after ballots have been certified" (citation omitted)). Thus, even though the election is several months away, the timelines surrounding the drafting and printing of Minnesota's general election ballots render the threat of irreparable harm "great[,] and of such imminence that there is a clear and present need for equitable relief[.]" ***755** *Iowa Utils. Bd.*, 109 F.3d at 425 (citation omitted). [18]

18 The Secretary's contention that Plaintiffs' motion improperly seeks final relief—as opposed to preserving the status quo—is equally inapt. In the context of a voting rights case where the harm sought to be avoided will occur in a *future* election, the status quo being maintained is the avoidance of the alleged constitutional violation. *See, e.g.*, *Netsch*, 344 F. Supp. at 1280 (holding, in case seeking to enjoin future incumbent-first ballot priority practice, that "[t]he constitutional rights of the plaintiffs ... will be irreparably damaged unless the *temporary order sought herein* is granted" (emphasis added)).

[58] The Secretary's argument that Plaintiffs have waited too long to seek relief is also unpersuasive. Certainly, a delay in bringing a motion for a preliminary injunction can undermine the strength of a party's request for injunctive relief. *See Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 894 (8th Cir. 2013) (noting that "delay alone may justify the denial of a preliminary injunction when the delay is inexplainable in light of a plaintiff's knowledge of the conduct of the defendant"). However, the Court is not persuaded that there was any meaningful delay in this case or that any such delay (to the extent it occurred at all) was unjustifiable or inexplainable. Plaintiffs specifically seek to avoid harm that is "extremely likely" to occur in 2020 General Election. (*See generally* Compl.) Accordingly, their suit (which necessarily was filed after the last general election, and one year before the 2020 General Election) is not, in the Court's view, untimely. *See Smith v. Clinton*, 687 F. Supp. 1310, 1313 (E.D. Ark. 1988) (noting that injury stemming for alleged unconstitutional apportionment plan was "suffered anew each time a[n] ... election is held under the [allegedly unconstitutional plan]").

In sum, the Court finds that Plaintiffs have established the likely threat of irreparable harm to their First and Fourteenth Amendment rights stemming from the Ballot Order statute. Accordingly, this factor weighs in favor of granting a preliminary injunction.

2. Likelihood Of Success On The Merits

[59] Beyond the threshold issue of irreparable harm, "the probability of success factor is the most significant" of the *Dataphase* factors. *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013). "[W]here a preliminary injunction is sought to enjoin the implementation of a duly enacted

state statute," as is the case here, "district courts [must] make a threshold finding that a party is likely to prevail on the merits." *Planned Parenthood Minn., N.D., S.D.*, 530 F.3d at 732–33 (noting that "this more rigorous standard" is required to "ensure that preliminary injunctions that thwart a state's presumptively reasonable processes are pronounced only after an appropriately deferential analysis").

As an initial matter, the parties dispute the appropriate standard of review that the Court should apply in evaluating the constitutionality of the Ballot Order statute. The Secretary contends that rational basis review should apply, which requires the Court to uphold the statute so long as it bears a rational relation to a legitimate state interest. (Def.'s MTD Mem. at 5–7.) In support, the Secretary argues that numerous courts, including the Eighth Circuit, have held that because statutes affecting ballot order have an "attenuated" effect on the fundamental right to vote, a heightened standard of review is not necessary, and that rational basis review is appropriate. (*Id.* at 5–6 (quoting *McLain*, 637 F.2d at 1167).

[60] **[61]** In response, Plaintiffs argue that because this is a state election law, ***756** the *Anderson/Burdick* test applies, which requires the Court to "weigh the 'character and magnitude' of the burden the State's rule imposes on [First and Fourteenth Amendment] rights against the interests the State contends justify the burden, and consider the extent to which the State's concerns make the burden necessary.' " *Timmons*, 520 U.S. at 358, 117 S.Ct. 1364 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983))); (*see* Pls.' MTD Opp'n Mem. at 5–6 (citations omitted).) While the Supreme Court has not provided any "litmus test" for measuring the severity of the burden that a state law imposes under the test, regardless how "slight [the state] burden may appear ... it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)). Under this test, Plaintiffs assert, the burden on Plaintiffs' First and Fourteenth Amendment rights is "severe" and accordingly, they contend that heightened scrutiny should apply. (Pls.' MTD Opp'n Mem. at 6.) But in any event, Plaintiffs argue that even if rational basis review applies, favoritism of one or more political parties over others that are similarly situated—even to make it harder for an incumbent to stay in power—does not pass muster. (*Id.* at 7.)

[62] **[63]** The Court finds that the *Anderson*/*Burdick* test applies here. Plaintiffs' claims rest on purported violations of the First and Fourteenth Amendment associational rights stemming from the Ballot Order statute. The Supreme Court has clearly stated that "[w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights," a court should "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify the burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358, 117 S.Ct. 1364 (citations omitted) (internal quotation marks omitted). There is no automatic " 'litmus-paper test' that will separate valid [state election laws] from invalid restrictions." *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564 (quoting *Storer*, 415 U.S. at 730, 94 S.Ct. 1274). To the contrary, in a constitutional challenge to a state election law, courts use the *Anderson*/*Burdick* test to determine the appropriate standard of review, and whether the challenged statute is constitutional under that standard, on a case-by-case basis. *Timmons*, 520 U.S. 351 at 358, 117 S.Ct. 1364 (applying *Anderson*/*Burdick* balancing test to evaluate appropriate standard of review for, and constitutionality of, state "fusion" candidacy statute); *see also Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (discussing *Anderson*/*Burdick* test). Indeed, other courts have applied the test when addressing constitutional challenges to ballot order statutes. *See, e.g.*, *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 714 (4th Cir. 2016) (applying *Anderson*/*Burdick* test to ballot order statute), *cert. denied sub. nom.*, *Sarvis v. Alcorn*, —— U.S. ——, 137 S. Ct. 1093, 197 L.Ed.2d 182 (2017); *Graves*, 946 F. Supp. at 1578 (same). [19]

19 While the Secretary is correct that the Eighth Circuit has observed that courts have applied rational basis review to ballot order statutes in the past, *see McLain*, 637 F.2d at 1167, that decision predates the Supreme Court's decisions in both *Anderson* and *Burdick*. The only post-*Anderson* case cited by the Secretary for the proposition that the Court should apply the rational basis test outright—*Graves v. McElderry*, 946 F. Supp. at 1581—in fact applied the *Anderson/Burdick* test to evaluate what standard of review was appropriate for a ballot order statute, and concluded that under that test, the ballot order statute at issue did not survive even rational basis review. *Id.* at 1578–82. The Eighth Circuit has since applied

the *Anderson*/*Burdick* test to state election law challenges. *See Jaeger*, 659 F.3d at 693.

***757** **[64]** Accordingly, in evaluating whether Plaintiffs are likely to succeed on the merits, the Court applies the *Anderson*/*Burdick* test to the Ballot Order statute, and considers (1) the "character and magnitude" of the burden that the Ballot Order statute imposes on Plaintiffs' First and Fourteenth Amendment associational rights; (2) the state's asserted interests for any such burden (as well as the legitimacy and strength of each of those interests); and (3) whether the state's interests justify that burden, which also requires consideration of the extent to which the state's concerns make that burden necessary. *Jaeger*, 659 F.3d at 693–94 (citing *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564). "[T]he rigorousness of [the Court's] inquiry into the propriety of [the Ballot Order statute] depends upon the extent to which [the statute] burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. The more severe of a burden, the higher level of scrutiny the Court applies. *Id.* (citations omitted).

a. Character and Magnitude of Burden Imposed On Plaintiffs' Constitutional Rights

The Court first considers the character and magnitude of the burden imposed by the Ballot Order statute on Plaintiffs' constitutional rights. Plaintiffs argue that the statute imposes a "severe" burden on their First and Fourteenth Amendment rights because the statute constitutes state-sanctioned systematic favoritism of one major political party over all others based solely on party affiliation. (*See* Pls.' MTD Opp'n Mem. at 6; *see also* Pls.' PI Mem. at 20 (noting that Minnesota's close elections make the burden imposed by the Ballot Order statute even more severe). In response, the Secretary contends that Eighth Circuit precedent —specifically, *McLain*, 637 F.2d at 1167—makes clear that any burden imposed by the statute is "attenuated" and accordingly subject to the lower, rational basis standard of review. (Def.'s PI Opp'n Mem. at 10.)

[65] **[66]** In evaluating the character and magnitude of the burden imposed by the Ballot Order statute, the Court is well aware of the Supreme Court's admonition that "[i]t is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)). Still, although voting is crucial to our democratic system, "[i]t does not follow ... that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Id.* (citation omitted). Because the Constitution provides that States may set the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const., art. I, § 4, cl. 1, the Supreme Court has recognized that States retain the power to regulate their own elections. *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059 (citing *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973)). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections" because " 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Id.* (quoting ***758** *Storer*, 415 U.S. at 730, 94 S.Ct. 1274 (1974)). Accordingly, "[e]lection laws will invariably impose *some* burden" on voting and associational rights because every state election law, " 'inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.' " *Id.* (quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564) (emphasis added).

[67] Here, the character of the Ballot Order statute undoubtably "has an effect on the fundamental right to vote ...." *McLain*, 637 F.2d at 1167. The statute categorically selects one "major political party" to be listed first on every general election ballot in Minnesota based entirely on their prior performance in the last state general election. *See* Minn. Stat. § 204D.13, subd. 2. While the party that benefits from this first-listed position may vary, such variation does not render the statute nonpartisan on its face. To the contrary, it simply means that "the direction of the statute's partisanship changes depending on the circumstances." *Jacobson*, 411 F. Supp. 3d at 1276. In fact, the Secretary admits that the purpose of the Ballot Order statute is to make it harder for the party in power to maintain power by giving poorer-performing major political parties a boost. (*See* Defs.' MTD Mem. at 4 ("The [Ballot Order] statute ... is facially designed to make that level of single-party power over the levers of Minnesota's government more difficult to maintain."); *Id.* at 8 ("[T]he statutory formula explicitly favors new parties and out-parties at the (again, marginal) expense of the most popular party."); *Id.* at 9 (noting the statute "remind[s] members of the current in-party that their opponents will be, on balance, more likely to be able to turn them out of office in the next general election thanks to the small advantage conferred by the ballot-order statute.").)

Contrary to the Secretary's arguments, the advantage provided by the Ballot Order statute is not small. The unrefuted evidence shows that the primacy effect created by the statute confers anywhere from 1% to 5.5% more votes on the party benefitting from the statute's operation. *See supra* § I(D)(1). Given that Minnesota's elections have, in the past, been decided by as slim of a margin as .01% of the vote share,[20] even a 1% increase in vote share as a result of the primacy effect created by the Ballot Order statute is significant. And it is also undisputed that this significant advantage is all but certain to benefit Legal Marijuana Now party candidates in Minnesota's 2020 General Election solely as a result of their political affiliation with that party. *See supra* § I(C). As such, Plaintiffs have shown that the likely character of the burden imposed by the Ballot Order statute is "discriminatory because it awards the primacy effect vote to candidates based solely and uniquely on their political affiliation." *Jacobson*, 411 F. Supp. 3d at 1276; *see also McLain*, 637 F.2d at 1167 (concluding that ballot order statute listing incumbents first constituted "favoritism" that "burden[ed] the fundamental right to vote possessed by supports of the last-listed candidates, in violation of the [F]ourteenth [A]mendment").

20 *See, e.g.*, *See 2008 General Election Results*, Minn. Secretary of State (last visited June 15, 2020), https://www.sos.state.mn.us/elections-voting/election-results/2008/2008-general-election-results/ (noting that in Minnesota's 2008 U.S. Senate race, Al Franken won over Norm Franken by 312 votes, or .01% of the total vote share).

[68] While the character of the Ballot Order statute places a discriminatory burden on the right to vote and freedom to political association, the magnitude of that burden is another question. In *McLain*, the Eighth Circuit addressed a similar —albeit incumbent-favoring—ballot order statute. 637 F.2d at 1167. In doing so, the ***759** court noted that while the statute certainly had an effect on the right to vote, the effect was, at best, "somewhat attenuated." *Id.* (noting that most courts apply rational basis review to such "ballot format" statutes). Other courts have similarly noted the lesser burden that ballot format statutes, like the one at issue, may impose on constitutional rights. *See, e.g., Democratic-Republican Org. of N.J. v. Guadagno*, 900 F. Supp. 2d 447, 455–56 (D. N.J. 2012) ("[A] candidate's ballot placement can also be regulated [by the state], as placement is surely a less important aspect of voting rights than access [to the ballot]." (citations omitted)), *aff'd*, 700 F.3d 130, 130 (3d Cir. 2012) (noting the district court "correctly applied the [*Anderson/Burdick*] balancing test"). The Court acknowledges that the Ballot Order statute at issue here does not bar access to the ballot, nor does it prevent voting for, campaigning for, or otherwise showing support for a particular political party's candidates. As one court noted, where "a restriction does not 'affect a political party's ability to perform its primary functions,' such as organizing, recruiting members, and choosing and promoting a candidate, the burden [on First Amendment rights] typically is not considered severe." *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 547 (6th Cir. 2014) (citation omitted).

[69] **[70]** **[71]** Still, while the burden imposed by the Ballot Order statute may not be severe, the Court cannot ignore " 'the effect of the [statute] on the voters, the parties and the candidates' and 'evidence of the real impact the restriction has on the political process.' " *Id.* (citation omitted). Indeed, the Supreme Court has cautioned that courts applying the *Anderson/Burdick* test should conduct a "realistic appraisal" of the statute at issue. *Anderson*, 460 U.S. at 806, 103 S.Ct. 1564. Doing so necessarily requires consideration of the practical burden the Ballot Order statute imposes on the Plaintiffs' constitutional rights. *Jacobson*, 411 F. Supp. 3d at 1281. While the "[s]everity" of a statute's effects on Plaintiffs' constitutional rights "is an objective question," the "realistic context" surrounding the statute's operation "is important to the [Court's] analysis." *Id.* at 1281 n.27.

When the practical burden of the statute is considered, the undisputed evidence shows that the Ballot Order statute is "not a neutral, nondiscriminatory restriction on Plaintiffs' voting [and associational] rights, and the burden it imposes is significant" considering the contextually-large windfall provided by the primacy effect. *Id.* at 1282. Indeed, even a 1% increase in vote share—which, under the Ballot Order statute, is arbitrarily awarded to one political party's candidates based solely on party affiliation—could be "decisive" in a Minnesota general election. *Id.* at 1281. Thus, even though the Ballot Order statute may have only an "attenuated effect" on Plaintiffs' constitutional rights when considered in a vacuum, *McLain*, 637 F.2d at 1167, any "realistic appraisal" of the statute, *Anderson*, 460 U.S. at 806, 103 S.Ct. 1564, indicates that it is likely that the practical burden that the Ballot Order statute places on Plaintiffs constitutional rights goes beyond the minimal burden normally associated with rational basis review. *See Jacobson*, 411 F. Supp. 3d at 1282

(applying heightened scrutiny to similar ballot order statute after concluding burden on Plaintiffs' constitutional rights was "significant in both the statistical sense and in qualitative terms").

b. Minnesota's Asserted State Interests

Having discussed the character and magnitude of the burden imposed on the Plaintiffs' constitutional rights by the Ballot Order statute, the Court now turns to Minnesota's asserted state interests underlying the statute, and consideration of the legitimacy and strength of each of those ***760** interests. *Jaeger*, 659 F.3d at 693–94 (citing *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564). According to the Secretary, the Ballot Order statute is justified by three state interests: (1) encouraging political diversity; (2) countering the "incumbent" effect; and (3) discouraging sustained single-party rule. (Def.'s PI Opp'n Mem. at 10.) Plaintiffs, in response, contend that Minnesota has no legitimate interest in tipping the scale in favor of *any* party, regardless of its interest in political diversity or countering the incumbent effect, because the "Constitution plainly prohibits any such interference." (Pls.' PI Mem. at 23.) The Court considers each purported state interest in turn.

With respect to the promotion of political diversity and discouraging single-party rule, the Supreme Court has criticized statutes that "limit[ ] the opportunities of independent-minded voters to associate in the electoral arena" because such restrictions "threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 794, 103 S.Ct. 1564. Moreover, the Supreme Court has observed that, historically, "political figures outside the two major parties have been fertile sources of new ideas and new programs" and that "many of their challenges to the status quo have in time made their way into the political mainstream." *Id.* (citing *Ill. Bd. of Elections*, 440 U.S. at 186, 99 S.Ct. 983). And the Court has noted that "the primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'—are served when election campaigns are not monopolized by the existing political parties." *Id.* (citation omitted).

However, even though political diversity and the desire to discourage single-party rule are laudable goals, the law does not permit a statute that explicitly favors some political parties at the expense of other political parties. Certainly, a state may have a legitimate interest in removing obstacles to allow a small political party to earn a position on the ballot. *Rhodes*, 393 U.S. at 31, 89 S.Ct. 5 (noting that Ohio laws that made it substantially more difficult for new parties to gain access to the election ballot placed "substantially unequal burden[ ]" on both the right to vote and the right to associate). Doing so does nothing more than allow new political ideas to be considered by the people in an election—on an equal playing field.

[72] **[73]** But the law is equally clear that such an interest does not extend to a state engaging in political favoritism to give an advantage *in an election* to a smaller party in order to promote political diversity. "The Fourteenth Amendment requires all candidates, newcomers and incumbents alike, to be treated equally" by the state. *Mann II*, 333 F. Supp. at 1267. Favoring one political party's candidates—even a small political party whose new ideas may increase political diversity—by giving them an advantage in an election does the opposite; it is a form of political patronage, which "is not a legitimate state interest which may be served by a state's decision to classify or discriminate in the manner in which election ballots are configured as to the position of candidates on the ballot." *Graves*, 946 F. Supp. at 1581 (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69–70, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)). Put another way, the Constitution does not allow a state to "put its thumb on the scale" of an election and "award an electoral advantage" to *any* party, irrespective of whether the party is in power or new to the political arena. *Jacobson*, 411 F. Supp. 3d at 1255; *see also Hand*, 285 F. Supp. 3d at 1297 ("The [Supreme] Court, in short, has repeatedly recoiled from anything that resembles a ***761** thumb on the scales of association and, by extension, the democratic process."). Here, at its core, the Secretary's asserted goal in promoting political diversity is in reality an interest in giving an electoral advantage—in the form of more votes—to smaller major political parties at the expense of established major political parties. Such an interest cannot be legitimate because it constitutes state-based political favoritism. *McLain*, 637 F.2d at 1167.

The same is true of any interest in combating a purported "incumbent" effect, which the Secretary primarily describes as an interest in "reducing the power of incumbency ...." (Def.'s PI Opp'n Mem. at 11.) And while states may wish to expand ballot access to new political parties—which may force incumbents to adapt to new ideas and political trends—the state cannot avoid the fact that the interest it seeks to vindicate here is a desire to give an electoral advantage to smaller major political parties at the expense of established major political parties. Such an interest is not

legitimate because, as noted above, it constitutes a form of political patronage and state-based favoritism. *See Graves*, 946 F. Supp. at 1581; *see also McLain*, 637 F.2d at 1167.

In sum, the Court finds that Plaintiffs have shown a likelihood that Minnesota's asserted interests in the Ballot Order statute are not legitimate.

c. Likelihood That Minnesota's Interests in the Ballot Order Statute Justify the Burden The Statute Imposes on Plaintiffs' Constitutional Rights

Finally, the Court considers whether the state's alleged interests in the Ballot Order statute justify the burden it imposes on Plaintiffs' constitutional rights. *Jaeger*, 659 F.3d at 693–94 (citing *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564). The Court need not engage in a substantial discussion of this point because, as noted above, the Court finds that the Plaintiffs have proven that it is likely that Minnesota's purported interests in the Ballot Order statute—the promotion of political diversity, discouraging single-party rule, and counteracting an "incumbency" effect—are not legitimate. *See supra* § II(C)(2)(b). Accordingly, Plaintiffs have shown that it is likely that the Ballot Order statute "cannot survive even [the] lowest level of scrutiny, the rational basis test, because the State has failed to articulate *any* legitimate interest to be served by [the statute]." *Graves*, 946 F. Supp. at 1581 (emphasis added); *see also Jacobson*, 411 F. Supp. 3d at 1282 ("[E]ven under the rational-basis standard, [the state] has not advanced relevant, legitimate interests which the [Minnesota] Legislature could rationally conclude justify burdening Plaintiffs' rights as [Minnesota's] current ballot order scheme does.").

3. Balance Of Harms and Public Interest

[74] **[75]** **[76]** Finally, the Court turns the last two factors of the preliminary injunction analysis—the balance of the harms, and the public interest. *See Virtual Radiologic Corp.*, 2020 WL 1061465, at *1 (citing *Dataphase Sys., Inc.*, 640 F.2d at 114). Balancing the harms involves assessing the harm the movant would suffer absent an injunction, as well as the harm other interested parties would experience if the injunction issued. *Mainstream Fashions Franchising, Inc. v. All These Things, LLC*, 453 F. Supp. 3d 1167, 1203–04, (D. Minn. 2020) (citing *Am. Mortg & Equity Consultants, Inc.*, 2020 WL 968354, at *6). It requires the Court to " 'flexibly weigh the case's particular circumstances to determine whether ... justice requires the court to intervene to preserve the status quo.' " *Wood v. Kapustin*, No. 13-cv-1495 (DSD/AJB), 2013 WL 3833983, at *4 (D. Minn. July 23, 2013) (quoting *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998)). The public interest ***762** factor, on the other hand, requires the Court to consider the interest of the public when deciding whether a preliminary injunction should issue. *Mainstream Fashions Franchising, Inc.*, 453 F.Supp.3d at 1204–05, (citing *Dataphase Sys., Inc.*, 640 F.2d at 114).

[77] The Court finds that both factors weigh in favor of the Plaintiffs. With respect to the public interest, the Eighth Circuit has observed that "the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the [constitutional] challenge because it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc); *see also Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (noting that after a finding that a state law is likely unconstitutional has been made, the "remote chance" that a state may later prove the law constitutional "cannot be held sufficient to overcome the public's interest in protecting freedom of expression" (citation omitted)). Having found that Plaintiffs are likely to prevail on the merits, and that the Ballot Order statute is likely unconstitutional, the Court finds that it is in the public interest to protect Plaintiffs' constitutional rights. [21]

21 The Secretary argues that the public interest favors him because (1) a proposed bill currently before the Minnesota Legislature would resolve the Ballot Order statute's purported constitutional problem; (2) Plaintiffs waited too long to bring their case; and (3) an injunction would require the state to spend millions of dollars to buy new voting machines capable of remedying the Ballot Order statute's deficiencies, a cost that the state could not recover if it wins on the merits. (Def.'s PI Opp'n Mem. at 17–18.) As noted above, however, the Court does not consider any delay by Plaintiffs to be particularly onerous, *see supra* § II(C)(1). Moreover, a pending bill is not law, and does not diminish Plaintiffs' interest in avoiding harm to their constitutional rights. *See Navarro v. United States*, No. 13-6424 (RMB), 2014 WL 6895591,

at *2 n.1 (D. N.J. Dec. 5, 2014) (declining to consider compliance with proposed bill because it was "*not* law"). And, as the Court discusses below, the injunctive relief being granted at this preliminary stage will not require Minnesota to spend millions of dollars on new voting equipment. *See infra* § II(C)(4).

[78] **[79]** The balance of the harms also favors Plaintiffs. Absent an injunction, Plaintiffs are likely to suffer irreparable harm because the Ballot Order statute forces them to compete and vote on an uneven playing field. *See Graves*, 946 F. Supp. at 1579 (noting that position bias created by a state statute in an election "infringes upon the careful and thoughtful voters' rights of free speech and association by negating the weight or impact of those citizens' votes for candidates for public office"). Minnesota, on the other hand, does not suffer at all because a "State has no interest in enforcing laws that are unconstitutional ... [and] an injunction preventing the State from enforcing [the challenged statute] does not irreparably harm the State." *Little Rock Family Planning Services v. Rutledge*, 397 F. Supp. 3d 1213, 1322 (E.D. Ark. 2019) (citing *Hispanic Interest Coal. Of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1249 (11th Cir. 2012)). This is particularly true given that the injunctive relief granted at this preliminary stage, discussed *infra* § II(C)(4), will not require Minnesota to purchase new voting equipment, which might otherwise be a significant expense.

In summary, Plaintiffs have shown a threat of irreparable harm and a likelihood of success on the merits with respect to their claims that the Ballot Order statute infringes upon their First and Fourteenth Amendment rights. Moreover, Plaintiffs ***763** have also shown that the balance of the harms and the public interest favors a preliminary injunction barring enforcement of the statute, and the implementation of a nondiscriminatory ballot ordering system under which the State does not discriminate on the basis of party affiliation.

4. Appropriate Remedy

[80] **[81]** **[82]** **[83]** Having concluded that a preliminary injunction is appropriate, the Court now considers what form the injunction should take. The purpose of preliminary injunctive relief is to preserve the status quo and prevent the identified irreparable harm until the merits of the dispute can be resolved. *Miller v. Thurston*, No. 5:20-cv-05070, 462 F.Supp.3d 930, 945, (W.D. Ark. May 25, 2020). Accordingly, "a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." *Devose v. Herrington*, 42 F.3d 470, 470 (8th Cir. 1994) (citation omitted). The injunction itself should be narrowly tailored to remedy only the specific harms shown by the plaintiffs. *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022–23 (8th Cir. 2015) (citing *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (per curiam)). Because issuing a preliminary injunction is an exercise of discretion, the Court need not act mechanically, but can choose from a range of potentially permissible options, *Novus Franchising, Inc.*, 725 F.3d at 895–96 (8th Cir. 2013), keeping in mind its obligation to "mould each decree to the necessities of the particular case" while giving "particular regard for the public consequences in employing the extraordinary remedy of injunction," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (citations omitted) (internal quotation marks omitted).

At the direction of the Court, the parties submitted a stipulation detailing options that the State could take to implement a non-discriminatory system that gives similarly-situated major political party candidates an equal opportunity to be first on the ballot. (*See* Parties Joint Stip. re: Potential Relief.) The parties agree on two possible options: (1) requiring the Secretary to rotate *all candidates* in each partisan race—not just major-party candidates[22]—on a "precinct-by-precinct basis so that each of the candidates appears in the first ballot position an approximately equal number of times as the other candidates in the same race"; or (2) requiring the Secretary to implement a lottery procedure whereby Minnesota's four current major parties are "assigned, by lot, a single statewide ballot order that would govern the appearance of the parties' candidates in every partisan race in the November general election." (*Id.* at 1–2.) Plaintiffs prefer option one—rotation of all candidates' names—because it eliminates the primacy effect, as opposed to the lottery approach, which just randomly assigns the benefits of the primacy effect to one party. (*Id.* at 3.) The Secretary, on the other hand, prefers the lottery option because while the rotation option is technically feasible, it could result in an untested rotation algorithm being used in Minnesota's 2020 General Election. (*Id.* at 4–5.)

22 Notably, software limitations on current voting equipment appear to prevent rotation of only major political party candidates. (*See* Parties Joint Stip. Re: Potential Relief at 5.)

[84] **[85]** After carefully considering the two options, the Court finds that option two—the lottery approach—is more appropriate, at least as preliminary relief. The Court is mindful that a "preliminary injunction that requires the State to depart too drastically from its present framework ***764** ... might tip the balance of the harms so much that the purpose of the preliminary injunctive relief is frustrated." *Miller*, 462 F.Supp.3d at 944, . Accordingly, where a preliminary injunction will "upend a framework democratically enacted by the people," the Court "must strive to preliminary enjoin only those requirements that Plaintiffs have shown are likely unconstitutional, rather than use the injunctive process to impose a framework that appears preferable." *Id.* Here, the harm inflicted by the Ballot Order statute is one of political favoritism: Minnesota arbitrarily assigns an electoral boost to the poorest-performing major political party's candidates based solely on party affiliation to the detriment of all other major political party candidates on the ballot. Accordingly, requiring the Secretary to use a system where the first-listed major political party candidate is selected randomly completely avoids the irreparable harm at issue—state-based favoritism—by randomizing which party benefits from the primacy effect.

Additionally, the lottery approach is the better option at this preliminary stage because candidate order by random assignment "can be put into effect by the computer hardware and software that [already] administers Minnesota's elections without any fear of error." (Parties Joint Stip. Re: Potential Relief at 5.) By contrast, requiring a rotation framework "might tip the balance of the harms so much that the purpose of the preliminary injunctive relief is frustrated." *Miller*, 462 F.Supp.3d at 944, . As the Secretary notes, while an "all candidate rotation system" for partisan offices on Minnesota's 2020 General Election ballot *may* be possible using Minnesota's current voting systems, "neither the Secretary nor county election officials ... have had an opportunity to test a rotation algorithm to verify that it can accurately and efficiently administer a statewide general election." (Parties Joint Stip. Re: Potential Relief at 5.) And, the Secretary contends, there will not be enough time to conduct such testing between now and August, the date by which a finished algorithm must be put to use. [23] (*Id.*)

[23] The Court also notes that the rotation of all candidates for partisan office would necessarily impact the interests of independent and minor political party candidates who, as the Court noted above, are not similarly situated to major political party candidates for the purposes of Plaintiffs' equal protection claim. *See supra* § II(B)(2).

Finally, requiring a rotation-based system would likely trigger the Secretary's legal obligation to recertify counties' tabulation machines and software, a process that "takes several months" and cannot be completed before the mid-August 2020 deadline necessary for Minnesota's 2020 General Election. (*Id.* at 8); *see also* Minn. Stat. §§ 206.57, subd. 1 (2018) ("A voting system not approved by the secretary of state may not be used at an election in this state."); 206.58, subd. 1 (2018) (requiring any electronic voting system to be approved by the Secretary prior to use). The Court declines—at this preliminary stage—to require the Secretary to implement a process that, given the limited time before Minnesota's 2020 General Election, impedes his ability to meet his legal obligations to the citizens of Minnesota, or undermines the State's valid interest in ensuring the integrity of its elections. *See Crawford*, 553 U.S. at 197, 128 S.Ct. 1610 (acknowledging valid state interest in "protecting public confidence 'in the integrity and legitimacy of representative government' " (citation omitted)).

III. CONCLUSION

Based on the submissions and the entire file and proceedings herein, **IT IS HEREBY** ***765** **ORDERED** that Defendant Steve Simon's Motion to Dismiss (Doc. No. 13) is **DENIED**, and Plaintiffs Madeline Pavek, Ethan Sykes, DSCC, and DCCC's Motion for a Preliminary Injunction (Doc. No. 22) is **GRANTED** as follows:

1. Defendant Secretary Steve Simon, his successors in office, deputies, officers, employees, agents, or any other person in active participation or concert with the Secretary shall not enforce, nor permit enforcement of, the ballot order provision described in Minn. Stat. § 204D.13, subd. 2, from the date of this Order, until further modified by order of this Court. No bond is required.

2. Defendant Secretary Steve Simon is hereby ordered to adopt a procedure under which Minnesota's four current major political parties are assigned, by lot, a single statewide ballot order that governs the appearance of the parties' candidates in every partisan race in Minnesota's 2020 General Election.

IT IS SO ORDERED.

All Citations

467 F.Supp.3d 718

End of Document

TAB 6

44 F.3d 48
United States Court of Appeals,
Second Circuit.

Robert L. SCHULZ; Dorothy–Louise H. Brokaw; William Van Allen; Lloyd Wright; Libertarian Party of New York, Plaintiffs–Appellees,
Carol Berman; Owen T. Smith; Evelyn J. Aquila; Helena M. Donohue, each individually and in their capacities as Commissioners of the New York State Board of Elections, Defendants–Appellees,
v.
Jerry WILLIAMS; Michael R. Long, Chairman, Conservative Party of the State of New York, Intervenors–Defendants–Appellants.

No. 1144, Docket 94–9088.
|
Argued Nov. 1, 1994.
|
Decided Nov. 2, 1994.
|
Opinion Issued Dec. 27, 1994.

Synopsis

Political party, its gubernatorial candidate, and voters brought action challenging constitutionality of New York's voter registration list statute and ballot nomination petition statute. After remand, 38 F.3d 657, the United States District Court for the Northern District of New York, Con. G. Cholakis, J., granted injunctive relief. Intervenors appealed. The Court of Appeals, José A. Cabranes, Circuit Judge, held that: (1) chairman of another political party had standing to appeal as intervenor; (2) claims of political party and voters were not barred by doctrine of res judicata; (3) ballot nomination petition statute was valid; (4) voter registration list statute was unconstitutional; and (5) injunctive relief granted remained proper remedy.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (11)

[1] **Federal Courts** Intervention or addition of new parties on appeal

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3253 Persons Entitled to Seek Review or Assert Arguments; Parties; Standing
170Bk3257 Intervention or addition of new parties on appeal
(Formerly 170Bk544)

Intervenor must satisfy well established requisites of Article III to have standing to defend law or regulation on appeal when government has acquiesced in trial court's determination of invalidity. U.S.C.A. Const. Art. 3, § 1 et seq.

4 Cases that cite this headnote

[2] **Federal Courts** Intervention or addition of new parties on appeal

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3253 Persons Entitled to Seek Review or Assert Arguments; Parties; Standing
170Bk3257 Intervention or addition of new parties on appeal
(Formerly 170Bk544)

To maintain standing to appeal, intervenor must have suffered injury in fact that is fairly traceable to challenged action and that is likely to be redressed by relief requested. U.S.C.A. Const. Art. 3, § 1 et seq.

8 Cases that cite this headnote

[3] **Federal Courts** Intervention or addition of new parties on appeal

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General

170Bk3253 Persons Entitled to Seek Review or Assert Arguments; Parties; Standing
170Bk3257 Intervention or addition of new parties on appeal
(Formerly 170Bk544)

To suffer judicially cognizable "injury in fact," so as to have standing to appeal, intervenor must have direct stake in outcome of litigation, rather than mere interest in problem; intervenor's interest must be legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical. U.S.C.A. Const. Art. 3, § 1 et seq.

6 Cases that cite this headnote

[4] **Federal Courts** Intervention or addition of new parties on appeal

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3253 Persons Entitled to Seek Review or Assert Arguments; Parties; Standing
170Bk3257 Intervention or addition of new parties on appeal
(Formerly 170Bk544)

Chairman of one political party, who intervened in suit by another political party challenging legality of New York's ballot nomination petition statute and voter registration lists statute, had standing to defend statutes on appeal despite state's acquiescence in district court's determination that statutes were invalid, in light of possibility that placement of other party on ballot would siphon votes from chairman's party and cause chairman's party to lose its place on ballot. U.S.C.A. Const. Art. 3, § 1 et seq.; N.Y.McKinney's Election Law §§ 5–602, 6–140.

9 Cases that cite this headnote

[5] **Judgment** Represented parties; class actions

Judgment Matters unnecessary to decision

228 Judgment
228XVII Foreign Judgments
228k828 Effect of Judgments of State Courts in United States Courts
228k828.14 Persons Concluded
228k828.14(8) Represented parties; class actions
228 Judgment
228XVII Foreign Judgments
228k828 Effect of Judgments of State Courts in United States Courts
228k828.16 Issues or Questions Presented
228k828.16(2) Matters unnecessary to decision

Claims by political party and voters challenging constitutionality of New York ballot nomination petition statute and voter registration list statute were not barred, pursuant to doctrine of res judicata, by judgment entered in state litigation brought by five candidates from party, challenging jurisdiction of New York State Board of Elections to hear challenge to nominating petition, as interest of party and voters were not represented in state proceedings; however, gubernatorial candidate's present claims could have been raised in prior state proceedings, in which he was named as plaintiff, and thus were barred. N.Y.McKinney's Election Law §§ 5–602, 6–140, 16–102.

33 Cases that cite this headnote

[6] **Federal Courts** Conclusiveness; res judicata and collateral estoppel

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(B) Application to Particular Matters
170Bk3022 Procedural Matters
170Bk3045 Judgment; Orders
170Bk3045(6) Conclusiveness; res judicata and collateral estoppel
(Formerly 170Bk420)

Federal court must give same preclusive effect to state court decision as state would give it.

8 Cases that cite this headnote

[7] **Res Judicata** Claims or causes of action in general

336H Res Judicata
336HIV Matters Precluded; Scope of Prior and Subsequent Litigation
336HIV(A) In General
336Hk283 Matters Which Could Have Been Litigated or Determined
336Hk285 Claims or causes of action in general

(Formerly 228k713(2))

Under New York law, pursuant to doctrine of res judicata, parties are precluded from raising in subsequent proceeding any claims that they could have raised in prior one, where all claims arise from same underlying transaction.

28 Cases that cite this headnote

[8] **Constitutional Law** Nominations; primary elections

Constitutional Law Voters, candidates, and elections

Election Law Requisites and sufficiency

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1468 Nominations; primary elections
(Formerly 92k91)
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)9 Elections, Voting, and Political Rights
92k4232 Voters, candidates, and elections
(Formerly 92k274.2(2))
142T Election Law
142TVI Nominations
142Tk264 Petition, Certificate, or Nomination Papers
142Tk266 Requisites and sufficiency
(Formerly 144k22 Elections)

New York ballot nomination petition statute, requiring that independent nominating petition indicate each signer's election district and, when appropriate, assembly district or ward, did not unconstitutionally burden First and Fourteenth Amendment rights to associate and have candidates of one's choice placed on ballot; statutory requirement was not severe, it was justified by legitimate state goal of limiting ballot to those candidates who have demonstrated bona fide support, and it was reasonable means of achieving that goal. U.S.C.A. Const.Amends. 1, 14; N.Y.McKinney's Election Law § 6–140.

22 Cases that cite this headnote

[9] **Election Law** Requisites and sufficiency

142T Election Law
142TVI Nominations
142Tk264 Petition, Certificate, or Nomination Papers
142Tk266 Requisites and sufficiency
(Formerly 144k22 Elections)

New York ballot nomination petition statute, requiring that independent nominating petition indicate each signer's election district and, when appropriate, assembly district or ward, placed only slight burden upon voters' rights and, therefore, was not subject to strict scrutiny, considering low signature requirement, presumptive validity of petitions, and high success rate of independent hopefuls in securing ballot access. U.S.C.A. Const.Amends. 1, 14; N.Y.McKinney's Election Law § 6–140.

4 Cases that cite this headnote

[10] **Constitutional Law** Political parties in general

Election Law Inspection or copy of lists

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3636 Political parties in general
(Formerly 92k225.2(1))
142T Election Law
142TIII Voters
142TIII(C) Registration
142Tk129 Inspection or copy of lists
(Formerly 144k22 Elections)

New York voter registration list statute, which required that two copies of lists of registered voters published by county boards of election be sent to county chairmen of only those political parties whose gubernatorial candidates received at least 50,000 votes in preceding election, violated equal protection clause, by denying independent or minority parties equal opportunity to win votes of electorate. U.S.C.A. Const.Amend. 14; N.Y.McKinney's Election Law § 5–602.

9 Cases that cite this headnote

[11] **Injunction** Nominations and primary elections

212 Injunction
212IV Particular Subjects of Relief
212IV(J) Elections, Voting, and Political Rights
212k1344 Nominations and primary elections
(Formerly 212k80)

Permanent injunction granting political party additional time to produce valid signatures on nomination petitions was valid remedy for determination that New York's registered voter list statute violated equal protection clause by requiring list to be supplied only to parties whose gubernatorial candidate received at least 50,000 votes in preceding election, despite appellate decision overturning district court's additional ruling that ballot nomination petition statute, requiring petitions for independent nominations to indicate signer's election district, assembly district, and ward, was also unconstitutional. U.S.C.A. Const.Amend. 14; N.Y.McKinney's Election Law §§ 5–602, 6–140.

8 Cases that cite this headnote

Attorneys and Law Firms

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William Van Allen, pro se plaintiff-appellee.

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David L. Gruenberg, Troy, NY, for Jerry Williams, intervenor-defendant-appellant.

Before: MINER, McLAUGHLIN, and CABRANES, Circuit Judges.

Opinion

***50** JOSÉ A. CABRANES, Circuit Judge:

This appeal from a judgment of the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*) concerns the constitutionality of two provisions of New York State's Election Law: N.Y.Elec.Law § 5–602 and § 6–140 (McKinney's 1978 & Supp.1995). Section 5–602 requires that two copies of the lists of registered voters published by county boards of elections be sent to the county chairman of each political "party." Under N.Y.Elec.Law § 1–104(3), a "party" is a political organization whose gubernatorial candidate received at least 50,000 votes in the preceding election. The term does not include an "independent body," § 1–104(12), such as the Libertarian Party, one of the plaintiffs. [1]

1 Several terms that regularly appear in this opinion are defined by the New York Election Law.
Section 1–104(3) defines "party" as "any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor."
Section 1–104(12) defines "independent body" as "any organization or group of voters which nominates a candidate or candidates for office to be voted for at an election, and which is not a party as herein provided."
Section 1–104(11) defines "nomination" as "the selection in accordance with the provisions of [the Election Law] of a candidate for an office authorized to be filled at an election."
Section 1–104(13) defines "independent nomination" as "nomination by an independent body."

Section 6–140 requires that petitions for independent nominations indicate the signer's election district ("ED"), assembly district ("AD") (applicable in New York City and the towns of Nassau County) and ward ("W") (if any).

The constitutional challenge to these provisions was brought pursuant to 42 U.S.C. § 1983 (1988) by the Libertarian Party,

its gubernatorial candidate, and three voters, after the New York State Board of Elections ("Board") declared invalid a petition to nominate five Libertarian candidates for statewide offices. The district court declared that both provisions of the Election Law were unconstitutional and granted injunctive relief. Its injunction was appealed to this court on an expedited basis, about one week before the November 1994 election. We affirmed on November 2, 1994, but because of the time constraints, did not then issue an opinion.

BACKGROUND

The procedural history of this accelerated litigation is complex and has not yet been fully recounted. We do so here.

On August 23, 1994, an independent nominating petition purporting to contain 17,234 signatures was filed with the New York State Board of Elections on behalf of five Libertarian candidates for statewide office. Under N.Y.Elec.L. § 6–142, 15,000 valid signatures are required for a candidate's name to be placed on the ballot. The petition was presumptively valid until it was challenged by Jerry Williams, a registered voter, as permitted by section 6–154.[2] On September 12, 1994, eleven days after Williams filed specifications to his objections to the petition, the Board determined that the petition had only 10,305 valid signatures and was invalid. Among the reasons for its conclusion were that 1,028 signatures contained the wrong election district, 204 contained no election district, 20 contained no assembly district, and 9 contained the wrong assembly district. The number was also reduced on grounds that the original total overstated the number of actual signatures.

2 Section 6–154 provides, in pertinent part:

> 1. Any petition filed with the officer or board charged with the duty of receiving it shall be presumptively valid if it is in proper form and appears to bear the requisite number of signatures, authenticated in a manner prescribed by this chapter.
>
> 2. Written objections to any ... nominating ... petition ... may be filed by any voter registered to vote for such public office.... When such an objection is filed, specifications of the grounds of the objections shall be filed within six days thereafter with the same officer or board.... Each such officer or board is hereby empowered to make rules in reference to the filing and disposition of such petition, certificate, objections and specifications.

Immediately thereafter, the five Libertarian Party candidates sought an order in the New York Supreme Court, Albany County, declaring their nominating petition valid. They argued only that the Board lacked jurisdiction ***51** to hear Williams' challenge because of a defect in the service of the specifications to his objections. An order to show cause in that proceeding entered on September 13, 1994, setting a date of September 23, 1994, for a hearing on whether the court should enter an order declaring the independent nominating petition of the Libertarian Party sufficient and valid.

On September 16, 1994, Robert L. Schulz, the Libertarian candidate for governor, along with the Libertarian Party and three voters (Dorothy–Louise H. Brokaw, William Van Allen and Lloyd F. Wright), also brought the instant action in the United States District Court for the Northern District of New York.

In a ruling dated September 28, 1994, Judge Cholakis enjoined the Board from enforcing its September 12 determination, on the ground that the plaintiffs had made the showing necessary for preliminary injunctive relief. He found that the plaintiffs had demonstrated irreparable harm, a sufficiently serious question going to the merits, and a balance of hardships tipping in their favor. *See Fisher–Price, Inc. v. Well–Made Toy Mfg. Corp.,* 25 F.3d 119, 122 (2d Cir.1994) (setting out standard for injunctive relief); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979) (per curiam) (same). Judge Cholakis crafted a provisional remedy whereby the plaintiffs were given three additional days to produce valid signatures to demonstrate that they had the support statutorily required by section 6–142, but he waived the requirement of the provision of the ED, AD, and W numbers for those signatures. In Judge Cholakis's view, three days represented the "lost time" that the plaintiffs had had to spend processing ED, AD, and W numbers for the original petition. The Board was then to determine the validity of any newly submitted signatures and report back to the court, which would then fashion a final remedy.

On September 29, 1994, the New York State Supreme Court dismissed the candidates' petition challenging the jurisdiction of the Board to consider the objections and denied all relief sought.

On October 5, 1994, the district court granted motions to intervene by Jerry Williams, who had submitted to the Board the objections to the petition, and by Michael Long, Chairman of the Conservative Party of the State of New York. The court granted the motions under Rule 24(b) of the Federal Rules of Civil Procedure, which provides for permissive intervention. In so doing, the court noted that the Board at that time had chosen not to appeal from the grant of preliminary injunctive relief, but that such an appeal would be possible by the intervenors under 28 U.S.C. § 1292(a)(1) (1988), which provides for interlocutory appeals of injunctive orders. In the course of this ruling on the intervention motion, Judge Cholakis also "clarif[ied]" his September 28 decision as to both his legal conclusions and the three-day validation procedure set forth as a remedy.

The intervenors then appealed to this court, without the Board, from the order entering the preliminary injunction. At oral argument, Peter Kosinski, counsel for the Board, represented that the Board consisted of two members of the Democratic Party and two members of the Republican Party. He reported that two of the Board members did not support an appeal, thereby leaving the Board without the requisite majority to authorize an appeal. The New York Civil Liberties Union submitted a brief as *amicus curiae* in support of the plaintiffs-appellees' position.

On October 21, 1994, this court vacated the preliminary injunction and remanded on the grounds that no hearing had been held on contested evidence that might have been determinative of the application for the preliminary injunction. *Schulz v. Williams,* 38 F.3d 657 (2d Cir.1994).

From October 24 through October 26, Judge Cholakis held an evidentiary hearing, in which the Board participated as defendant, and on October 27, he reinstated his previous injunction. On October 28, the intervenors appealed, again without the Board. At oral argument, which was held on November 1, 1994, both parties agreed that the October 27 order, which followed a full trial on the merits, was a permanent injunction. On November 2, 1994, we affirmed in a summary order, ***52** noting that an opinion would follow. On November 8, 1994, the Libertarian candidates appeared on the ballot in the general election.

DISCUSSION

I. Standing of the Intervenors

A.

At the outset, the court must address the question of its subject matter jurisdiction. Although neither the district court nor the parties raised the issue below, it is well established that federal appellate courts have "an independent obligation to examine their own jurisdiction." *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603 (1990). The unusual procedural posture of this case—intervention after the grant of a preliminary injunction for purposes of appeal after the state decided not to appeal—warrants careful examination of the question of jurisdiction.

The Supreme Court has made clear that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles,* 476 U.S. 54, 68, 106 S.Ct. 1697, 1706, 90 L.Ed.2d 48 (1986). In deciding whether the intervenors meet the Article III requirements, we take special note of the fact that the intervenors, but not the state, attempt to defend on appeal the constitutionality of the *state's* statutes. In *Diamond,* the Supreme Court held that a physician seeking to appeal a district court ruling that an Illinois abortion law was unconstitutional lacked standing to pursue the appeal himself, after the state had decided not to seek review. In so concluding, the court noted that the power to create a legal code was "one of the quintessential functions of a State." *Id.* at 65, 106 S.Ct. at 1705. The physician, the Court found, did not assert an injury in fact but was simply attempting to compel the state to enact a code in his interests. *Id.*

[1] Since *Diamond,* various circuits have recognized situations in which a private individual has standing to defend on appeal a law or regulation even though the government has acquiesced in a district court's determination of invalidity. *See, e.g., Didrickson v. U.S. Dep't of Interior,* 982 F.2d 1332 (9th Cir.1992); *Yniguez v. Arizona,* 939 F.2d 727 (9th Cir.1991); *cf. United States v. AVX Corp.,* 962 F.2d 108 (1st Cir.1992) (considering possibility, but ultimately rejecting standing of intervenor-plaintiff, an environmental organization, to challenge on appeal settlement entered into by federal and state governments with defendant corporations). To maintain standing, the intervenor

must satisfy the well-established requisites of Article III. *Didrickson,* 982 F.2d at 1338. [3] We now pursue that inquiry.

3 The fact that the appellants were granted intervenor status is not dispositive of their standing to appeal. As the Court of Appeals for the Ninth Circuit has noted, "An interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties." *Didrickson,* 982 F.2d at 1338.

B.

[2] **[3]** To maintain standing to appeal, an intervenor must have suffered an injury in fact that is fairly traceable to the challenged action and that is likely to be redressed by the relief requested. *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). To suffer a judicially cognizable "injury in fact" an intervenor must have a "direct stake in the outcome of a litigation" rather than "a mere interest in the problem." *Diamond,* 476 U.S. at 66–67, 106 S.Ct. at 1705 (quoting *United States v. SCRAP,* 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973)). The interest must be "a legally-protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, ——, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (citations and internal quotations omitted).

[4] Michael Long intervened and appealed in his capacity as chairman of the Conservative Party of the State of New York, which had a candidate for governor on the 1994 ballot. In his affidavit in support of his ***53** motion to intervene, Long stated that the "improper placing of an additional party, in this case the Libertarian Party of New York, on the state-wide ballot for Governor could siphon votes from the Conservative Party line and therefore adversely affect the interests of the Conservative Party." [4]

4 We look to Long's affidavit in support of his motion to intervene as a second-best source for our standing inquiry. Had the parties or the district court raised the issue of standing below, then the intervenors might have submitted affidavits specifically to meet their burden of establishing the elements of standing. *See Lujan v. Defenders of Wildlife,* 504 U.S. at —— – ——, 112 S.Ct. at 2136–37. In the absence of such documents at this stage, we look first at the evidence presented at trial. *See id.* (burden of proof on question of standing corresponds to stage of litigation). Because the intervenors, however, did not present any of their own evidence but relied on cross examination at trial, we turn instead to the affidavits in support of their motions to intervene. *See Warth v. Seldin,* 422 U.S. 490, 501–02, 95 S.Ct. 2197, 2206–07, 45 L.Ed.2d 343 (1975) (court may review all materials in record to assess standing, including affidavits in support of standing). In so doing, we note that the portions on which we rely do not appear to be contradicted or undermined by other evidence in the record.

The well-established concept of competitors' standing applies here. *See Fulani v. League of Women Voters Educ. Fund,* 882 F.2d 621, 626 (2d Cir.1989) (finding loss of "opportunity to compete equally for votes in an election" sufficient injury for standing requirement). Had Judge Cholakis improperly afforded relief to the Libertarian Party, then the Conservative Party, a "party" under N.Y.Elec.L. § 1–104, stood to suffer a concrete, particularized, actual injury—competition on the ballot from candidates that, as Long said, were able to "avoid complying with the Election Laws" and a resulting loss of votes. As Long points out, if a minority party fails to poll enough votes (50,000) in the gubernatorial election, it loses its place on the ballot. The district court's decision could have caused that injury, and this appeal could have afforded relief that would have redressed that injury. Therefore, Long, as representative of the Conservative Party, satisfies the minimum Article III requirements for standing.

We conclude that a case or controversy exists between Long and the plaintiffs that affords this court jurisdiction over this appeal. Because we reach this conclusion, we need not consider whether Williams would have standing to appeal independently. Through his status as an intervenor, which has not been challenged on appeal, Williams may " 'piggyback' " on Long's standing as an appellant. *Diamond,* 476 U.S. at 64, 106 S.Ct. at 1704.

II. The Permanent Injunction

Having decided that this court has jurisdiction over this appeal, we now review the permanent injunction. In these circumstances, we review the injunction for an abuse of discretion. "Abuse of discretion can be found if the district

court relied upon a clearly erroneous finding of fact or incorrectly applied the law." *Nikon Inc. v. Ikon Corp.,* 987 F.2d 91, 94 (2d Cir.1993) (citing *Bristol–Myers Squibb Co. v. McNeil–P.P.C., Inc.,* 973 F.2d 1033, 1038 (2d Cir.1992)).

A. Claim preclusion

[5] We first consider whether the district court correctly held that principles of res judicata did not bar the court from considering the plaintiffs' claims.

[6] **[7]** At issue is what preclusive effect, if any, resulted from the proceeding brought by the five Libertarian candidates in the New York State Supreme Court prior to the filing of the instant action. Under *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984), a federal court must give the same preclusive effect to a state court decision as a state would give it. *Migra,* then, turns our attention to New York law. Under New York law, parties are precluded from raising in a subsequent proceeding any claim they could have raised in the prior one, where all of the claims arise from the same underlying transaction. *Reilly v. Reid,* 45 N.Y.2d 24, 29, 407 N.Y.S.2d 645, 379 N.E.2d 172 (1978). Moreover, "a judgment in a prior action is binding not only on the parties to that action, but on those in privity with them." *Green v. Santa Fe Indus., Inc.,* 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 514 N.E.2d 105 (1987).

***54** The appellants argue that res judicata bars review of the plaintiffs' claims on the grounds that Schulz could have brought these claims in the state court proceeding; that the Libertarian Party was adequately represented by its five candidates in that proceeding; and that the interests of the voters in the instant matter are *de minimis.*

The district court rejected these arguments. The court first concluded that the state court action, brought pursuant to N.Y.Elec.L. § 16–102,[5] was not a proper forum for a facial constitutional challenge and that the plaintiffs' claims therefore could not have been brought in that action. It noted further that testimony regarding the appearance or non-appearance of Schulz and the Libertarian Party in the state action was "conflicting," that the voters did not appear in that action, and that the state court's decision was issued after the federal court's first decision.

5 Section 16–102 provides, in pertinent part:

> [A]ny independent nomination ... may be contested in a proceeding instituted in the supreme court by any aggrieved candidate....

We agree with the district court that the Libertarian Party and the voters were not barred by principles of res judicata from raising constitutional claims in this federal court action, but we disagree as to Schulz's claims. First, neither the district court nor the plaintiffs provide any authority for the plaintiffs' argument that Schulz could not have pursued his claims in the New York proceeding. To be sure, under New York's Election Law a court's jurisdiction in a summary proceeding is limited to that conferred by the election statute. *Corrigan v. Board of Elections,* 38 A.D.2d 825, 826, 329 N.Y.S.2d 857 (2d Dept), *aff'd,* 30 N.Y.2d 603, 331 N.Y.S.2d 35, 282 N.E.2d 122 (1972). N.Y.Elec.L. § 16–100, however, provides: "The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally." Although this provision does not explicitly address facial constitutional challenges, New York courts have held that the state supreme court has jurisdiction in proceedings under section 330 (the predecessor to section 16–100) to review the constitutionality of election law provisions. *See Friedman v. Cuomo,* 39 N.Y.2d 81, 83, 382 N.Y.S.2d 961, 346 N.E.2d 799 (1976), *cited with approval in Press v. County of Monroe,* 50 N.Y.2d 695, 702, 431 N.Y.S.2d 394, 409 N.E.2d 870 (1980); *see also Franco v. Board of Elections,* 64 Misc.2d 19, 314 N.Y.S.2d 615 (Sup.Ct.) (considering facial challenge to election law provision in special proceeding under § 330), *aff'd,* 35 A.D.2d 679, 315 N.Y.S.2d 812 (2d Dep't 1970); *cf. Golkin v. Abrams,* 803 F.2d 55, 56–57 (2d Cir.1986) (per curiam) (finding candidates who were parties to New York state court proceeding concerning validity of their petition precluded from raising constitutional claims in subsequent federal suit).

Since any party to the state court proceeding could have raised questions about the constitutionality of the disputed provisions, we next look at whose interests were represented in the state proceeding. We begin with the three voters. Although the district court did not specifically address whether the voters' interests were represented in the prior proceeding, we conclude that their claims are not barred by the doctrine of res judicata. It is well settled that under circumstances such as these, voters and their interests are sufficiently independent from the candidate's that the voters' claims are not barred by the candidate's prior litigation. *See Tarpley v. Salerno,* 803 F.2d 57, 59–60 (2d Cir.1986) (per

curiam) (while finding action by candidate barred by res judicata, permitting action by plaintiffs-voters who had not appeared in state action on grounds that plaintiff-voter "stands on a different footing").

Nor is preclusion warranted on the theory that the voters' interests are *de minimis,* as the intervenors suggest. The intervenors rely on *Unity Party v. Wallace,* 707 F.2d 59 (2d Cir.1983), for the proposition that an encumbrance on voters' fundamental rights to associate politically and to vote for candidates of their choice is *de minimis* when voters may cast write-in ballots. *Unity Party,* 707 F.2d at 62. However, *Unity Party* is ***55** not on point. The *Unity Party* court was not faced with the question of whether the voters' claims were barred by res judicata. *Unity Party* concerned a challenge to the constitutionality of N.Y.Elec.L. § 6–146, which requires candidates of independent bodies to file in a timely manner a form acknowledging their acceptance of a nomination secured by petition. When the candidate in *Unity Party* failed to file the necessary papers (the only candidate out of 148 to fail to do so that year), he was denied a place on the ballot. The court rightly concluded that this "flimsy wicket" of a requirement imposed only a *de minimis* burden on voters' rights, particularly in light of the write-in option. *Unity Party,* 707 F.2d at 62. The characterization concerned the burden imposed by that particular measure, not whether voters had any claim at all.

Having determined that the voters' claims are not precluded, we next consider the claims of the Libertarian Party. The district court, in deciding that these claims were not barred, found that the evidence concerning the appearance or non-appearance of the Libertarian Party was "conflicting." Inasmuch as the Libertarian Party was not a named petitioner in the state court proceeding, the court's finding, on this record, is not clearly erroneous. Moreover, while the Libertarian Party certainly had an interest in the state petition, we cannot conclude that the "interests represented by the [candidates]," were "in all respects identical to those" of the Party, or that the state litigation "was managed as [the Libertarian Party] thought it should be." *Green v. Santa Fe Indus., Inc.,* 70 N.Y.2d at 254, 519 N.Y.S.2d 793, 514 N.E.2d 105 (citations and internal quotations omitted). The Libertarian Party's claims, therefore, are also not barred.

We do not, however, agree with the district court's conclusion that Schulz's claims were not barred under principles of res judicata. It is well established under both New York and federal law that a party to an action who had the opportunity to raise a claim, but failed to do so, is barred from raising that claim in a subsequent action. *Reilly v. Reid, supra; cf. Allen v. McCurry,* 449 U.S. 90, 104, 101 S.Ct. 411, 419, 66 L.Ed.2d 308 (1980) (asking whether party had "full and fair opportunity to litigate" federal claims in state court). The district court found that the testimony as to Schulz's "appearance or non-appearance" was "conflicting." While representing to the district court that he had been aware of the state suit when it was brought, Schulz said: "It was not my understanding that [the lawyer] was going to name me as a plaintiff in that case." Schulz said further that he appeared in court for the state proceeding because he was "curious" about it.

The facts stated by Schulz may well be true, but they do not detract from the more important, undisputed facts that Schulz was named in the state pleadings as a plaintiff, was in court on the day of the state proceeding, and has made no claim that the attorney who appeared on his behalf in the matter did so by virtue of fraud or misrepresentation. Because he was party to an action in which he could have brought his constitutional claims, Schulz's claims were barred by res judicata in the instant action. [6]

6 In support of its decision that the plaintiffs' claims were not barred, the district court also noted that its order of preliminary injunction preceded —by one day—the state court's decision, and that the latter judgment therefore did not bar the former order. This argument does not help the plaintiffs because the district court's first order was a preliminary injunction, tentative by nature and in fact subsequently vacated. It was not a final judgment for purposes of res judicata. *See Goodheart Clothing Co. v. Laura Goodman Enters.,* 962 F.2d 268, 273–74 (2d Cir.1992).

We therefore affirm the district court's conclusion that the claims of the voters and the Libertarian Party are not barred by res judicata. However, we reverse the district court's conclusion with regard to Schulz, and we find that he was precluded from raising constitutional claims in this action. This holding, however, does not bear on the remainder of this opinion, as none of the claims was brought solely by Schulz, nor was the relief granted particular to him.

B. Section 6–140

[8] We now turn to the merits. We first consider the plaintiffs' contention that N.Y.Elec.L. § 6–140 is unconstitutional. As ***56** described above, this statute requires that an independent nominating petition indicate each signer's election district and, when appropriate, assembly district or ward. The plaintiffs claim and the district court agreed that this restriction places an unconstitutional burden on the plaintiffs' First and Fourteenth Amendment rights to associate and to have candidates of their choice placed on the ballot. *See Burdick v. Takushi,* 504 U.S. 428, ——, 112 S.Ct. 2059, 2064, 119 L.Ed.2d 245 (1992).

The Supreme Court has recently made clear that while voting enjoys constitutional protection, every law that imposes a burden on the right to vote need not be subject to strict scrutiny. Those regulations that impose "severe" restrictions "must be narrowly drawn to advance a state interest of compelling importance." *Burdick,* 504 U.S. at ——, 112 S.Ct. at 2063 (quoting *Norman v. Reed,* 502 U.S. 279, ——, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992) (internal quotations omitted)). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' ... 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick,* 504 U.S. at —— – ——, 112 S.Ct. at 2063–64 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788, 103 S.Ct. 1564, 1569, 75 L.Ed.2d 547 (1983); *see also LaRouche v. Kezer,* 990 F.2d 36, 39–40 (2d Cir.1993).

To determine the "rigorousness of our inquiry," *Burdick,* 504 U.S. at ——, 112 S.Ct. at 2063, we must evaluate the weight of the burden imposed by the challenged requirement. To do so, we proceed by the "totality approach" and consider the alleged burden imposed by the challenged provision in light of the state's overall election scheme. *LaRouche,* 990 F.2d at 39. We look further to how independent bodies have fared in the past in their attempts to gain ballot access in New York. *Storer v. Brown,* 415 U.S. 724, 742, 94 S.Ct. 1274, 1285, 39 L.Ed.2d 714 (1974). We also consider precedent in which courts have evaluated whether comparable voting regulations imposed an unconstitutional burden. And we of course review the evidence presented.

1. Assessing the burden

[9] New York's election system is largely organized at the local level. Elections are conducted not by the state Board but by local boards organized at the county level, and in New York City at the city level. The county boards are required by statute to maintain registration poll records, organized by election districts within the county, which indicate the registered voters in each district. N.Y.Elec.L. §§ 5–600, 5–602. There was testimony that there are more than 5,600 election districts in New York State.

A candidate for statewide office representing a party—a political organization polling 50,000 votes in the prior election—need not collect signatures in support of his or her candidacy. *See* N.Y.Elec.L. § 6–104. However, an independent who seeks a place on the ballot for statewide office must gather the signatures of 15,000 registered voters, and the petition must indicate each voter's election district, and, where applicable, assembly district and ward. Signatures may be gathered during a 42–day period which, in 1994, extended from July 12 to August 23.

A petition filed by an independent body enjoys presumptive validity. N.Y.Elec.L. § 6–154. That is, if no objections to the petition are raised, the candidate will be placed on the ballot. However, any voter is permitted to present objections to the petition under section 6–154. ED, AD and W numbers may be used by both objectors and the board (in statewide elections as in the instant case, the state Board) to verify signatures.

Past history suggests that the burden imposed by the ED, AD and W requirement in this scheme does not "unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot." *Burdick,* 504 U.S. at ——, 112 S.Ct. at 2064. According to undisputed figures presented by the Board members and the intervenors, three other independent parties gained access to the ballot by petition in 1994. In 1993, three did so, and in 1992 five did so—with the Libertarian Party gaining access in both years. Preceding years indicate similar success rates.

***57** The plaintiffs argue that such figures are misleading, because most petitions proceed unchallenged. They represented at oral argument that 24 petitions had been filed by independent bodies since 1982, and the only one challenged had failed to survive.

We cannot, however, look to the only challenged petition as our guide. The fact that independent petitions enjoy presumptive validity is not a reason to turn our attention away from successful petitions, as plaintiffs suggest. To the contrary, presumptive validity is a relevant fact in the totality of the scheme. Past history indicates that the advantages of

presumptive validity have made the ballot largely accessible to third-party contenders in New York. As evidenced by the myriad of independent bodies that have held a place on New York's ballot—the Libertarian, Communist, Socialist Workers, National Law, New Alliance, Workers World, Independent Progressive Line, Unity, and "No Party"—the challenged burden is not a hefty impediment to ballot access.

We next evaluate the ED, AD, and W requirement in light of precedent. At the outset, we note that the New York legislature in 1992 reduced the number of signatures required for independents from 20,000 to 15,000. N.Y.Elec.L. § 6–142. According to the record, there were more than 8,700,000 registered voters in New York as of April 1994. Therefore, 15,000 represents less than one percent of the registered voters. In *Storer v. Brown, supra,* the Supreme Court upheld a California requirement that petitioners gather in 24 days 325,000 signatures—representing five percent of the total votes in the preceding election. 415 U.S. at 739, 94 S.Ct. at 1283. In *American Party of Texas v. White,* 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974), the Supreme Court upheld Texas's requirement of signatures of one percent of the gubernatorial vote of the preceding election—in that case, 22,000—within 55 days. *Id.* at 778, 94 S.Ct. at 1304. And as the intervenors point out, if all of the time that plaintiffs allege was needed to process ED, AD, and W numbers was instead spent gathering signatures, then the plaintiffs could have gathered 45,000 signatures. The plaintiffs themselves state that they would need 30,000 signatures to provide a "safe margin" against challenges. Yet, these figures still represent half of one percent or less of the registered voters of New York. The burden of demonstrating this modicum of support falls well within the constitutional bounds set by *Storer.*

The district court concluded that the burden imposed by the ED, AD, and W requirement was severe. Because of other aspects of New York's electoral scheme (a low signature requirement and the presumptive validity of petitions), the high success rate of independent hopefuls in securing ballot access, and the Supreme Court's upholding of higher burdens, we disagree. We recognize the plaintiffs' evidence that vote canvassers spent 50% to 70% of their time processing these numbers; but that fact alone does not make the burden "severe." As the Supreme Court has said, "[h]ard work and sacrifice by dedicated volunteers are the lifeblood of any political organization." *American Party of Texas,* 415 U.S. at 787, 94 S.Ct. at 1309. The question is whether the restriction "unreasonably interfere[s]" with the effort to place a candidate on the ballot. *Burdick,* 504 U.S. at ——, 112 S.Ct. at 2064. We conclude that the requirement of providing ED, AD, and W numbers places only a slight burden upon the plaintiffs' rights.

2. Assessing the state's interest

Having concluded that the burden imposed is not severe, it follows that we do not apply strict scrutiny to the statutory requirement. Rather, we need to evaluate only whether the requirement is justified by a "legitimate interest" and is a "reasonable way of accomplishing this goal." *Burdick,* 504 U.S. at ——, 112 S.Ct. at 2067.

The justification put forth in support of the provision is the state's interest in limiting the ballot to those candidates who have demonstrated support, and its interest in assuring that the support demonstrated is bona fide and is not the product of fraud or misrepresentation. Organization by election district provides a swift and efficient method of confirming voter registration, defenders of the provision contend. *Cf.* ***58** *Rutter v. Coveney,* 38 N.Y.2d 993, 994, 384 N.Y.S.2d 437, 348 N.E.2d 913 (1976) (stating that ED, AD requirements are "designed to facilitate the discovery of irregularities or fraud" in petitions).

These interests are by no means novel and have long enjoyed support in the case law. The requirement that a candidate make a preliminary showing of substantial support helps to prevent "a ballot that is complex and confusing but does not enhance the democratic nature of our political processes." *LaRouche,* 990 F.2d at 39 (citing *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971)). The state is further entitled to take steps to ensure that elections are "fair and honest." *Burdick,* 504 U.S. at ——, 112 S.Ct. at 2063 (quoting *Storer,* 415 U.S. at 730, 94 S.Ct. at 1279).

The Supreme Court in *Anderson* stated that we must "pass[ ] judgment" on the "legitimacy and strength" of the state's proffered interests. 460 U.S. at 789, 103 S.Ct. at 1570. The plaintiffs have contended that section 6–140, as well as section 5–602, represents a "deliberate design" by the principal political parties to prevent independent bodies from gaining access to the ballot. Yet, they provide no evidence to support this claim. And if it were true, then the asserted culprits have not had much success: As the plaintiffs represented, 23 of the last 24 petitions resulted in independent bodies gaining access to the ballot. Thus, the restriction aims to achieve a legitimate state interest.

3. Assessing the means employed

Having decided that the ED, AD, and W requirement is not severe, and that it is justified by a legitimate state goal, we now must consider whether the requirement is a reasonable means of achieving that goal.

The district court did not focus on whether the ED, AD, and W requirement was a "reasonable" electoral device, but instead considered whether it was "necessary" to the state's goal of petition verification. Having found, contrary to our conclusion, that the burden imposed was severe, Judge Cholakis applied strict scrutiny. In so doing, he distinguished the instant case from *Burdick,* in which the burden was deemed "limited" and strict scrutiny therefore not warranted. 504 U.S. at —— – ——, 112 S.Ct. at 2063–65. Judge Cholakis instead relied on *Anderson v. Celebrezze,* which stated that a court should consider "the extent to which [the state's] interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789, 103 S.Ct. at 1570.

Burdick cites *Anderson* with approval, and in fact adopts the *Anderson* test. But *Burdick* and its progeny make clear that not every law that "imposes any burden upon the right to vote must be subject to strict scrutiny." 504 U.S. at —— – ——, 112 S.Ct. at 2062–63; *see Hagelin for President Comm. of Kans. v. Graves,* 25 F.3d 956, 961 (10th Cir.1994) (not requiring state to make "particularized showing of a need" for ballot access laws, but only to establish that they represent "reasonable response to the state's interest"), *cert. denied,* 513 U.S. 1126, 115 S.Ct. 934, 130 L.Ed.2d 880 (1995); *Libertarian Party of Me. v. Diamond,* 992 F.2d 365, 373 (1st Cir.) (holding ballot access requirements "neither inappropriate to their purposes nor *unconstitutionally* burdensome"), *cert. denied,* 510 U.S. 917, 114 S.Ct. 310, 126 L.Ed.2d 257 (1993). [7]

7 Because strict scrutiny is not warranted in this case, the case is distinguishable from *Pilcher v. Rains,* 853 F.2d 334 (5th Cir.1988), on which the plaintiffs rely.

The important lesson of *Anderson* that *Burdick* reiterates is that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick,* 504 U.S. at ——, 112 S.Ct. at 2063. Because we have concluded that the burden imposed by the requirement is slight, we need only consider whether the requirement is a reasonable means of achieving the state's legitimate goals. [8]

8 The *per curiam* opinion that vacated the district court's initial entry of a preliminary injunction by no means required the district court to apply strict scrutiny. The scope of that opinion was limited to the fact that the district court had not yet conducted an evidentiary hearing on contested evidence that might have been determinative of the application for a preliminary injunction. The *per curiam* opinion's citation to *Anderson* simply referred to the analysis that the district court articulated. At that stage it did not review it.

***59** This question of the constitutionality of the ED, AD, and W requirement was considered in *Berger v. Acito,* 457 F.Supp. 296 (S.D.N.Y.1978), and the court there found that the requirement was constitutional, saying it "is within the legislative province to provide for the publication and use of the registration information in a particular fashion." [9] *Id.* at 300. What potentially changes the calculus since that 1978 decision is the advent and accessibility of advanced computer technology.

9 The *Berger* court specifically considered the constitutionality of N.Y.Elec.L. § 6–132, which applies the same ED, AD, and W requirement to candidates' "designating petitions" for primary elections.

Although the facts in this case appeared to be hotly contested on this question, the relevant facts—as culled from the record, oral argument, and the district court opinions—actually do not appear to be in dispute. There was abundant testimony that for relatively small sums of money—by one account, $12,000, by others, less—the State Board of Elections could gain the computer capacity that would make verification of signatures by books organized by election district numbers obsolete.

At the same time, however, neither the plaintiffs, their witnesses, nor the district court contends that the state has that capacity at this time. One of the plaintiffs' witnesses who worked for the state Board testified that the storage capacity of the Board's computer equipment was not adequate for the state's entire voter database. Another, who also worked for the Board, said, "I need to analyze this system in a

form outside of this court to tell you what the storage requirements are for voter registration stored on the State Board of Elections computer.... [T]hat's something we haven't done yet and need to do." The witness acknowledged that the Board currently lacked the capacity to store a list of the state's registered voters in alphabetical form but could get that capacity if it purchased the proper software and hardware. Finally, one of the plaintiff's witnesses who gathered votes and, as well, reviewed the Board's computer capacity, testified that the Board's equipment as it currently exists could store information about the state's nearly nine million registered voters, but other files would have to be removed, and it would create "headaches" for the computer technicians.

In analyzing the constitutionality of the requirement at issue, we are not to determine how the State of New York should verify voter signatures in the best of all worlds—a world in which it had the funds to create a statewide computer system that was capable of checking the registration status of nine million voters. Rather, we must consider whether the means employed are reasonable. *Burdick,* 504 U.S. at ——, 112 S.Ct. at 2067. We cannot conclude that the burden imposed upon voters by the system as it now exists constitutionally requires the State of New York to expend both the money and human and other resources to alleviate that burden. [10]

10 We by no means intend to suggest that adaptation of computer technology in this area is inadvisable or unwarranted—only that under these circumstances it is not constitutionally required. We recognize that the political branches of the New York government are taking steps toward increased computerization of the electoral process. Testimony indicated, for example, that the State Board of Elections' 1993 report to the Legislature contained a recommendation by the Board's database programmer analyst that the Board replace its computer system and initiate a pilot program to automate petition checking. Moreover, a 1982 regulation permits the counties to switch their central file registration records—compilations of voter lists from all election districts—onto a computerized format. N.Y.Comp.Codes R. & Reg. tit. 9 § 6207.1.

In sum, we conclude that the district court erred in holding that the burden imposed by the ED, AD, and W requirement is severe. Because the level of scrutiny to be applied to the restriction follows from that determination, we hold further that the district court erred in applying strict scrutiny. Applying the rational basis test, we conclude that the provision is constitutional.

C. Section 5–602

[10] The plaintiffs allege that N Y.Elec.L. § 5–602 violates their rights under ***60** the Equal Protection Clause of the Fourteenth Amendment because it discriminates against independent bodies in favor of parties. [11] *See Bullock v. Carter,* 405 U.S. 134, 140–44, 92 S.Ct. 849, 854–56, 31 L.Ed.2d 92 (1972) (applying the "fundamental rights" strand of equal protection analysis to restrictions that affect First and Fourteenth Amendment rights of voters). The statute requires local boards of election to supply, free of charge and absent specific request, two copies of lists of registered voters to, among others, the county chairmen of political parties.

11 Section 5–602 provides in relevant part:

> The board of elections shall prepare at least fifty copies of such pamphlet and shall send at least one copy of each such list to the state board of elections, at least two copies to the county chairman of each political party, and shall keep at least five copies for public inspection at each main office or branch of the board. Other copies shall be sold at a charge not exceeding the cost of publication.

The plaintiffs' complaint specifically requests a declaratory judgment that section 5–602 is invalid, but it does not request the same for section 5–604. Section 5–604 requires that enrollment lists indicating the party enrollment of registered voters be sent to the chairmen of the state committee of each political party and to the county chairmen of each party, normally in April of each year.

Though the plaintiffs' complaint and memorandum of law speak of the harm caused by both provisions, and though Judge Cholakis stated that the reasoning he employed with respect to section 5–602 applied to section 5–604, he did not rest the grant of preliminary relief on that provision. Though we see no reason why the patent constitutional infirmity of section 5–602 would not apply to section 5–604, we decline to review the constitutionality of a provision not specifically considered by the district court.

This provision does not warrant lengthy analysis because the Supreme Court has already considered this question. The predecessor to section 5–602, section 376(5) of the Election Law of 1949 (as amended), was held unconstitutional in *Socialist Workers Party v. Rockefeller,* 314 F.Supp. 984, 997 (S.D.N.Y.) (three-judge court), *summarily aff'd,* 400 U.S. 806, 91 S.Ct. 65, 27 L.Ed.2d 38 (1970).

The Supreme Court has said that "the precedential effect of a summary affirmance extends no further than the precise issues presented and necessarily decided by those actions." *Anderson,* 460 U.S. at 784 n. 5, 103 S.Ct. at 1568 n. 5 (internal quotations omitted). But the precise issue presented here was indeed decided in *Socialist Workers Party.* Despite that ruling, the New York legislature reenacted the provision considered in that case in all material, unlawful respects, but simply under a different number, when it recodified the Election Law in 1976.

The reasons why the courts found the provision invalid in 1970 remain true today and apparently require repeating:

> It is clear that the effect of these provisions ... is to deny independent or minority parties ... an equal opportunity to win the votes of the electorate. The State has shown no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need therefor....
>
> ... The State is not required to provide such lists free of charge, but when it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them.

Socialist Workers Party, 314 F.Supp. at 995–96.

[11] The typical remedy afforded when a statute is found to be facially unconstitutional is an injunction enjoining its enforcement. In this case, however, that relief would not have remedied the harm already worked—voter lists that could have aided the plaintiffs in their petitioning effort were not made available to them but were provided to their adversaries. Those parties could use the lists in their efforts to place their candidates already on a party line on an additional independent line, and to wage a swift and effective attack on the Libertarian petition. [12]

12 The intervenors contend that the plaintiffs were not harmed because the lists that they were seeking are published and distributed after the petitioning period. However, the harm stemmed from the availability, and lack thereof, of the most recent lists published and distributed to party chairmen before the 1994 election.

***61** Although Judge Cholakis designed the specifics of his preliminary relief around the purported "lost time" attributable to the gathering of ED, AD and W numbers, the preliminary and permanent injunctions were based on the unconstitutional burdens created by *both* provisions. Under the particular circumstances presented here, it was not an abuse of discretion to afford this relief on the basis of the facial unconstitutionality of section 5–602. *Cf. McCarthy v. Briscoe,* 429 U.S. 1317, 1322, 97 S.Ct. 10, 13, 50 L.Ed.2d 49 (1976) (in fashioning remedy in response to state's unconstitutional election law, "a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support"). [13]

13 The Board members, in their memorandum of law before the district court, raised the issue that the Board was not charged with administering section 5–602. Rather, the county boards provide information under that statute. While the individual county board members might have been proper parties to this action, the state Board's members also were proper parties. "It is well-settled that a state official may properly be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional act if that official plays some role in the enforcement of the act." *Donohue v. Board of Elections of N.Y.,* 435 F.Supp. 957, 963 (E.D.N.Y.1976). Under New York law, the state Board has "jurisdiction of, and [is] responsible for, the execution and enforcement of ... statutes governing campaigns, elections and related procedures." N.Y.Elec.L. § 3–104. The state Board's members therefore have the requisite "special relation" to the contested provision to render them proper defendants. *Ex parte Young,* 209 U.S. 123, 157, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908).

Conclusion

In sum, we affirm the district court's declaratory judgment that N.Y.Elec.L. § 5–602 is unconstitutional. The district court,

however, erred in declaring section 6–140 unconstitutional. Nevertheless, we hold that the district court's entry of a permanent injunction was not an abuse of discretion, as it represented appropriate relief for the plaintiffs based on the harm worked by the discriminatory aspects of section 5–602. On that basis, we affirm the permanent injunction.

All Citations

44 F.3d 48

TAB 7

566 F.Supp.2d 63
United States District Court, D. New Hampshire.

Fred HOLLANDER
v.
Senator John McCAIN and the Republican National Committee.

Civil No. 08–cv–99–JL.
|
July 24, 2008.

Synopsis

Background: Voter brought action against the Republican National Committee (RNC) and its presumed presidential nominee, alleging that candidate was not eligible for the presidency due to fact that he was born in the Panama Canal Zone. The RNC moved to dismiss.

[Holding:] The District Court, Joseph N. Laplante, J., held that voter did not have standing to bring suit.

Motion granted.

Procedural Posture(s): Motion to Dismiss.

West Headnotes (5)

[1] **Federal Civil Procedure** Construction of pleadings

Federal Civil Procedure Matters deemed admitted; acceptance as true of allegations in complaint

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1829 Construction of pleadings
170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1835 Matters deemed admitted; acceptance as true of allegations in complaint

A court faced with a challenge to standing at the pleading stage must accept as true all material allegations of the complaint, and construe the complaint in favor of the complaining party.

[2] **Federal Civil Procedure** Pro Se or Lay Pleadings

170A Federal Civil Procedure
170AVII Pleadings
170AVII(A) Pleadings in General
170Ak654 Construction
170Ak657.5 Pro Se or Lay Pleadings
170Ak657.5(1) In general

A pro se complaint must be construed liberally, held to less stringent standards than formal pleadings drafted by lawyers.

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

Article III standing has three requirements: (1) the plaintiff has suffered an injury in fact; (2) that injury bears a causal connection to the defendant's challenged conduct; and (3) a favorable judicial decision will likely provide the plaintiff with redress from that injury. U.S.C.A. Const. Art. 3, § 1 et seq.

6 Cases that cite this headnote

[4] **United States** Presidential eligibility and qualification

393 United States
393I Status, Powers, and Functions in General
393I(C) Executive Branch; President
393k242 Presidential eligibility and qualification

(Formerly 393k26)

New Hampshire voter did not have standing to challenge Republican party's presumed presidential nominee, based on allegation that by virtue of candidate's birth in the Panama Canal Zone, he was not a "natural born citizen" eligible to hold office of President under the Constitution; voter did not suffer a cognizable injury, as inclusion of an alleged constitutionally ineligible candidate on the ballot did not prevent voter from voting for someone else. U.S.C.A. Const. Art. 2, § 1, cl. 1 et seq.; U.S.C.A. Const. Art. 3, § 1 et seq.

28 Cases that cite this headnote

[5] **Election Law** Persons entitled to bring contest

142T Election Law
142TVII Conduct of Election
142TVII(H) Actions and Proceedings; Election Contests
142Tk530 Persons entitled to bring contest
(Formerly 144k273 Elections)

Voters have no standing to complain about the participation of an ineligible candidate in an election, even if it results in the siphoning of votes away from an eligible candidate they prefer.

13 Cases that cite this headnote

Attorneys and Law Firms

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Amir C. Tayrani, Matthew D. McGill, Gibson Dunn & Crutcher LLP, Washington, DC, Charles G. Douglas, III, Douglas Leonard & Garvey, Concord, NH, for Defendants.

ORDER

JOSEPH N. LAPLANTE, District Judge.

Fred Hollander, proceeding pro se, brings this action challenging Senator John McCain's eligibility to serve as President of the United States. Hollander claims that McCain, by virtue of his birth in the Panama Canal Zone—albeit to American parents—is not a "natural born Citizen" eligible to hold the office of President under Article II, § 1 of the Constitution.

Though McCain and his co-defendant, the Republican National Committee ("RNC"), vigorously dispute this claim, they argue that this court cannot decide it in any event due to a number of jurisdictional defects: lack of standing and ripeness, mootness, and nonjusticiability. The defendants also argue that Hollander has failed to state a claim for relief because (1) they are not state actors, so Hollander cannot maintain any constitutional claim against them and (2) in any event, any remedy for it would necessarily violate their own First Amendment rights.

***65** This court held a hearing on the defendants' motion to dismiss this action on those grounds on July 24, 2008. Based on the arguments presented there, as well as in the parties' briefing, the court rules that Hollander lacks standing to bring this action. The court does not reach the rest of the parties' arguments, including, most notably, the question of McCain's constitutional eligibility to be President.

I. ***Applicable Legal Standard***

[1] **[2]** A court faced with a challenge to standing at the pleading stage, as here, must "accept as true all material allegations of the complaint, and ... construe the complaint in favor of the complaining party." *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Hollander's pro se complaint, furthermore, must be construed liberally, "held to less stringent standards than formal pleadings drafted by lawyers." *Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (internal quotation marks omitted). Yet even these standards do not require the court to credit "[e]mpirically unverifiable conclusions, not logically compelled, or at least supported, by the stated facts" in the complaint. *Sea Shore Corp. v. Sullivan,* 158 F.3d 51, 54 (1st Cir.1998) (internal quotation marks omitted); *Ahmed v. Rosenblatt,* 118 F.3d 886, 890 (1st Cir.1997).

II. ***Background***

McCain was born, in 1936, at the Coco Solo Naval Air Station, a United States military installation in the Panama Canal Zone.[1] At the time, McCain's father—who, like McCain's mother, was an American citizen—was stationed there on active duty with the United States Navy. McCain, by virtue of his American parentage, is unquestionably an

American citizen. *See* Act of May 24, 1934, Pub.L. No. 73–250, § 1, 48 Stat. 797 (amended 1952) ("Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States") [2] ; *see also* Act of Aug. 4, 1937, Pub.L. No. 75–243, 50 Stat. 558 (codified as amended at 8 U.S.C. § 1403(b)) (conferring citizenship on children born in the Canal Zone to one American parent on or after February 26, 1904, and born to one American parent anywhere in Panama after that date so long as the parent was employed there by the United States at the child's birth).

1 Though Hollander makes this allegation in his complaint, in his objection he states, "[s]ince the hospital at the Coco Solo Naval Air Station did not even exist until 1941 ..., it is reasonable to assume that [McCain] was born in the city of Colón in the Republic of Panama." Hollander has also provided a copy of McCain's birth certificate, which lists his place of birth as Colón. The defendants dispute this theory, but it is irrelevant to the present motion in any event.

2 The law is the same today. *See* 8 U.S.C. § 1401(c) (2005).

Yet the Constitution provides that "No person except a *natural born* Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President." U.S. Const., art. II, § 1, cl. 4 (emphasis added). The phrase "natural born Citizen" is not defined in the Constitution, *see Minor v. Happersett,* 88 U.S. 162, 167, 21 Wall. 162, 22 L.Ed. 627 (1875), nor does it appear anywhere else in the document, *see* Charles Gordon, *Who Can Be President of the United States: An Unresolved Enigma,* 28 Md. L. Rev. 1, 5 (1968). The phrase has thus spawned a largely academic controversy over whether it excludes those citizens who acquired that ***66** status via birth to American parents abroad. *Compare, e.g.,* Jill A. Pryor, *The Natural–Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty,* 97 Yale L.J. 881, 899 (1988) (concluding that those citizens are eligible) *with, e.g.,* Gabriel J. Chin, *Why Senator John McCain Cannot Be President* 17–18 (July 2008) (unpublished manuscript), *available at* http://www.law.arizona.edu/FacultyPubs/Documents/Chin/ALS08–14.pdf (concluding they are not). [3]

3 Though the weight of the commentary falls heavily on the side of eligibility, *see, e.g.,* Sarah Helene Duggin & Mary Beth Collins, "*Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It,* 85 B.U. L. Rev. 53, 82–83 (2005) (surveying authority), many of these commentators acknowledge that the question is not completely free from doubt, *see, e.g.,* Lawrence Friedman, *An Idea Whose Time Has Come—The Curious History, Uncertain Effect, and Need for Amendment of the "Natural Born Citizen" Requirement for the Presidency,* 52 St. Louis U. L.J. 137, 143 (2007).

The question has taken on a real-world dimension, however, during the occasional presidential candidacies of politicians born abroad: Franklin D. Roosevelt, Jr., who was born to American parents in Canada, *see* Warren Freedman, *Presidential Timber: Foreign Born Children of American Parents,* 35 Cornell L.Q. 357 n. 2 (1950); George Romney (father to McCain's one-time opponent in the recent Republican presidential primary, Mitt Romney), who was born to American parents in Mexico, *see* Gordon, *supra,* at 1; and, now, McCain, *see, e.g.,* Chin, *supra,* at 3–4. In McCain's case, the question also takes on an additional layer of complication due to his birth in the Panama Canal Zone.

Those born "in the United States, and subject to the jurisdiction thereof," U.S. Const., amend. XIV, have been considered American citizens under American law in effect since the time of the founding, *United States v. Wong Kim Ark,* 169 U.S. 649, 674–75, 18 S.Ct. 456, 42 L.Ed. 890 (1898), and thus eligible for the presidency, *see, e.g., Schneider v. Rusk,* 377 U.S. 163, 165, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964) (dicta). So the defendants say that, apart from McCain's citizenship by parentage, he can be President because "he was born within the sovereign territory of the United States," namely, the Canal Zone, over which they argue the United States was exercising the powers of a sovereign at the time of McCain's birth, under the Hay–Bunau–Varilla Convention. *See* Convention between the United States and the Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, U.S.–Pan., art. III, Nov. 18, 1903, 33 Stat. 2234, 2235. The Supreme Court, however, has made contradictory comments in dicta on the status of the Canal Zone. *Compare O'Connor v. United States,* 479 U.S. 27, 28, 107 S.Ct. 347, 93 L.Ed.2d 206 (1986) (observing that the United States exercised sovereignty over the Canal Zone under the Convention) *with Vermilya–Brown*

Co. v. Connell, 335 U.S. 377, 381, 69 S.Ct. 140, 93 L.Ed. 76 (1948) (observing that the United States has no sovereignty there).

Hollander claims, due to what he calls McCain's "unequivocal ineligibil [ity]" for the Presidency, that the RNC "should not be permitted to nominate him.... This would lead to the disenfranchisement of [Hollander] and 100 million additional voters" in the general presidential election. Hollander, in fact, claims that he has already suffered disenfranchisement in the 2008 New Hampshire Republican primary, because it resulted in the allocation of delegates to the Republican National Convention ***67** on McCain's behalf, despite his alleged ineligibility. [4]

4 McCain received about 37 percent of the vote in the primary, resulting in the allocation of seven delegates to him and five to other candidates.

As a result, Hollander says, his vote in the New Hampshire primary, and those of others participating in primary elections in which McCain appeared on the ballot, "will count less than [the votes of] those who voted in other parties' primary elections," which led to the allocation of votes to a constitutionally eligible Presidential candidate. Hollander adds that the defendants are responsible for this disenfranchisement because McCain ran in the New Hampshire primary "under false pretenses" to his eligibility for the Presidency, while the RNC "authorized" him to do so. To remedy his claimed disenfranchisement in the New Hampshire Republican primary, and to prevent his further claimed disenfranchisement in the general election, Hollander requests: (1) a declaratory judgment that McCain is ineligible for the Presidency, (2) an injunction requiring McCain to withdraw his candidacy, and (3) an injunction requiring the RNC to reallocate the delegates awarded to McCain as the result of the New Hampshire primary and others, and to nominate another candidate.

III. *Analysis*

[3] As previously mentioned, the defendants argue that Hollander lacks standing to maintain this lawsuit. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies'.... As an incident to the elaboration of this bedrock requirement, [the Supreme] Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). So-called "Article III standing" has three requirements: (1) the plaintiff has suffered "an injury in fact," (2) that injury bears a causal connection to the defendant's challenged conduct, and (3) a favorable judicial decision will likely provide the plaintiff with redress from that injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The party bringing the claim—Hollander here—bears the burden to show his or her standing to bring it. *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004).

Based on these principles, the Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan,* 504 U.S. at 573–74, 112 S.Ct. 2130. These holdings include *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), where the Court ruled that a group of citizens lacked standing to litigate the eligibility, under the Incompatibility Clause, [5] of members of Congress to serve simultaneously in the military reserves.

5 Together with the Ineligibility Clause, this provision states, "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const., art. I, § 6, cl. 2.

***68** Alleging injury "because Members of Congress holding a Reserve position in the Executive Branch were said to be subject to the possibility of undue influence by the Executive Branch, in violation of the concept of the independence of Congress" embodied in the Clause, the plaintiffs sought an injunction against the service of congressmen in the reserves as well as "a declaration that membership in the Reserves is an office under the United States prohibited to Members of Congress by Art. I, § 6, cl. 2." *Schlesinger,* 418 U.S. at 211–12, 94 S.Ct. 2925 (footnote omitted). But the Court called it

> nothing more than a matter of speculation whether the claimed nonobservance of that Clause deprives citizens of the faithful discharge of the legislative duties of reservist members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.

Id. at 217, 94 S.Ct. 2925 (footnote omitted). The Court went on to hold "that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Id.* at 229, 94 S.Ct. 2925.

Schlesinger makes clear, then, that Hollander does not have standing based on the harm he would suffer should McCain be elected President despite his alleged lack of eligibility under Art. II, § 1, cl. 4. That harm, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance." 418 U.S. at 217, 94 S.Ct. 2925; *see also Ex parte Levitt,* 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (ruling that citizen lacked standing to challenge appointment of Hugo Black to the Court under the Ineligibility Clause based on his membership in Congress when it enacted a new judicial pension plan).

[4] Hollander, however, argues that the harm to him from McCain's candidacy transcends simply the right to be governed by a constitutionally qualified President; Hollander claims it also impacts his right to vote, both in the New Hampshire Republican Primary and the general election. This is a difficult theory to understand, but it appears to rest on the premise that McCain's mere status as a presidential candidate or party nominee somehow interferes with the electoral franchise of voters like Hollander who consider McCain ineligible for the office. Presumably, those voters are empowered to address that concern on their own by voting for a different presidential candidate, whose eligibility is unimpeachable. The presence of some allegedly ineligible candidate on the ballot would not seem to impair that right in the least, no matter how that candidate performs in the election.

To be sure, courts have held that a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election. *See, e.g., Tex. Dem. Party v. Benkiser,* 459 F.3d 582, 586–87 & n. 4 (5th Cir.2006); *Schulz v. Williams,* 44 F.3d 48, 53 (2d Cir.1994); *Fulani v. Hogsett,* 917 F.2d 1028, 1030 (7th Cir.1990). But that notion of "competitive standing" has never been extended to *voters* challenging the eligibility of a particular candidate. *See Gottlieb v. Fed. Elec. Comm'n,* 143 F.3d 618, 622 (D.C.Cir.1998).

[5] In *Gottlieb,* the court drew a distinction between voters' claims over the allegedly illegal *exclusion* of their preferred candidate and the allegedly illegal *inclusion* of a rival candidate. *Id.* While ***69** the exclusion "directly imping[es] on the voters' ability to support" their chosen candidate—after all, they cannot vote for somebody who is not on the ballot—the mere inclusion of a rival does "not impede the voters from supporting the candidate of their choice" and thus does not cause the legally cognizable harm necessary for standing. *Id.* (citing *Buckley v. Valeo,* 424 U.S. 1, 94, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)). So voters have no standing to complain about the participation of an ineligible candidate in an election, even if it results in the siphoning of votes away from an eligible candidate they prefer. *See id.* As *Gottlieb* reasons, only the eligible candidate, or his or her political party, can claim standing based on that injury.

In addition to *Gottlieb,* "[s]everal other Circuit Courts have also concluded that a voter fails to present an injury-in-fact when the alleged harm ... is only derivative of a harm experienced by a candidate." *Crist v. Comm'n on Pres. Debates,* 262 F.3d 193, 195 (2d Cir.2001) (per curiam). One of those courts was the First Circuit in *Becker v. Federal Election Commission,* 230 F.3d 381 (1st Cir.2000). There, both presidential candidate Ralph Nader and a group of voters challenged the corporate sponsorship of presidential debates. *Id.* at 383–84. Nader alleged that, in light of "his principled stand against accepting corporate contributions," he could not participate in these debates, placing him at a competitive disadvantage to his campaign rivals, who harbored no such qualms. *Id.* at 386. The court of appeals ruled that this conferred standing on Nader, but not on the voters. *Id.* at 389–90.

In rejecting the voters' standing, the court reasoned:

> Regardless of Nader's injury, his supporters remain fully able to advocate for his candidacy and to cast their votes in his favor. The only derivative harm Nader's supporters can possibly assert is that their preferred candidate now has less chance of being elected. Such 'harm,' however, is hardly a restriction on voters' rights and by itself is not a legally cognizable injury sufficient for standing.

Id. at 390 (citations omitted). That reasoning applies with equal force here. McCain's candidacy for the presidency, whatever his eligibility, is "hardly a restriction on voters' rights" because it in no way prevents them from voting for somebody else. In fact, Hollander alleges that he did just that in the New Hampshire Republican primary.

That Hollander's chosen candidate lost despite McCain's alleged ineligibility does not, as Hollander asserts, mean that his vote "count[ed] less" than, say, those cast in the New Hampshire Democratic primary, which presumably gave voters a choice among constitutionally qualified candidates only. [6] So far as the complaint discloses, the New Hampshire Secretary of State duly counted the votes in each party's primary and apportioned the delegates to the candidates accordingly under New Hampshire law. *See* N.H.Rev.Stat. Ann. § 659:94. The apportionment of a majority ***70** of the Republican delegates to McCain, who won his party's primary here, did not injure Hollander any more than the constructive exclusion of Nader from the presidential debates injured his supporters; in each case, the practice simply made it less likely that the plaintiff's preferred candidate would ultimately be elected, which, as the First Circuit held in *Becker,* does not amount to a judicially cognizable injury.

Hollander also argues that he "would again be disenfranchised should he vote for McCain in the general election and then McCain should be subsequently removed due to his lack of eligibility." Unlike Hollander's other "disenfranchisement" theory, this one does not depend on the failure of his chosen candidate *because of* McCain's alleged ineligibility, but on the success of Hollander's chosen candidate—who is McCain in this scenario—*despite* his alleged ineligibility. On this theory, however, Hollander's alleged "disenfranchisement" flows not from the actions he has challenged here, *i.e.,* McCain's presidential campaign or the RNC's likely selection of him as its nominee, but from his subsequent removal from office at the hands of someone else (presumably one of the co-equal branches of government), resulting (presumably, yet again) in a President different from the one Hollander helped to elect.

This theory presents a number of serious problems, not the least of which are whether the removal of an elected official by non-electoral means amounts to "disenfranchisement" of the voters who put him there, *cf. Powell v. McCormack,* 395 U.S. 486, 547, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), and whether the claim is "contingent on events that may not occur as anticipated or may not occur at all," *Lincoln House, Inc. v. Dupre,* 903 F.2d 845, 847 (1st Cir.1990), namely, McCain's election to, then removal from, the office of President. [7] Putting those considerations aside, however, the theory does not establish Hollander's standing because it does not "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct," *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), but to the conduct of those—whoever they might turn out to be—responsible for ultimately ousting McCain from office. Indeed, McCain and the RNC are trying to achieve the opposite.

6 It is hard to say for sure, since there were some twenty-one presidential candidates in the New Hampshire Democratic primary, many of whom are hardly household names. N.H. Sec'y of State, *Candidates for Upcoming Presidential Primary Election,* http://www.sos.nh.gov/presprim2008/candidatesfiled.htm (last visited July 24, 2008). There were the same number of presidential candidates on the Republican side. *Id.* This underscores the difficulty with Hollander's theory that the simple presence of an ineligible candidate on a ballot necessarily disenfranchises all voters who support eligible candidates in that election.

7 There is also the question of whether "disenfranchisement" resulting from a vote for an ineligible candidate is the sort of "self-inflicted" harm caused by the voter, rather than any state actor, which therefore does not amount to an infringement of the franchise right. *See* 1 Lawrence H. Tribe, *American Constitutional Law* § 13–

24, at 1122–23 (2d ed. 1988) (reasoning that, where voters disqualify themselves from voting in one party's primary under state law by voting in another's, it is the voters' own behavior, "rather than the operation of state law, that should be blamed for their inability to cast a ballot," discussing *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973)).

Hollander's real complaint seems to be that, in the general election, he will face the Hobson's choice of having to vote for his party's nominee, who is allegedly ineligible, or against his party's nominee, though he is a registered Republican. But a political party retains considerable, if not unlimited, discretion over the selection of its nominees, *see* 1 Tribe, *supra,* §§ 13–23—13–25, at 1118–1129, and these limitations have never been understood to incorporate the "right" of registered party members to a constitutionally eligible nominee.[8] Moreover, Hollander remains free ***71** to cast his vote for any candidate he considers eligible, including by writing in whichever Republican candidate he believes should be nominated instead of McCain, and to have that vote counted just as much as those cast for the party's official nominee, so his right to the franchise remains intact. *See Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (defining right as "to vote freely for the candidate of one's choice" without "debasement or dilution of the weight of a citizen's vote"). Difficult choices on Election Day do not translate into judicially cognizable injuries.

8 The Supreme Court has upheld state laws prohibiting certain candidates from appearing on the ballot—including those "ineligible for office, unwilling to serve, or [running as] another party's candidate"—against challenges founded on the associational rights of the party who wishes to nominate such a candidate. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (footnote omitted); *see also Socialist Workers Party of Ill. v. Ogilvie,* 357 F.Supp. 109, 113 (N.D.Ill.1972) (rejecting party's First Amendment challenge to exclusion from ballot of presidential candidate who did not meet constitutional age requirement). But again, Hollander's claim is not a political party's challenge to the exclusion of its candidate from, or the inclusion of a rival candidate on, the ballot; it is a voter's challenge to the inclusion of an allegedly ineligible candidate on the ballot. So this case raises no question as to the constitutionality of a state-law prohibition on ineligible candidates; Hollander's claim is not that McCain was or will be kept from the ballot, but that he should have been or should be.

This is not to demean the sincerity of Hollander's challenge to McCain's eligibility for the presidency; as discussed *supra* Part II, that challenge has yet to be definitively settled, and, as a number of commentators have concluded, arguably cannot be without a constitutional amendment. What is settled, however, is that an individual voter like Hollander lacks standing to raise that challenge in the federal courts. *See* Dugan & Collins, *supra,* at 115 (recognizing debates over meaning of Art. II, § 1, cl. 4, but concluding that voters lack standing to raise that issue judicially). Indeed, "[t]he purest reason to deny standing is that the plaintiff is not able to show an injury to the voter interest, however much the plaintiff may feel offended by the challenged practice." 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.4 (2d ed. 1984 & 2007 supp.) (footnote omitted). Because Hollander can show no such injury, this court lacks jurisdiction over his attempt to resolve the question of McCain's eligibility under Art. II, § 1, cl. 4. Whatever the contours of that constitutional provision, Article III has been definitively read by the courts to confer no jurisdiction over this kind of action.

IV. *Conclusion*

For the foregoing reasons, the defendants' motion to dismiss is granted on the ground that Hollander lacks standing. All other pending motions are denied as moot. The clerk shall enter judgment accordingly and close the case.

SO ORDERED.

All Citations

566 F.Supp.2d 63, 2008 DNH 129

TAB 8

2020 WL 2042365
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

Stanley William PAHER, et al., Plaintiffs,
v.
Barbara CEGAVSKE, in her official capacity as Nevada Secretary of State, et al., Defendants.

Case No. 3:20-cv-00243-MMD-WGC
|
Signed 04/28/2020

Attorneys and Law Firms

David C. O'Mara, The O'Mara Law Firm, P.C., Reno, NV, for Plaintiffs.

ORDER

MIRANDA M. DU, CHIEF UNITED STATES DISTRICT JUDGE

I. SUMMARY

***1** Plaintiffs [1] challenge a plan ("the Plan") that the Nevada Secretary of State ("Secretary"), in partnership with Nevada's 17 county election officials, [2] developed to implement an all-mail election for the upcoming June 9, 2020, Nevada primary election to address public health concerns caused by the spread of the coronavirus disease ("COVID-19") in Nevada. Proposed Intervenors-Defendants ("Proposed Intervenors") [3] seek intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2), or alternatively, as permissive under Federal Rule of Civil Procedure 24(b) [4]. (ECF No. 27.) The Court will grant the motion to intervene ("Motion").

1 Plaintiffs are registered Nevada voters: William Paher, Gary Hamilton, Terresa Monroe-Hamilton. (ECF No. 1 at 3.)

2 Plaintiffs also name as a defendant the Registrar of Voters for Washoe County. (ECF No. 1.)

3 Proposed Intervenors are Nevada State Democratic Party, DNC Services Corporation/Democratic National Committee, DCCC, Priorities USA, and John Solomon. (ECF No. 27 at 1.)

4 The Court directed any response to the Motion to be filed by April 28, 2020, at 12:00 pm PST. (ECF No. 34.) No response was filed within the prescribed time.

II. BACKGROUND

The following facts are taken from the Verified Complaint and exhibits attached thereto.

This action challenges the Secretary's decision to conduct an all-mail election for the June 9, 2020, primary. (ECF No. 1-1.) In the press released issued on March 24, 2020, the Secretary explained that the decision to implement the Plan was made to "maintain a high level of access to the ballot, while protecting the safety of voters and poll workers[— who belong to groups who are at high risks for severe illness from COVID-19—]." (*Id.*)

Under the Plan, all *active* registered voters will be mailed an absentee ballot (mail-in ballot) for the primary election. If a voter is registered to vote at his or her current address, they need not take any further action to receive an absentee ballot. (*E.g.*, ECF No. 1-3.) If an individual is not registered or needs to update registration information (e.g., such as name, address, and party), they are required to do so. (*Id.*) To accommodate same-day registration requirements enacted by the 2019 Nevada Legislature, the Plan also establishes at least one physical polling place in each of Nevada's counties and in Carson City. (ECF No. 1-1.)

Perhaps without much surprise to anyone who has followed states efforts to manage elections during this pandemic, the Plan faces legal challenges in both this Court and the state court. Here, Plaintiffs assert five claims for relief and request declaratory and injunctive relief to prevent the Secretary and county administrators from implementing the Plan. (ECF No. 1 at 8–13.) They particularly challenge the Plan's expansion of mail-in voting or in their characterization, "[t]he Plan would require the State to forego almost all in-person voting and instead conduct the Primary by mailed absent ballots." (ECF No. 1 at 9.) In contrast, in a lawsuit filed in state court ("State Court Action"), Proposed Intervenors "do not object to Defendants' expansion of vote by mail" but they assert where the Plan fall short is its failure to provide "meaningful opportunities for in-person voting" among other deficiencies. (ECF No. 27 at 3–4 & n.2; ECF No. 27-3 at 3–5.) And just as Proposed Intervenors have moved to intervene in this action, the group supporting Plaintiffs have moved to intervene in the State Court Action. (ECF No. 27-1 at 5 n.3 (stating that "True

the Vote, representing two different individual voters, filed a motion to intervene in the State Court Action, raising exactly the same arguments they have raised in this case").)

III. DISCUSSION

***2** The Court agrees with Proposed Intervenors that intervention is warranted as a matter of right under Rule 24(a) and as permissive under Rule 24(b).

A. Intervention under Rule 24(a)

When evaluating motions to intervene as a matter *of right*, courts construe Rule 24 liberally in favor of potential intervenors, focusing on practical considerations rather than technical distinctions. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). Nonetheless, an applicant for intervention bears the burden of showing that he/she is entitled to intervene. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

Rule 24(a) permits anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect [his] interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). A party seeking to intervene by right must meet four requirements:

> (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 841 (9th Cir. 2011) (citations omitted). "Failure to satisfy any one of the requirements is fatal to the application." *Id.* (quoting *Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009)).

1. Factor One: Timeliness

"Timeliness is 'the threshold requirement' for intervention as of right." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (quoting *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990)). Proposed Intervenors moved for intervention within six days from the filing of the action and before the reply brief in support of Plaintiffs' motion for preliminary injunction is due under the Court's expedited briefing schedule. (ECF Nos. 1, 27.) There is no question that their Motion is timely.

2. Factors Two and Three: Significant Protectable Interest and Impairment of That Interest

Generally "[a]n applicant has a 'significant protectable interest' in an action if (1) [he] asserts an interest that is protected under some law, and (2) there is a 'relationship' between [his] legally protected interest and the plaintiff's claims." *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). However, "[t]he 'interest' test is not a bright-line rule." *Alisal*, 370 F.3d at 919 (citations omitted).

Proposed Intervenors argue that Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates, and individual intervenor John Solomon's plan to vote by mail. (ECF No. 27 at 7.) Proposed Intervenors have sufficiently shown that they maintain significant protectable interests which would be impaired by Plaintiffs' challenge to the Plan's all-mail election provisions. That a group of voters similar to Plaintiffs have apparently moved to intervene in Proposed Intervenors' State Court Action further underscores the significance of the interests at stake and that impairment of the ability to protect the various interests will likely result should intervention be disallowed here.

3. Factor Four: Adequacy of Representation

***3** Courts consider three factors when assessing whether a present party will adequately represent the interests of an applicant for intervention:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Arakaki v. Cayetano, 324 F.3d 1078, 1086 (2003). Moreover, "[t]he burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki*, 324 F.3d at 1086).

Proposed Intervenors insist that because they disagree that the other aspects of the Plan are adequate to extend the franchise for all Nevada voters, their interests do not fully align with that of Defendants and Defendants therefore cannot adequately protect their interests in this action. (ECF No. 27 at 8–9.) However, in terms of this action, Proposed Intervenors' interests do not appear to diverge significantly from that of Defendants. Both groups presumably share the goal of protecting the all-mail election provisions of the Plan being challenged here. Nevertheless, Proposed Intervenors do not agree that the Plan goes far enough to protect the franchise, as evidenced by their State Court Action, and may present arguments about the need to safeguard Nevadan's right to vote that are distinct from Defendants' arguments. Indeed, a comparison of Defendants' response brief (ECF No. 28) and Proposed Intervenors' opposition brief (ECF No. 27-1) reveal divergent arguments.

Having considered the relevant factors under Rule 24(a), the Court agrees with Proposed Intervenors that they have demonstrated entitlement to intervene as a matter of right.

B. Intervention under Rule 24(b)

Even if intervention as of right was not warranted in this case, Proposed Intervenors have demonstrated that they meet the requirements of permissive intervention.

Rule 24(b)(1)(B) permits a court to allow anyone to intervene who submits a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." An applicant "who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction." *Donnelly*, 159 F.3d at 412. Because a court has discretion in deciding whether to permit intervention, it should consider whether intervention will cause undue delay or prejudice to the original parties, whether the applicant's interests are adequately represented by the existing parties, and whether judicial economy favors intervention. *Venegas v. Skaggs*, 867 F.2d 527, 530–31 (9th Cir. 1989).

Proposed Intervenors have shown permissive intervention is warranted. Their motion is timely, they assert similar defenses in support of the Plan's all-mail election provisions, and their opposition brief raises arguments in response to Plaintiffs' challenges to the Plan and does not assert issues unrelated to this action. (*See* discussion *supra.*) Moreover, the Court finds intervention will not cause delay or prejudice given that the Motion was filed before Plaintiffs' reply brief was due and before the scheduled hearing on the merits.

IV. CONCLUSION

***4** The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motion before the Court.

It is therefore ordered that Proposed Intervenors-Defendants' motion to intervene (ECF No. 27) is granted.

All Citations

Not Reported in Fed. Supp., 2020 WL 2042365

End of Document

TAB 9

2020 WL 3074351
Only the Westlaw citation is currently available.
United States District Court, E.D. California.

Darrell ISSA, James B. Oerding, Jerry Griffin, Michelle Bolotin, and Michael Sienkiewicz, Plaintiffs,
v.
Gavin NEWSOM, in his official capacity as Governor of the State of California, and Alex Padilla, in his official capacity as Secretary of State of California, Defendants.
Republican National Committee; National Republican Congressional Committee; and California Republican Party, Plaintiffs,
v.
Gavin Newsom, in his official capacity as Governor of California; and Alex Padilla, in his official capacity as California Secretary of State, Defendants.

No. 2:20-cv-01044-MCE-CKD
|
(and related case) No. 2:20-cv-01055-MCE-CKD
|
Signed 06/10/2020

Attorneys and Law Firms

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John William Killeen, Office of the Attorney General, Sacramento, CA, for Defendants.

MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., UNITED STATES DISTRICT JUDGE

***1** On May 8, 2020, California Governor Gavin Newsom issued Executive Order N-64-20, which requires all California counties to implement all-mail ballot elections for the November 3, 2020, federal elections ("Executive Order"). By way of the above-captioned related actions, two sets of Plaintiffs seek to enjoin enforcement of that Executive Order by Defendants, Governor Newsom and California's Secretary of State Alex Padilla: (1) the Republican National Committee, the National Republican Congressional Committee, and the California Republican Party (collectively, "RNC Plaintiffs"); and (2) one congressional candidate and four individual California voters, including members of the Republican, Democratic, and Independent Parties (collectively, "Issa Plaintiffs").

The Democratic Congressional Campaign Committee and the Democratic Party of California (collectively, "Proposed Intervenors") now move to intervene as defendant-intervenors in both cases as a matter of right under Federal Rule of Civil Procedure 24(a)(2).[1, 2] Alternatively, the Proposed Intervenors seek permissive intervention under Rule 24(b). The RNC Plaintiffs do not oppose the Proposed Intervenors' request, but the Issa Plaintiffs have filed an opposition. Defendants have not responded, and the Proposed Intervenors have filed Reply briefs. For the reasons set forth below, the Proposed Intervenors' Motions to Intervene are GRANTED.[3]

1 All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure, unless otherwise noted.

2 See Mot. Intervene, Case No. 2:20-cv-01044-MCE-CKD, ECF No. 12, and Mot. Intervene, Case No. 2:20-cv-01055-MCE-CKD, ECF No. 18.

3 The Court granted the Proposed Intervenors' Requests for Expedited Briefing Schedule on the present Motions. See Stip. and Order, Case No. 20-cv-01044-MCE-CKD, ECF No. 14, and Stip. and Order, No. 20-cv-01055-MCE-CKD, ECF No. 20. Due to the expedited briefing schedule and because oral argument would not have been of material assistance, the Court ordered these matters submitted on the briefs. See E.D. Local Rule 230(g).

STANDARD

An intervenor as a matter of right must meet all requirements of Rule 24(a)(2) by showing:

> (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and

(4) the existing parties may not adequately represent the applicant's interest.

In evaluating whether these requirements are met, courts are guided primarily by practical and equitable considerations. Further, courts generally construe [the Rule] broadly in favor of proposed intervenors. A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

***2** United States v. City of Los Angeles, 288 F.3d 391, 397–98 (9th Cir. 2002) (citations and internal quotation marks omitted).

Alternatively, under Rule 24(b)(1), a party may be given permission by the court to intervene if that party shows "(1) independent grounds for jurisdiction; (2) the motion is timely filed; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 839 (9th Cir. 1996).

ANALYSIS

A. Timeliness of Application

Three factors must be evaluated to determine whether a motion to intervene is timely:

> (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. Delay is measured from the date the proposed intervenor should have been aware that its interests would no longer be protected adequately by the parties, not the date it learned of the litigation.

United States v. State of Wash., 86 F.3d 1499, 1503 (9th Cir. 1996). "Timeliness is to be determined from all the circumstances" in the court's "sound discretion." NAACP v. New York, 413 U.S. 345, 366 (1973).

The Issa Plaintiffs do not dispute the timeliness of the Proposed Intervenors' request. Both the Issa and RNC Plaintiffs filed their Complaints on May 21 and 24, 2020, respectively, and the Proposed Intervenors filed the Motions to Intervene on June 3, 2020. To date, no substantive proceedings have occurred, and this Court has ordered all Plaintiffs to file any motions for preliminary injunction by June 11, 2020. The Court thus finds the Motions to Intervene are timely.

B. Significant Protectable Interest and Disposition May Impair or Impede Ability to Protect Interest

A proposed intervenor has a " 'significant protectable interest' in [the] action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." City of Los Angeles, 288 F.3d at 398 (quoting Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998)). "The 'interest' test is not a clear-cut or bright-line rule, because '[n]o specific legal or equitable interest need be established.' " Id. (quoting Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993)). Under the interest test, courts are required "to make a practical, threshold inquiry" to discern whether allowing intervention would be "compatible with efficiency and due process." Id. (citations and internal quotation marks omitted).

***3** An applicant may satisfy the requirement of a "significant protectable interest" if the resolution of the plaintiff's claims will affect the applicant for intervention. Montana v. United States Envt'l Prot. Agency, 137 F.3d 1135, 1141–42 (9th Cir. 1998). The requisite interest need not even be direct as long as it may be impaired by the outcome of the litigation. Cascade Nat'l Gas Corp. v. El Paso Nat'l Gas Co., 386 U.S. 129, 135–36 (1967). "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 822 (9th Cir. 2001) (quoting Fed. R. Civ. P. 24 advisory committee's notes).

The Proposed Intervenors cite three protectable interests as the basis for their intervention: (1) asserting the rights of their members to vote safely without risking their health; (2) advancing their overall electoral prospects; and (3) diverting their limited resources to educate their members on the election procedures. Contrary to the arguments of the Issa

Plaintiffs, such interests are routinely found to constitute significant protectable interests. As another federal district court recently held,

> Proposed Intervenors argue that Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates.... Proposed Intervenors have sufficiently shown that they maintain significant protectable interests which would be impaired by Plaintiffs' challenge to the Plan's all-mail election provisions.

Paher v. Cegavske, Case No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020). Furthermore, if both the Issa and RNC Plaintiffs were to succeed on their claims, then the Proposed Intervenors would have to devote their limited resources to educating their members on California's current voting-by-mail system and assisting those members with the preparation of applications to vote by mail. See Crawford v. Marion Cty. Elec. Bd., 472 F.3d 949, 951 (7th Cir. 2007). Finally, as the Proposed Intervenors point out, their interests are very similar to those of the Issa Plaintiffs. See Proposed Intervenors' Reply, Case No. 2:20-cv-01044-MCE-CKD, ECF No. 23, at 3 n.3. Therefore, the Court concludes that significant protectable interests have been demonstrated.

C. No Existing Adequate Representation

When determining whether a proposed intervenor's interests are adequately represented, the following factors are considered:

> (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that such other parties would neglect.

City of Los Angeles, 288 F.3d at 398 (citations omitted). The burden of showing that existing parties may inadequately represent the proposed intervenor's interests is a minimal one. The applicant need only show that "the representation of [its] interest 'may be' inadequate." Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 (1972). Any doubt as to whether the existing parties will adequately represent the intervenor should be resolved in favor of intervention. Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).

Although Defendants and the Proposed Intervenors fall on the same side of the dispute, Defendants' interests in the implementation of the Executive Order differ from those of the Proposed Intervenors. While Defendants' arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors 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. See Citizens for Balanced Use v. Mont. Wilderness Ass'n, 647 F.3d 893, 899 (9th Cir. 2011) ("[T]he government's representation of the public interest may not be identical to the individual parochial interest of a particular group just because both entities occupy the same posture in the litigation.") (citations and internal quotation marks omitted). As a result, the parties' interests are neither "identical" nor "the same." See Berg, 268 F.3d at 823 (rebutting presumption of adequacy by showing the parties "do not have sufficiently congruent interests"). The Court thus finds that absent intervention, the interests of the Proposed Intervenors may not be adequately represented.

***4** In sum, because all of the factors have been met, the Court finds the Proposed Intervenors are entitled to intervene as a matter of right under Rule 24(a)(2). [4]

4 Because the Court finds intervention is appropriate under Rule 24(a)(2), it need not consider whether intervention is alternatively appropriate under Rule 24(b).

CONCLUSION

For the reasons set forth above, the Proposed Intervenors' Motions to Intervene are GRANTED. The deadline for the Proposed Intervenors to answer or otherwise respond to the Complaints shall be the same as the deadline, or any continued deadline, set for Defendants to answer or otherwise respond.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2020 WL 3074351

TAB 10

2020 WL 5229116
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

DONALD J. TRUMP FOR PRESIDENT, INC., et al., Plaintiff(s),
v.
Barbara CEGAVSKE, Defendant(s).

Case No. 2:20-CV-1445 JCM (VCF)
|
Signed 08/21/2020

Attorneys and Law Firms

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Aaron D. Ford-AG, Craig A. Newby, Gregory Louis Zunino, Nevada State Attorney General's Office, Carson City, NV, for Defendant.

ORDER

James C. Mahan, UNITED STATES DISTRICT JUDGE

***1** Presently before the court is the motion to intervene by proposed intervenor-defendants DNC Services Corporation/ Democratic National Committee, Democratic Congressional Campaign Committee, and the Nevada State Democratic Party (collectively, "proposed intervenors"). (ECF No. 9). Plaintiffs Donald J. Trump for President, Inc., the Republican National Committee, and the Nevada Republican Party have responded with non-opposition, (ECF No. 30), and the proposed intervenors note that defendant Barbara Cegavske, Nevada Secretary of State, has consented to their intervention, (ECF No. 9).

Plaintiffs challenge Nevada's recent changes in state voting law. (ECF Nos. 1, 29). The proposed intervenors move to intervene pursuant to Federal Rule of Civil Procedure 24, arguing that the existing defendant fails to adequately represent their interests. (ECF No. 9); *see also Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.' "). While the Nevada Secretary of State "has an undeniable interest in defending the actions of state government," the proposed intervenors claim to have a distinct interest in ensuring that voters of the Democratic Party can vote. (ECF No. 9).

Here, plaintiffs have filed a notice of non-opposition to the instant motion to intervene. (ECF No. 30). Without opining on the merits, this court construes plaintiffs' non-opposition as consent and grants this motion pursuant to Local Rule 7-2(d). [1] The proposed intervenors may join this matter as defendants.

1 "The failure of an opposing party to file points and authorities in response to any motion, except a motion under Fed. R. Civ. P. 56 or a motion for attorney's fees, constitutes a consent to the granting of the motion." Local Rule 7-2(d).

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the proposed intervenor-defendants DNC Services Corporation/Democratic National Committee, Democratic Congressional Campaign Committee, and the Nevada State Democratic Party's motion to intervene as of right (ECF No. 9) be, and the same hereby is, GRANTED.

All Citations

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TAB 11

322 F.3d 728
United States Court of Appeals,
District of Columbia Circuit.

The FUND FOR ANIMALS, INC., et al., Appellees,
v.
Gale A. NORTON, Secretary, Department of the Interior, et al., Appellees.
Natural Resources Department of the Ministry of Nature and Environment of Mongolia, Appellant.

No. 01-5346
|
Argued Feb. 21, 2003.
|
Decided March 18, 2003.

Synopsis

Environmental group challenged Interior Department's listing of central Asian argali sheep as merely threatened rather than endangered species. The United States District Court for the District of Columbia, Gladys Kessler, J., denied Mongolian government ministry's motion to intervene as defendant, and appeal was taken. The Court of Appeals, Garland, Circuit Judge, held that ministry was entitled to intervene as of right.

Reversed.

West Headnotes (12)

[1] **Federal Civil Procedure** Intervention

Federal Civil Procedure Grounds and Factors

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak311 In general
170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak314.1 In general

Qualification for intervention as of right depends on: (1) whether applicant has standing; (2) timeliness of motion; (3) whether applicant claims interest relating to property or transaction which is subject of action; (4) whether applicant is so situated that disposition of action may as practical matter impair or impede applicant's ability to protect that interest; and (5) whether applicant's interest is adequately represented by existing parties. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

112 Cases that cite this headnote

[2] **Federal Courts** Parties and Process

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(C) Decisions Reviewable
170BXVII(C)2 Particular Decisions, Matters, or Questions as Reviewable
170Bk3297 Parties and Process
170Bk3298 In general
(Formerly 170Bk587)

Denial of motion for intervention as of right is appealable final order; it is conclusive with respect to distinct interest asserted by movant. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

10 Cases that cite this headnote

[3] **Federal Courts** Parties

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3585 Parties
170Bk3585(1) In general
(Formerly 170Bk870.1, 170Bk817, 170Bk776)

Standard of review on appeal from denial of motion to intervene as of right depends on nature of challenged determination; trial court's determinations of law are reviewed de novo, its findings of fact are reviewed for clear error, and its discretionary rulings are reviewed for abuse. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

7 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

To establish standing under Article III, prospective intervenor must show: (1) injury-in-fact, (2) causation, and (3) redressability. U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

59 Cases that cite this headnote

[5] **Federal Civil Procedure** Governmental bodies and officers thereof

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak338 Governmental bodies and officers thereof

Mongolian government ministry had standing to seek intervention in suit challenging Interior Department's listing of central Asian argali sheep as merely threatened rather than endangered species; fees paid by sport hunters, which could be cut off if plaintiffs prevailed, were primary source of funding for Mongolian government's argali conservation program. U.S.C.A. Const. Art. 3, § 2, cl. 1; Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

5 Cases that cite this headnote

[6] **Administrative Law and Procedure** Proceedings

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(D) Right of Review; Standing; Parties
15Ak1681 Proceedings
(Formerly 15Ak665.1)

Petitioner, whose standing to seek review of administrative action is self-evident, is not required to file evidentiary submissions in support of standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

11 Cases that cite this headnote

[7] **Evidence** Admissibility in same proceedings

157 Evidence
157X Admissions
157X(C) Judicial Admissions
157k1679 Pleadings
157k1681 Admissibility in same proceedings
(Formerly 157k208(1))

Party's pleadings are admissible as evidence in support of its opponent's cause.

1 Cases that cite this headnote

[8] **Federal Civil Procedure** Time for intervention

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak320 Time for intervention

Motion to intervene as defendant, in action challenging Interior Department's Endangered Species Act determination, was timely where filed less than two months after plaintiffs filed their complaint and before agency filed answer. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

9 Cases that cite this headnote

[9] **Federal Civil Procedure** Governmental bodies and officers thereof

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak338 Governmental bodies and officers thereof

Mongolian government ministry had interest needed for intervention as of right in suit

challenging Interior Department's listing of central Asian argali sheep as merely threatened rather than endangered species; fees paid by sport hunters, which could be cut off if plaintiffs prevailed, were primary source of funding for Mongolian government's argali conservation program. Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

6 Cases that cite this headnote

[10] Federal Civil Procedure Governmental bodies and officers thereof

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak338 Governmental bodies and officers thereof

Disposition of environmental organization's suit challenging Interior Department's listing of central Asian argali sheep as merely threatened rather than endangered species would potentially impede Mongolian government's ability to protect its interests, for purpose of determining whether government ministry was entitled to intervene as defendant; fees paid by sport hunters, which could be cut off if plaintiffs prevailed, were primary source of funding for Mongolian government's argali conservation program. Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

6 Cases that cite this headnote

[11] Federal Civil Procedure Inadequacy of representation of applicant's interest

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest

Proposed intervenor's burden of establishing that its interests are not adequately represented by current parties is minimal. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

60 Cases that cite this headnote

[12] Federal Civil Procedure Governmental bodies and officers thereof

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak338 Governmental bodies and officers thereof

Mongolian government's interests were not adequately represented by Interior Department or sheep hunting and conservation groups, for purpose of determining whether it was entitled to intervene as of right in environmental group's suit challenging Interior Department's listing of central Asian argali sheep as merely threatened rather than endangered species; Mongolian government was only advocate focused primarily on interests of Mongolian people and natural resources. Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

9 Cases that cite this headnote

***730 **270** Appeal from the United States District Court for the District of Columbia (No. 01cv00813).

Attorneys and Law Firms

John J. Jackson III argued the cause and filed the briefs for appellant.

Howard M. Crystal argued the cause for plaintiffsappellees. With him on the brief was Katherine A. Meyer. Jonathan R. Lovvorn entered an appearance.

Before: TATEL and GARLAND, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge GARLAND.

Opinion

GARLAND, Circuit Judge:

The Natural Resources Department of the Ministry of Nature and Environment of Mongolia (NRD) appeals from the denial of its motion to intervene in a case concerning the application of the Endangered Species Act to argali sheep located within Mongolia's borders. Because the NRD satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2), we reverse and direct that the NRD be allowed to intervene.

I

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, requires the Secretary of the Interior to determine whether any species is "endangered" or "threatened," *id.* § 1533(a)(1), a responsibility she has delegated to the Department of the Interior's Fish and Wildlife Service (FWS), 50 C.F.R. § 402.01(b). A species is endangered if it "is in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. § 1532(6), and is threatened if it "is likely to become an endangered species within the foreseeable future," *id.* § 1532(20). The ESA provides specified protections for endangered species, *id.* § 1538(a)(1), and instructs the Secretary to issue such regulations as she "deems necessary and advisable to provide for the conservation of" threatened species, *id.* § 1533(d).

The argali sheep, an Asian relative of the North American bighorn sheep, is the largest species of wild sheep in the world. Adult males weigh between 210 and 310 pounds and possess enormous spiral horns. Addition of Argali to List of Endangered and Threatened Wildlife, 57 Fed.Reg. 28,014, 28,014 (FWS, June 23, 1992). In 1992, the FWS listed the argali as endangered throughout most of its range. It listed the species as threatened rather than endangered, however, in Mongolia, Kyrgyzstan, and Tajikistan. *Id.* (codified at 50 C.F.R. pt. 17).

On April 16, 2001, The Fund for Animals, along with other organizations and individuals dedicated to wildlife conservation in general and protection of argali sheep in particular (collectively, the "Fund" or "plaintiffs"), filed suit against the Secretary of the Interior and the Director of the FWS. The plaintiffs alleged that the defendants violated the ESA, the Administrative Procedure Act, 5 U.S.C. § 706, and their own regulations by failing to list the argali as an endangered species in Mongolia, Kyrgyzstan, and Tajikistan, and by issuing hundreds of permits for sport hunters to import killed argali (or parts thereof) into the United States as "trophies." The plaintiffs asked the court, inter alia, to direct the defendants to list the argali as an endangered species in those countries, to declare unlawful all outstanding permits for the import of argali sheep, and to enjoin the defendants from issuing additional permits.

On April 27, 2001, the Foundation for North American Wild Sheep, as well as ***731 **271** other organizations and individuals dedicated to wild sheep hunting and conservation (collectively, the "FNAWS intervenors"), filed a motion to intervene as defendants in the Fund's lawsuit. On June 4, 2001, " the Country of Mongolia, through its Natural Resources Department of the Ministry of Nature and Environment," sought to intervene as a defendant as well. Mot. to Add Intervenor at 1 (J.A. at 139).[1] The NRD, represented by the same counsel who filed on behalf of the FNAWS intervenors, described itself as the agency of the Mongolian government responsible for " implement[ing] [the] policy and decision of [the] Government on rational utilization of natural resources, rehabilitation, and ... protection," including the country's "tourist hunting program." *Id.* at 2 (J.A. at 140). Another pair of organizations dedicated to hunting and conservation, the Safari Club International and the Wildlife Conservation Fund of America (collectively, the "Safari Club intervenors"), moved to intervene on June 27, 2001.

1 The NRD sought intervention through a motion, filed by the FNAWS intervenors, to add the NRD as an intervenor.

On September 4, 2001, the district court granted the motions for intervention filed by both the FNAWS and Safari Club intervenors, but denied the motion filed by the NRD. The court did not explain its decision, other than to state that denial of intervention was based "[u]pon consideration of [the NRD's motion], the opposition thereto, and the entire record herein." NRD Order at 1 (J.A. at 386). The instant appeal followed.

II

Rule 24 of the Federal Rules of Civil Procedure provides for both permissive intervention and intervention as of right.

See Fed.R.Civ.P. 24(a) & (b). The NRD's motion relied on both theories, and its briefs on appeal cite both. Because we conclude that the NRD is entitled to intervene as of right, we need not address the issue of permissive intervention. *See Foster v. Gueory,* 655 F.2d 1319, 1323–24 (D.C.Cir.1981).

[1] Rule 24(a)(2) states in relevant part:

> Upon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a)(2). Parsing the language of the rule, we have held that qualification for intervention as of right depends on the following four factors:

> (1) the timeliness of the motion; (2) whether the applicant "claims an interest relating to the property or transaction which is the subject of the action"; (3) whether "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) whether "the applicant's interest is adequately represented by existing parties."

Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C.Cir.1998) (quoting Fed.R.Civ.P. 24(a)(2)) (citations omitted). We have further held that, in addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to ***732** ****272** intervene as of right must demonstrate that it has standing under Article III of the Constitution. *See Military Toxics Project v. EPA,* 146 F.3d 948, 953 (D.C.Cir.1998); *Mova Pharm.,* 140 F.3d at 1074; *Building & Constr. Trades Dep't v. Reich,* 40 F.3d 1275, 1282 (D.C.Cir.1994). As we have explained, "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties." *City of Cleveland v. NRC,* 17 F.3d 1515, 1517 (D.C.Cir.1994).

[2] **[3]** The denial of a motion for intervention as of right is an appealable final order "because it is conclusive with respect to the distinct interest asserted by the movant." *Smoke v. Norton,* 252 F.3d 468, 470 (D.C.Cir.2001); *see Alternative Research & Dev. Found. v. Veneman,* 262 F.3d 406, 409–10 (D.C.Cir.2001). We have been somewhat inconsistent, however, in describing the standard of review for such appeals.[2] As we have previously observed, that may be because we have not always distinguished between the different kinds of determinations necessary to establish the predicate for intervention. *See Massachusetts School of Law at Andover, Inc. v. United States,* 118 F.3d 776, 779 (D.C.Cir.1997). Notwithstanding that Rule 24(a) is entitled "Intervention of Right," the determinations necessary to establish that predicate are of three different kinds. Some are pure issues of law and hence are reviewed de novo. *See Massachusetts School of Law,* 118 F.3d at 779; *Mova Pharm.,* 140 F.3d at 1074. Others involve findings of fact and are reviewed for clear error. *Cf.* Fed.R.Civ.P. 52(a) (providing that "[f]indings of fact ... shall not be set aside unless clearly erroneous"). And some involve a measure of judicial discretion and hence are reviewed for abuse of that discretion. *See Massachusetts School of Law,* 118 F.3d at 779 (noting "the existence of district court discretion over the timeliness and adequacy of representation issues under Rule 24(a)(2)") (citing *Hodgson v. United Mine Workers,* 473 F.2d 118, 125 n. 26 (D.C.Cir.1972)); *Natural Res. Def. Council v. Costle,* 561 F.2d 904, 907, 913 (D.C.Cir.1977) (same).[3] Of course, where (as here) the district court has not accompanied its decision with either factual findings or explanation, there is nothing to which we can defer regardless of which standard of review applies. *See Cook v. Boorstin,* 763 F.2d 1462, 1468 (D.C.Cir.1985).

2 *Compare Smoke,* 252 F.3d at 470–71 (stating that the court reviews denials of intervention as of right for clear error), *and Foster,* 655 F.2d at 1324 (same), *with Mova Pharm.,* 140 F.3d at 1074 (explaining that "[t]o the extent that a district court's ruling on a motion to intervene as of right is based on questions of law, it is reviewed *de novo*; to the extent that it is based on questions of fact, it is ordinarily reviewed for abuse of discretion"), *and Building & Constr. Trades,* 40 F.3d at 1282 (stating that denials are reviewed under an abuse of discretion standard).

3 *Cf. Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990) (prescribing a unitary abuse of discretion standard for reviewing determinations made under Federal Rule of Civil Procedure 11, but noting that a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence").

Because a would-be intervenor's Article III standing presents a question going to this court's jurisdiction, *see Sierra Club v. EPA,* 292 F.3d 895, 898 (D.C.Cir.2002), we address it first, in Part III below. In Part IV, we consider the four factors set forth in Rule 24(a)(2).

III

[4] **[5]** To establish standing under Article III, a prospective intervenor — like ***733** ****273** any party — must show: (1) injury-in-fact, (2) causation, and (3) redressability. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136–37, 119 L.Ed.2d 351 (1992); *Sierra Club,* 292 F.3d at 898. The NRD argues that it meets these requirements because fees paid by sport hunters are the primary source of funding for its argali conservation program. If the Fund succeeds in barring American hunters from bringing their trophies home, some hunters will not travel to Mongolia to hunt the argali, and the revenues that support the conservation program will decline.

The NRD's argument is persuasive. The threatened loss of tourist dollars, and the consequent reduction in funding for Mongolia's conservation program, constitute a concrete and imminent injury. This injury is fairly traceable to the regulatory action — the placement of the argali on the endangered list and the cancellation of import permits — that the Fund seeks in the underlying lawsuit. And it is likely that a decision favorable to the NRD would prevent that loss from occurring.

In *Military Toxics Project v. EPA,* we considered a similar set of circumstances. There, the Chemical Manufacturers Association (CMA) sought to intervene on the side of the Environmental Protection Agency (EPA) in a lawsuit brought by the Military Toxics Project, a coalition of citizens' groups. 146 F.3d at 953. The Project sued to overturn an EPA rule that declared that most military munitions at firing ranges did not constitute "regulatory solid waste" for purposes of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.,* when used for their "intended purpose." *Military Toxics Project,* 146 F.3d at 952. We concluded that the CMA had standing to intervene because, inter alia, "some of its members produce[d] military munitions," those members "benefit[ed] from the EPA's 'intended use' interpretation," and they "would suffer concrete injury if the court grant[ed] the relief the petitioners [sought]." *Id.* at 954. The parallels to this case are clear: Mongolia's sheep are the subject of the disputed regulations, the country benefits from the FWS's current regulations, and Mongolia would suffer concrete injury if the court were to grant the relief the plaintiffs seek.

The Fund does not dispute the logic of the NRD's reasoning. Instead, it contends that the agency has failed to support its claims with evidence. Quoting our decision in *Sierra Club v. EPA,* the Fund insists that the NRD's standing cannot rest on "mere allegations, but must set forth by affidavit or other evidence specific facts." 292 F.3d at 899 (quotation marks omitted). The Fund contends that the NRD has offered neither affidavits nor other evidence sufficient to satisfy this requirement. 4

4 We note that the above quotations from *Sierra Club* refer to a party's obligations at the summary judgment stage, but not at "the pleading stage" where " 'general factual allegations of injury ... may suffice.' " *Sierra Club,* 292 F.3d at 898–99 (quoting *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. at 2137). In light of our disposition, we need not decide whether the NRD's motion to intervene is closer to a motion for summary judgment or to a pleading.

[6] *Sierra Club,* however, does not require parties to file evidentiary submissions in support of standing in every case. To the contrary, our decision made clear that "[i]n many if not most cases the petitioner's standing to seek review of administrative action is self-evident." *Id.* at 899–900. "In particular, if the complainant is 'an object of the action (or forgone action) at issue' — as is the case usually in ***734** ****274** review of a rulemaking and nearly always in review of an adjudication — there should be 'little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.' " *Id.* at 900 (quoting *Defenders of Wildlife,* 504 U.S. at 561–62, 112 S.Ct. at 2137). In this case, while the NRD is not itself the object of the challenged agency action, sheep that Mongolia regards

as its national property and natural resource plainly are its subject. And for the purpose of determining whether standing is self–evident, we see no meaningful distinction between a regulation that directly regulates a party and one that directly regulates the disposition of a party's property. [5]

5 In fact, in some respects Mongolia is itself "an object of the action ... at issue," *Sierra Club,* 292 F.3d at 900 (quotation marks omitted), because the Fund's complaint contends that the country's conservation program does not satisfy the statutory criteria for issuing import permits under the ESA. *See* Pls.' Second Am. Compl. ¶¶ 41–57.

[7] But even if we were to harbor any doubts about NRD's standing, they would be dissipated by evidence in the district court record. First, there are the Fund's own pleadings, which are admissible as evidence in support of its opponent's cause. *See First Bank of Marietta v. Hogge,* 161 F.3d 506, 510 (8th Cir.1998); *Dugan v. EMS Helicopters, Inc.,* 915 F.2d 1428, 1431–32 (10th Cir.1990). In aid of the Fund's attack on the FWS's import permit policy, but in complete accord with the NRD's standing contentions, the Fund's complaint declares:

> A U.S. hunter who cannot import his "trophy" from the country where it is killed is unlikely to spend the resources required to travel to that country to kill the animal. Accordingly, the number of argali that are killed by U.S. hunters is directly related to the number of import permits the [FWS] issues.

Pls.' Second Am. Compl. ¶ 38. This point is further supported by affidavits filed by another set of parties to the district court litigation — the Safari Club intervenors. Confirming both the NRD's logic and the Fund's pleadings, two hunters aver that they will likely cancel their previously scheduled hunting trips to Mongolia if they are unable to obtain import permits. Jacklin Decl. ¶¶ 2, 5 (J.A. at 306); Ward Decl. ¶¶ 2, 5 (J.A. at 308).

We therefore conclude that the NRD has established its Article III standing, and that lack of standing is not a ground for rejecting its motion to intervene as of right. [6]

6 The plaintiffs do not question the NRD's prudential standing, and rightly so. In *Bennett v. Spear,* the Supreme Court held that the broad language of the citizen-suit provision of the ESA — which extends to departments of foreign governments, *see* 16 U.S.C. §§ 1532(13), 1540(g)(1)(C), and on which the plaintiffs rely in the present case — "negates the zone-of-interests test" and expands standing "to the full extent permitted under Article III." 520 U.S. 154, 164, 165, 117 S.Ct. 1154, 1163, 137 L.Ed.2d 281 (1997). Even if that were not the case, the NRD's interests are "arguably within the zone of interests to be protected or regulated by the statute," *In re: Vitamins Antitrust Class Actions,* 215 F.3d 26, 29 (D.C.Cir.2000) (quotation marks omitted), because the ESA requires the Secretary of the Interior to take into account efforts "being made by any ... foreign nation, or any political subdivision of a ... foreign nation, to protect [threatened or endangered] species ... within any area under its jurisdiction," 16 U.S.C. § 1533(b)(1)(A).

IV

Turning to the four-factor test of Rule 24(a)(2), *see supra* Part II, we find the balance of our analysis not difficult at all.

***735** **[8]** ****275** First, the NRD's motion was timely. The NRD moved to intervene less than two months after the plaintiffs filed their complaint and before the defendants filed an answer. Indeed, the NRD's motion was filed three weeks before that of the Safari Club intervenors — whose motion the district court granted.

[9] The second factor is also readily dispatched. Our conclusion that the NRD has constitutional standing is alone sufficient to establish that the NRD has "an interest relating to the property or transaction which is the subject of the action," Fed.R.Civ.P. 24(a)(2). *See Mova Pharm.,* 140 F.3d at 1076. In any event, because the relevant "property" is Mongolia's sheep and the relevant "transaction" is the FWS's decision to permit the importation of those sheep from Mongolia, there can be no question that the NRD has the requisite interest. *See Foster,* 655 F.2d at 1324 ("An intervenor's interest is obvious when he asserts a claim to property that is the subject matter of the suit...."); *United States v. American Tel. & Tel. Co.,* 642 F.2d 1285, 1291–93 (D.C.Cir.1980) (holding that a prospective intervenor possessed the requisite interest in a

database that another company sought from the government, because the database had been prepared by the intervenor).

[10] Third, the NRD is "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect [its] interest." Fed.R.Civ.P. 24(a)(2). Prior to 1966, Rule 24(a)(2) required the applicant to show that it "may be bound by a judgment in the action." Fed.R.Civ.P. 24(a)(2) (1966); *see* Fed.R.Civ.P. 24(a)(2) advisory committee's note on 1966 amendment; *Nuesse v. Camp,* 385 F.2d 694, 701 (D.C.Cir.1967). But the 1966 amendments to Rule 24 eliminated that requirement and substituted the present language, which we have read "as looking to the 'practical consequences' of denying intervention, even where the possibility of future challenge to the regulation remain[s] available." *Natural Res. Def. Council,* 561 F.2d at 909 (quoting *Nuesse,* 385 F.2d at 702). Regardless of whether the NRD could reverse an unfavorable ruling by bringing a separate lawsuit, there is no question that the task of reestablishing the status quo if the Fund succeeds in this case will be difficult and burdensome. *See id.* at 910 ("[I]t is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation."). Moreover, as the NRD further argues, its loss of revenues during any interim period would be substantial and likely irreparable. *Cf. Mova Pharm.,* 140 F.3d at 1076 (holding that danger of loss of market share due to denial of a preliminary injunction satisfied the third Rule 24(a)(2) factor).

[11] **[12]** This leaves only the question of whether the NRD's interest is "adequately represented by existing parties." Fed.R.Civ.P. 24(a)(2). The Supreme Court has held that this "requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972). Citing *Trbovich,* we have described this requirement as "not onerous." *Dimond v. District of Columbia,* 792 F.2d 179, 192 (D.C.Cir.1986); *see also Foster,* 655 F.2d at 1325; *American Tel. & Tel. Co.,* 642 F.2d at 1293 (stating that a petitioner " 'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee' " (quoting ***736** ****276** 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 (1st ed.1972))). Measured by that standard, we conclude that neither of the two groups of existing parties in this case — the federal defendants and the other intervenors — adequately represents the NRD's interests. [7]

7 Our cases are inconsistent as to who bears the burden with respect to this factor. The language of some cases, particularly those that quote the above passage from *Trbovich,* suggest that the burden is on the aspiring intervenor. *See Foster,* 655 F.2d at 1325; *Dimond,* 792 F.2d at 192. Others declare that the burden is on the opponent of intervention, because Rule 24(a)(2) states that if its first three factors are satisfied, intervention "shall" be permitted "unless" the applicant's interest is already adequately represented. *See American Tel. & Tel. Co.,* 642 F.2d at 1293; *Smuck v. Hobson,* 408 F.2d 175, 181 (D.C.Cir.1969). In any event, *Trbovich* makes clear that the standard for measuring inadequacy of representation is low, and in this case it is satisfied regardless of who bears the burden.

The NRD's interests plainly are not adequately represented by the federal defendants. It is true, as the Fund notes, that both the FWS and the NRD agree that the FWS's current rules and practices are lawful. But the FWS's obligation is to represent the interests of the American people, as expressed in the ESA, while the NRD's concern is for Mongolia's people and natural resources. There may be some overlap, since the ESA requires the FWS — when determining whether a species is endangered or threatened — to "tak[e] into account those efforts, if any, being made by any ... foreign nation, or any political subdivision of a ... foreign nation, to protect such species ... within any area under its jurisdiction." 16 U.S.C. § 1533(b)(1)(A). But taking the NRD's efforts "into account" does not mean giving them the kind of primacy that the NRD would give them. [8] Nor must the FWS's appraisal of the NRD's efforts necessarily match the NRD's self-appraisal. It is, therefore, not hard to imagine how the interests of the NRD and those of the FWS might diverge during the course of litigation — when, for example, the FWS may be required to present its assessment of the quality of Mongolia's argali conservation program.

8 *See* 16 U.S.C. § 1533(b)(1)(A) (requiring that determinations of threatened or endangered status be made "solely on the basis of the best scientific and commercial data available" after taking into

account the conservation efforts of a foreign nation).

For just these reasons, we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.[9] For example, in holding that the District of Columbia did not adequately represent the interests of a private insurance company that wished to ***737** ****277** intervene to support the District against a challenge to its no–fault insurance law, we explained:

> A government entity such as the District of Columbia is charged by law with representing the public interest of its citizens. [The insurance company], on the other hand, is seeking to protect a more narrow and "parochial" financial interest not shared by the citizens of the District of Columbia. The District would be shirking its duty were it to advance this narrower interest at the expense of its representation of the general public interest.

Dimond, 792 F.2d at 192–93. Although it is true that the NRD is itself a governmental entity, it is not an agency of our government. Hence, examined from the perspective of the FWS's responsibilities, the NRD's interests are "more narrow and 'parochial' " — just as the FWS's interests may appear when viewed from the perspective of Mongolia.

Finally, we also reject the Fund's contention that the NRD's interest is adequately represented by the FNAWS and Safari Club intervenors — non-Mongolian organizations and individuals interested in sheep hunting and conservation. We could no more regard the NRD's interests as adequately represented by those intervenors than we could regard the FWS's interests as adequately represented by a Mongolian — or even an American — hunt club, however conservation–minded the club might be. Although there may be a partial congruence of interests, that does not guarantee the adequacy of representation. As we have recognized, "interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse,* 385 F.2d at 703. Moreover, even "a shared general agreement ... does not necessarily ensure agreement in all particular respects," *Natural Res. Def. Council,* 561 F.2d at 912, and "[t]he tactical similarity of the present legal contentions of the [parties] does not assure adequacy of representation or necessarily preclude the [intervenor] from the opportunity to appear in [its] own behalf," *Nuesse,* 385 F.2d at 703.

Nor does the fact that the NRD is represented by the same counsel as the FNAWS intervenors establish the adequacy of representation. Rule 24(a)(2) requires a showing that the existing parties, not their lawyers, will adequately represent the applicant. Sharing the same counsel does not guarantee that the clients' interests are congruent, and if there is a divergence, it is counsel and not the clients who must bend. We are satisfied that the NRD's interests in this litigation are not adequately represented as measured by the *Trbovich* standard, and we therefore find that the last of the Rule 24(a)(2) requirements for intervention has been met.

9 *See, e.g., Natural Res. Def. Council,* 561 F.2d at 912–13 (allowing rubber and chemical companies to intervene in support of EPA because their interest "is more narrow and focused than EPA's" and, "[g]iven the acknowledged impact that regulation can be expected to have upon their operations, appellants' participation in defense of EPA decisions that accord with their interest may also be likely to serve as a vigorous and helpful supplement to EPA's defense"); *Smuck,* 408 F.2d at 181 (holding that a school board did not adequately represent the interests of intervening parents because the "board represents all parents," while the intervenors "may have more parochial interests centering upon the education of their own children"). Similarly, in *Trbovich* the Supreme Court authorized intervention by a union member who sought to participate in a suit that the Secretary of Labor had instituted against the member's union, upon the member's own complaint. *See* 404 U.S. at 529, 92 S.Ct. at 631–32. The Court rejected the Secretary's claim that he adequately represented the petitioner, because "the Secretary has an obligation to protect the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Id.* at 539, 92 S.Ct. at 636 (quotation marks omitted).

V

Having concluded that the district court erred in denying the NRD intervention as of right, we could remand this case for reconsideration in light of the discussion set forth above. In the past, however, we have not hesitated to direct that intervention be allowed where we found denial to constitute error. [10] That disposition is appropriate where, as here, we cannot envision a contrary determination that would withstand further appeal. [11] Accordingly, ***738 **278** we remand this case to the district court with directions to grant the NRD's motion to intervene as of right.

10 *See Mova Pharm.,* 140 F.3d at 1076–77; *Dimond,* 792 F.2d at 194; *Foster,* 655 F.2d at 1325; *Natural Res. Def. Council,* 561 F.2d at 913; *see also Trbovich,* 404 U.S. at 539, 92 S.Ct. at 637 (remanding with directions to the district court to allow intervention).

11 In opposing *permissive* intervention in the district court, the Fund, quoting Federal Rule of Civil Procedure 24(b), expressed concern that the NRD would "unduly delay or prejudice the adjudication" by interjecting extraneous claims. At the oral argument of this appeal, however, the Fund agreed that the district court had shown itself able to prevent such delay or prejudice without denying intervention: in granting the motions of the FNAWS and Safari Club intervenors, the court limited their intervention to "the claims raised by the original parties" and barred them from raising "collateral issues." FNAWS Order at 1; Safari Club Order at 1. The same option is available to the district court with respect to the NRD. *See* Fed.R.Civ.P. 24(a) advisory committee's note on 1966 amendment ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.").

So ordered.

All Citations

322 F.3d 728, 55 ERC 2128, 355 U.S.App.D.C. 268, 55 Fed.R.Serv.3d 414

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TAB 12

647 F.3d 893
United States Court of Appeals, Ninth Circuit.

CITIZENS FOR BALANCED USE, Plaintiff–Appellee,
v.
MONTANA WILDERNESS ASSOCIATION; Greater Yellowstone Coalition; the Wilderness Society, Applicants–in–intervention–Appellants,
and
Mary Erickson, Gallatin National Forest Supervisor; United States Forest Service, Defendants.

No. 10–35823
|
Argued and Submitted June 7, 2011.
|
Filed July 26, 2011.

Synopsis

Background: Advocacy group brought action challenging interim order issued by United States Forest Service limiting snowmobile and other motorized and mechanized use in wilderness study area. The United States District Court for the District of Montana, Sam E. Haddon, J., denied conservation groups' motion to intervene on government's side, and they appealed.

[Holding:] The Court of Appeals, Gould, Circuit Judge, held that groups were entitled to intervene as of right.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (11)

[1] Federal Courts Parties and Process

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(C) Decisions Reviewable
170BXVII(C)2 Particular Decisions, Matters, or Questions as Reviewable
170Bk3297 Parties and Process
170Bk3298 In general
(Formerly 170Bk587)

Court of Appeals has jurisdiction over denial of motion to intervene as of right as final appealable order. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

7 Cases that cite this headnote

[2] Federal Courts Parties

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3585 Parties
170Bk3585(1) In general
(Formerly 170Bk817, 170Bk776)

Court of Appeals reviews denial of motion to intervene as of right de novo, with exception of timeliness prong, which is reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

5 Cases that cite this headnote

[3] Federal Courts Parties and Process

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(C) Decisions Reviewable
170BXVII(C)2 Particular Decisions, Matters, or Questions as Reviewable
170Bk3297 Parties and Process
170Bk3298 In general
(Formerly 170Bk555)

Court of Appeals has jurisdiction over denial of motion for permissive intervention only if it determines that district court abused its discretion. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.

7 Cases that cite this headnote

[4] Federal Civil Procedure Grounds and Factors

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak314.1 In general

Applicant seeking to intervene as of right must demonstrate that: (1) intervention application is timely; (2) applicant has significant protectable interest relating to property or transaction that is subject of action; (3) disposition of action may, as practical matter, impair or impede applicant's ability to protect its interest; and (4) existing parties may not adequately represent applicant's interest. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

175 Cases that cite this headnote

[5] **Federal Civil Procedure** Intervention

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak311 In general

While applicant seeking to intervene as of right has burden to show that requirements for intervention are met, requirements are broadly interpreted in favor of intervention. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

71 Cases that cite this headnote

[6] **Federal Civil Procedure** Interest of applicant in general

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak315 Interest of applicant in general

To demonstrate significant protectable interest, applicant for intervention as of right must establish that interest is protectable under some law and that there is relationship between legally protected interest and claims at issue. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

114 Cases that cite this headnote

[7] **Federal Civil Procedure** Inadequacy of representation of applicant's interest

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest

In ruling on motion to intervene as of right, burden of showing inadequacy of representation is minimal, and satisfied if applicant can demonstrate that representation of its interests may be inadequate. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

66 Cases that cite this headnote

[8] **Federal Civil Procedure** Inadequacy of representation of applicant's interest

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest

In evaluating adequacy of representation on motion to intervene as of right, court must examine three factors: (1) whether interest of present party is such that it will undoubtedly make all of proposed intervenor's arguments; (2) whether present party is capable and willing to make such arguments; and (3) whether proposed intervenor would offer any necessary elements to proceeding that other parties would neglect. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

91 Cases that cite this headnote

[9] **Federal Civil Procedure** Inadequacy of representation of applicant's interest

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest

If applicant for intervention as of right and existing party share same ultimate objective, presumption of adequacy of representation arises, and to rebut presumption, applicant must make compelling showing of inadequacy of

representation. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

58 Cases that cite this headnote

[10] **Federal Civil Procedure** Inadequacy of representation of applicant's interest

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)1 In General
170Ak314 Grounds and Factors
170Ak316 Inadequacy of representation of applicant's interest

On motion to intervene as of right, there is assumption of adequacy when government is acting on behalf of constituency that it represents, which must be rebutted with compelling showing. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

7 Cases that cite this headnote

[11] **Federal Civil Procedure** Environmental law

170A Federal Civil Procedure
170AII Parties
170AII(H) Intervention
170AII(H)2 Particular Intervenors
170Ak337.5 Environmental law
(Formerly 170Ak331)

United States Forest Service did not adequately represent interests of conservation groups in action challenging Service's interim order limiting snowmobile and other motorized and mechanized use in wilderness study area, and thus groups were entitled to intervene as of right in action, where Service acted under compulsion of district court decision gained by groups' previous litigation against it, Service was appealing decision that led them to adopt interim order, and groups sought to secure broadest possible restrictions on recreational uses in study area, but Service made clear its position that much narrower restrictions would suffice. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

2 Cases that cite this headnote

Attorneys and Law Firms

***894** Douglas L. Honnold, Timothy J. Preso, Sean M. Helle (argued), and Jenny K. Harbine, Earthjustice, Bozeman, MT, for applicants-in-intervention-appellants Montana Wilderness Association, Greater Yellowstone Coalition, and the Wilderness Society.

Catherine A. Laughner, Mary Christina Surr McCann, and Kyle W. Nelson (argued), Browning, Kaleczyc, Berry & Hoven, P.C., Bozeman, MT, for plaintiff-appellee Citizens for Balanced Use.

***895** Appeal from the United States District Court for the District of Montana, Sam E. Haddon, District Judge, Presiding. D.C. No. 2:10–cv–00017–SEH.

Before: RAYMOND C. FISHER, RONALD M. GOULD, and RICHARD A. PAEZ, Circuit Judges.

OPINION

GOULD, Circuit Judge:

Three conservation groups, Montana Wilderness Association, Greater Yellowstone Coalition, and The Wilderness Society (collectively, "Applicants") appeal from the denial of their motion to intervene on the side of the defendants in an action brought by Citizens for Balanced Use ("CBU") against Mary Erickson, in her official capacity as Supervisor of the Gallatin National Forest, and the United States Forest Service ("Forest Service"). In the underlying action, CBU challenged an interim order issued by the Forest Service in response to an adverse decision in prior litigation brought by Applicants. That interim order, which is the subject of this litigation, restricted motorized and mechanized vehicle use in a section of the Gallatin National Forest. CBU alleged that the challenged interim order violated the Montana Wilderness Study Act of 1977 ("MWSA") and the Administrative Procedure Act ("APA") because it unduly restricted the use or possession of snowmobiles, tracked ATVs, and other over-snow vehicles. Because we conclude that Applicants satisfied the four requirements for intervention as of right under Federal Rule of Civil Procedure 24(a), we reverse and remand with instructions that the district court allow Applicants to intervene and become parties to the ongoing litigation, and that the district court take reasonable steps to put Applicants

on equal footing with the original parties so as to ensure their opportunity for participation.

I

The Gallatin National Forest, in southwest Montana, contains within its boundaries the Hyalite–Porcupine–Buffalo Horn Wilderness Study Area ("Study Area"), made up of 155,000 acres of public lands established by the Montana Wilderness Study Act of 1977, Pub.L. No. 95–150, 91 Stat. 1243. The MWSA requires the Secretary of Agriculture to administer the Study Area so as to "maintain [its] presently existing wilderness character [as of 1977] and potential for inclusion in the National Wilderness Preservation System." MWSA § 3(a), 91 Stat. 1243.

In October 2006, after several years of environmental analysis, public review, and public comment, the Forest Service issued the Travel Management Plan ("Plan"), along with a Final Environmental Impact Statement, to manage travel and recreation within the Study Area. Three conservation groups—the same groups that are the applicants for intervention in this case, namely Montana Wilderness Association, Greater Yellowstone Coalition, and the Wilderness Society—filed an action in March 2007 to challenge the Plan under the APA on the theory that the Plan permitted increased motorized and mechanized activity in the Study Area in violation of the MWSA and the National Environmental Policy Act ("NEPA"). *See Mont. Wilderness Ass'n v. McAllister,* 658 F.Supp.2d 1249 (D.Mont.2009). CBU, [1] with several other recreational use advocacy groups, also ***896** filed suit against the Forest Service to challenge the Plan, but, unlike the conservation groups, it asserted that the Plan was overly restrictive of motorized and mechanized recreational activity in violation of the MWSA. The two separate challenges to the Plan were consolidated. In September 2009, the district court in the consolidated action granted summary judgement to the conservation plaintiffs (Applicants in this case) based on its conclusion that the Plan was arbitrary and capricious and violated the MWSA and NEPA; enjoined the continued implementation of the Plan; and remanded to the agency for further proceedings consistent with its ruling. *See id.* at 1256, 1266. The Forest Service appealed the district court's grant of summary judgment for the conservation plaintiffs (Applicants), and that appeal is currently pending before this court.

1 CBU, a membership organization based in Bozeman, Montana, seeks to preserve and enhance recreational access opportunities, including the use of snowmobiles, tracked ATVs, and other over-snow vehicles, on public lands such as the Study Area.

In November 2009, in response to the district court's ruling, the Forest Service announced an interim management strategy for the Study Area, made effective by an Interim Order, which further limited snowmobile and other motorized and mechanized use. [2] In April 2010, CBU initiated this action against the Forest Service to challenge the Interim Order. CBU claimed that the Interim Order violated the MWSA and the APA because it restricts motorized and mechanized vehicle use in areas that were open to such use in 1977. Ten days after the Forest Service filed its answer in CBU's new action, Applicants filed a motion to intervene as of right under Rule 24(a)(2), or, in the alternative to intervene in the court's discretion under Rule 24(b). CBU opposed the motion. The district court denied the motion. Applicants timely appealed the district court's denial of their motion seeking intervention as of right or permissive intervention.

2 A news release issued by the Gallatin National Forest explained: "The interim strategy constrains snowmobile use in the[Study Area] to the Big Sky Snowmobile Trail and an open area for cross country snowmobile travel ... near Golden Trout Lakes and west of Windy Pass."

II

[1] **[2]** We have jurisdiction over the denial of a motion to intervene as of right as a final appealable order under 28 U.S.C. § 1291. *Sw. Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 814 (9th Cir.2001). We review the denial of a motion to intervene as of right de novo, with the exception of the timeliness prong, which we review for abuse of discretion. [3] *Id.* at 817.

3 Here, the district court did not make any findings on timeliness or rest its decision to deny intervention on a failure of Applicants to satisfy that prong, and CBU does not contest that the motion to intervene was timely.

[3] We have jurisdiction over the denial of a motion for permissive intervention only if we determine that the district court abused its discretion. *League of United Latin Am. Citizens v. Wilson ("LULAC"),* 131 F.3d 1297, 1307–08 (9th Cir.1997); *see also Freedom From Religion Found., Inc. v. Geithner,* 644 F.3d 836, 843–44 (9th Cir.2011) (stating that we review the denial of a motion for permissive intervention for abuse of discretion). We need not reach the issue of permissive intervention if we determine that intervention as of right was improperly denied. *United States v. City of L.A.,* 288 F.3d 391, 398 (9th Cir.2002) ("We reverse as to intervention as of right, and we therefore do not consider whether the [applicant] was entitled to intervene permissively.").

III

[4] **[5]** Federal Rule of Civil Procedure 24(a)(2) states:

> ***897** On timely motion, the court must permit anyone to intervene who ... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

An applicant seeking to intervene as of right under Rule 24 must demonstrate that four requirements are met: "(1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Prete v. Bradbury,* 438 F.3d 949, 954 (9th Cir.2006) (internal quotation marks and citation omitted); *see also Berg,* 268 F.3d at 817. While an applicant seeking to intervene has the burden to show that these four elements are met, the requirements are broadly interpreted in favor of intervention. *Prete,* 438 F.3d at 954. "In addition to mandating broad construction, our review is guided primarily by practical considerations, not technical distinctions." *Berg,* 268 F.3d at 818 (internal quotation marks and citation omitted).

CBU concedes that Applicants meet the first three elements of the test for intervention as of right and urge that intervention was properly denied solely on the basis that Applicants did not show that the Forest Service may not adequately represent their interest. We agree with the parties that Applicants meet the first three requirements for intervention as of right. Those requirements, while not now disputed, merit brief discussion because they are part of the setting in which we examine the disputed issue.

With respect to the first requirement, Applicants filed their motion to intervene in a timely manner, less than three months after the complaint was filed and less than two weeks after the Forest Service filed its answer to the complaint. The motion to intervene was made at an early stage of the proceedings, the parties would not have suffered prejudice from the grant of intervention at that early stage, and intervention would not cause disruption or delay in the proceedings. These are traditional features of a timely motion. *See Nw. Forest Res. Council v. Glickman,* 82 F.3d 825, 836 (9th Cir.1996).

[6] Second, Applicants have a significant protectable interest in the action. "Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a 'practical, threshold inquiry,' and '[n]o specific legal or equitable interest need be established.' " *Id.* at 837 (quoting *Greene v. United States,* 996 F.2d 973, 976 (9th Cir.1993)). To demonstrate a significant protectable interest, an applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue. *Id.* As CBU concedes, Applicants have a significant protectable interest in conserving and enjoying the wilderness character of the Study Area, which rests on the provisions of the MWSA invoked in this case. *See, e.g., United States v. Carpenter,* 526 F.3d 1237, 1240 (9th Cir.2008) (explaining that a prior opinion made clear that wilderness conservation groups "were entitled to intervene because they had the requisite interest in seeing that the wilderness area be preserved for the use and enjoyment of their members"); *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 528 (9th Cir.1983) (holding that the National Audubon ***898** Society had the right to intervene in a suit challenging the actions of the Interior Secretary in connection with the development of a bird conservation area based on the Audubon Society's interest in the preservation of birds and their habitats). Applicants have satisfied the second

requirement for intervention as of right given their interest in preserving wilderness character within the Study Area.

Third, the disposition of this action may, as a practical matter, impair or impede Applicants' ability to protect their interest. "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene...." Fed.R.Civ.P. 24 advisory committee's note; *see also Berg,* 268 F.3d at 822 ("We follow the guidance of Rule 24 advisory committee notes...."). Under similar circumstances, "[h]aving found that appellants have a significant protectable interest, [this court had] little difficulty concluding that the disposition of th[e] case may, as a practical matter, affect it." *California ex rel. Lockyer v. United States,* 450 F.3d 436, 442 (9th Cir.2006). If CBU prevails in this case and succeeds in enjoining enforcement of the restrictions of the Interim Order that limit motorized and mechanized use in the Study Area, Applicants' interest in conserving and enjoying wilderness in the Study Area may, as a practical matter, be impaired.

[7] **[8]** **[9]** **[10]** This brings us to the parties' principal dispute on the question of whether Applicants meet the fourth and final requirement for intervention as of right: that the existing parties may not adequately represent the applicant's interest. The burden of showing inadequacy of representation is "minimal" and satisfied if the applicant can demonstrate that representation of its interests "may be" inadequate. *Arakaki v. Cayetano,* 324 F.3d 1078, 1086 (9th Cir.2003). In evaluating adequacy of representation, we examine three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Id.* The "most important factor" in assessing the adequacy of representation is "how the interest compares with the interests of existing parties." *Id.* If an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises. *LULAC,* 131 F.3d at 1305. To rebut the presumption, an applicant must make a "compelling showing" of inadequacy of representation. *Arakaki,* 324 F.3d at 1086. "There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents," which must be rebutted with a compelling showing. *Id.*

CBU's central contention is that intervention as of right was properly denied because Applicants did not make a sufficient showing that the Forest Service's representation may be inadequate. CBU argues that Applicants and the Forest Service share the same ultimate objective—that of upholding the validity of the Interim Order—and that this gives rise to a presumption of adequacy of representation. Applicants respond that there is no such alignment of objectives because the Forest Service implemented the Interim Order only to comply with the earlier district court decision, a decision that the Forest Service now seeks to overturn on appeal. Applicants further contend that the Forest Service will defend the Interim Order by asserting that the recreational use restrictions were required by the outcome ***899** of the prior litigation and not by the MWSA's mandate that the Forest Service "maintain" the Study Area's wilderness character.

[11] We agree with Applicants and reject CBU's contention that the Forest Service's and Applicants' ultimate objectives are identical where the Forest Service acted under compulsion of a district court decision gained by Applicants' previous litigation, and where the Forest Service is simultaneously appealing the decision that led them to adopt the now-challenged Interim Order. Applicants and the Forest Service have distinct interests and objectives in that Applicants wish to defend the Interim Order as containing the kind of restrictions that are statutorily mandated by the MWSA to protect wilderness character, while the Forest Service may assert only that the Interim Order was compelled by the prior district court decision, which the Forest Service is also seeking to overturn.[4] Applicants seek to secure the broadest possible restrictions on recreational uses in the Study Area to protect its interest in the wilderness character, while the Forest Service has made clear its position that, while the Interim Order does not violate the MWSA, much narrower restrictions would suffice to comply with its statutory mandate. This represents more than a mere difference in litigation strategy, which might not normally justify intervention, but rather demonstrates the fundamentally differing points of view between Applicants and the Forest Service on the litigation as a whole. *See California ex rel. Lockyer,* 450 F.3d at 444–45. As one of our sister circuits has persuasively explained, the government's representation of the public interest may not be "identical to the individual parochial interest" of a particular group just because "both entities occupy the same posture in the litigation." *WildEarth Guardians v. U.S. Forest Serv.,* 573 F.3d 992, 996 (10th Cir.2009) (quoting *Utah Ass'n of Cntys. v. Clinton,* 255 F.3d 1246, 1256 (10th Cir.2001)).

> 4 Indeed, if the Forest Service succeeds in reversing or vacating the prior district court ruling on its appeal, the Forest Service predictably may change its litigation position or even abandon the defense of the Interim Order and withdraw it.

Even assuming that the Forest Service and Applicants share the objective of defending the legality of the Interim Order, Applicants have made a "compelling showing" of inadequate representation as required to permit intervention where there is such a unity of objectives. Applicants assert that the Forest Service may not adequately represent their interest in conserving and enjoying wilderness character in the Study Area because (1) the Forest Service reluctantly adopted the restrictions on motorized use in the Interim Order—restrictions that are favorable to Applicants' interests—in response to successful litigation the Applicants themselves brought, and (2) the Forest Service now seeks to overturn on appeal the very court decision that forced it to adopt the Interim Order. This showing is compelling.

We have concluded that the "inadequacy of representation" prong was met in analogous factual circumstances on substantially weaker showings. In *County of Fresno v. Andrus,* 622 F.2d 436 (9th Cir.1980), for example, the district court denied a motion for intervention as of right filed by the organization National Land for People, Inc. ("NLP") in an action brought by the County of Fresno to enjoin the Secretary of the Department of the Interior from promulgating regulations governing excess land sales until an environmental impact statement was prepared. *Id.* at 437. NLP had previously brought an action and ***900** obtained a preliminary injunction to compel the Secretary to initiate rulemaking proceedings. *Id.* We held that the Department of the Interior did not adequately represent NLP's interest because the Department did not appeal the district court's grant of a preliminary injunction, as NLP would have done, and because there was "further reason to doubt that the Department will fully protect NLP's interest ... in light of the fact that the Department began its rulemaking only reluctantly after NLP brought a law suit against it." *Id.* at 439.

Similarly, in *Idaho Farm Bureau Federation v. Babbitt,* 58 F.3d 1392 (9th Cir.1995), we affirmed the district court's decision granting intervention as of right under Rule 24(a) to a conservation organization on the side of the United States Fish and Wildlife Service ("FWS") to defend a final rule listing a particular species of snail as an endangered species. *Id.* at 1395. We concluded that the FWS may have inadequately represented the interests of the conservation organization because:

> FWS delayed its decision on the listing proposal for years and took action only after [intervenor] filed suit to compel FWS to make a decision. FWS was unlikely to make strong arguments in support of its own actions considering that it proceeded to make a decision largely to fulfill the settlement agreement in the suit [intervenor] filed. Furthermore, FWS was unlikely to argue on behalf of [intervenor], the very organizations that compelled FWS to make a final decision by filing a lawsuit.

Id. at 1398.

Like the government defendants in each of these cases, the Forest Service issued the Interim Order at issue here only reluctantly in response to successful litigation by Applicants. In light of *County of Fresno* and *Babbitt,* this fact alone demonstrates that the Forest Service may not put forth as strong of an argument in defense of the Interim Order—particularly the argument that the order's restrictions are mandated by the MWSA and not just by the district court's order—because the Forest Service earlier opposed Applicants in their efforts to secure the restrictions. That the Forest Service has appealed the decision of the district court that compelled it to issue the Interim Order adds substantial weight to Applicants' position that the Forest Service may be unable or unwilling to pursue vigorously all available arguments in support of the Applicants' interest. Based on the relevant precedent and the peculiar circumstances of this case, there is sufficient reason to doubt the adequacy of the Forest Service's representation of Applicants' interest so as to warrant intervention as of right by Applicants. *See Trbovich v. United Mine Workers of Am.,* 404 U.S. 528, 538, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

We stress that intervention of right does not require an absolute certainty that a party's interests will be impaired or that existing parties will not adequately represent its interests. Rule 24(a) is invoked when the disposition of the action "may" practically impair a party's ability to protect their

interest in the subject matter of the litigation, "unless existing parties adequately represent that interest." Fed.R.Civ.P. 24(a)(2). Rule 24(a) has been interpreted to mean that a party whose interests are threatened may intervene in an action to protect those interests directly if the existing parties may not adequately protect their interests. *See Trbovich,* 404 U.S. at 538 n. 10, 92 S.Ct. 630 ("The requirement ... is satisfied if the applicant shows that representation of his interest 'may be' inadequate...."). Given the Forest Service's prior litigation position adverse to Applicants, the Forest Service's appeal of the district court ruling that enjoined the Travel Management Plan, and ***901** the fact that the Forest Service issued the Interim Order challenged here in response to that very same adverse ruling, we cannot conclude that the Forest Service will undoubtedly make all of Applicants' arguments, nor can we be assured that the Forest Service is capable of making and willing to make such arguments. Even if we applied a presumption of adequate representation, that presumption was persuasively rebutted by Applicants' presentation.

Applicants satisfied all four requirements for intervention as of right, and the denial of their motion was therefore in error. Because we reverse the district court's denial of intervention as of right, we need not reach the issue of whether the district court abused its discretion in denying permissive intervention. *See City of L.A.,* 288 F.3d at 398.

IV

Applicants showed, in a timely-filed motion, that they have a significant protectable interest in this action, that the disposition may impair their ability to protect that interest, and that the Forest Service may not adequately represent their interest. Applicants are entitled to intervene under Rule 24(a). We reverse and remand with instructions that Applicants be made parties to the litigation and that the district court promptly "take all reasonable steps to put the new parties on equal footing with the original parties." *California ex rel. Lockyer,* 450 F.3d at 445. Because the district court may soon rule on dispositive motions that could affect Applicants' interests, time is of the essence; the clerk is instructed to issue the mandate forthwith. *See id.*

REVERSED AND REMANDED.

All Citations

647 F.3d 893, 80 Fed.R.Serv.3d 30, 11 Cal. Daily Op. Serv. 9349, 2011 Daily Journal D.A.R. 11,223

End of Document

TAB 13

2009 WL 5206722
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. California.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, San Diego Chapter, Plaintiff,
v.
CALIFORNIA DEPARTMENT OF TRANSPORTATION; Randall Iwasaki; and Olivia Fonseca, Defendants,
and
Coalition for Economic Equity; and National Association for the Advancement of Colored People, San Diego Chapter, Defendant-Intervenors.

No. 09-01622.
|
Dec. 23, 2009.

Attorneys and Law Firms

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Benjamin Jacob Schnayerson, Mara Elizabeth Rosales, Rosales Law Partners LLP, G. Scott Emblidge, Rachel Josephine Sater, Moscone, Emblidge & Quadra, LLP, San Francisco, CA, Kathryn Theresa Papalia, State of California, Department of Transportation, Sacramento, CA, for Defendants.

Alan L. Schlosser, ACLU of Northern California, Michael I. Begert, Erin S. Conroy, Sujal Jayendra Shah, Bingham McCutchen LLP, Oren M. Sellstrom, Lawyers' Committee for Civil Rights, San Francisco, CA, Carlos Patricio Mino, Bingham McCutchen LLP, East Palo Alto, CA, Julia Snyder, Bingham McCutchen LLP, Los Angeles, CA, for Defendant-Intervenors.

ORDER GRANTING MOTION TO INTERVENE

JOHN A. MENDEZ, District Judge.

***1** This matter comes before the Court on a Motion to Intervene by the Coalition for Economic Equity ("CEE") and the National Association for the Advancement of Colored People, San Diego Chapter ("NAACP") (collectively "Intervenors"). Intervenors seek to intervene as defendants in a suit brought by the Associated General Contractors of America, San Diego Chapter ("AGCA") against the California Department of Transportation ("CA DOT"), CA DOT Director Randall Iwasaki and Deputy Director Olivia Fonseca. AGCA opposes the Motion to Intervene. CA DOT has not addressed the motion. [1]

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 78-230(h).

FACTUAL AND PROCEDURAL BACKGROUND

CA DOT, as a recipient of federal funds, complies with the federal requirements for maintaining a Disadvantaged Business Enterprises ("DBE") program for administering contracts. This program is administered pursuant to the federal requirements and is based on data from a 2007 minority contractor disparity study commissioned by CA DOT.

On June 11, 2009, AGCA filed the present lawsuit, alleging that the DBE program is unconstitutional pursuant to the Fourteenth Amendment of the United States Constitution, 42 U.S.C. §§ 1981, 1983, and 2000d, and Article 1, Section 31 of the California Constitution. AGCA seeks declaratory and injunctive relief. CA DOT filed its answer on July 7, 2009, and Intervenors filed the present Motion to Intervene on September 14, 2009. No other motions have been filed in the case, and trial is set for March 2011.

Intervenors are two organizations whose memberships include minority business owners who are among the intended beneficiaries of the DBE program. Intervenors advocate for equality on behalf of their members, and have been active in urging CA DOT to implement its current DBE program.

I. OPINION

A. *Legal Standard*

Parties may intervene in a lawsuit as a matter of right or by permission of the Court. The Ninth Circuit applies a four-part test in evaluating a motion for intervention as of right pursuant to Federal Rule of Civil Procedure 24(a): (1) the application for intervention must be timely;(2) the applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the action;(3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and(4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit. *Southwest Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 817 (9th Cir.2001). Each of these requirements must be met before an intervention of right can be allowed. *NAACP v. New York,* 413 U.S. 345, 369, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973).

The test is applied "liberally in favor of potential intervenors," and the Court's analysis "is 'guided primarily by practical considerations,' not technical distinctions." *Southwest Ctr. for Biological Diversity,* 268 F.3d at 818. The burden is on the party seeking intervention to demonstrate that each of the elements are satisfied before the court will provide the nonparty with a right to intervene. *League of United Latin American Citizens v. Wilson,* 131 F.3d 1297, 1302 (9th Cir.1997).

***2** A party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation. *California ex rel Lockyer v. U.S.,* 450 F.3d 435, 441 (9th Cir.2006). In evaluating a motion to intervene, the court must take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true, absent sham, frivolity or other objections. *Southwest Ctr. For Biological Diversity,* 268 F.3d at 820.

Compared with intervention as of right, a district court has broad discretion in deciding a motion for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). *San Jose Mercury News, Inc. v. U.S. Dis. Court, Northern Dis. (San Jose),* 187 F.3d 1096, 1100 (9th Cir.1999). A party may be allowed to intervene so long as: (1) "independent grounds for jurisdiction [exist]; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or ... fact in common." *Id.*

In determining whether a motion for intervention is timely, courts consider the following three factors: "(1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason for and any delay in moving to intervene." *Northwest Forest Resource Council v. Glickman,* 82 F.3d 825, 836 (9th Cir.1996).

B. *Intervention as of Right*

Intervenors seek leave of the Court to intervene as defendants in this case, arguing that they meet the requirements for intervention as of right as well as permissive intervention. No other motions have been filed in the case, and trial is set for March 2011. Accordingly, Intervenors motion is timely and does not burden or delay the case. Intervenors have a protectable interest in the lawsuit, as they represent the intended beneficiaries of the government program at issue. Their interests will be directly impacted by the outcome of this lawsuit. "By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues ..." *United States of America v. City of Los Angeles, California,* 288 F.3d 391, 398 (9th Cir.2002).

AGCA argues against intervention as a matter of right, claiming that CA DOT will sufficiently represent Intervenors' interests in the suit. Intervenors acknowledge that CA DOT can be expected to defend its program, but argue that this does not necessarily mean adequate representation for Intervenors' specific interests.

Intervenors need only meet the minimal burden of showing that representation may be inadequate. *Forest Conservation Council v. U.S. Forest Service,* 66 F.3d 1489, 1498 (9th Cir.1995). To determine adequacy of representation, courts consider whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; whether the present party is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect. *Id.* at 1498-99 (internal citations omitted). While a presumption of adequate representation arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee, this presumption arises only when the government is acting specifically on behalf of the constituency that it is representing. *United States of America v. City of Los Angeles, California,* 288 F.3d 391, 401-2 (9th Cir.2002).

***3** Here, as Intervenors point out, CA DOT's main interest is ensuring safe public roads and highways. CA DOT is not charged by law with advocating on behalf of minority business owners. Intervenors, on the other hand, have a personal stake in the program and in the outcome of this lawsuit, an interest that has at times pitted them against CA DOT. Intervenors have shown that representation may not be adequate for a variety of reasons, thus meeting their burden.

C. *Permissive Intervention*

AGCA also argues against permissive intervention, on the grounds that Intervenors will cause delay and inefficiency. However, these arguments are without merit. The motion to intervene was timely filed, and there is no basis for AGCA's allegation that Intervenors intend to use this case merely as a platform for presenting policy arguments and unfairly disrupting the Court's handling of AGCA's case.

Given the liberal standards for intervention, at a minimum Intervenors have met the standard for the Court to grant permissive intervention. Independent grounds for jurisdiction exist, the motion is timely, and Intervenors' motion as well as their proposed Answer, demonstrate the common questions of law and fact presented by Intervenors' defenses to AGCA's claims.

The Court further finds that Intervenors meet the requirements for intervention of right. Accordingly, the Court finds that Intervenors are entitled to intervention as a matter of right.

III. ORDER

For the reasons set forth above, the Intervenors' Motion to Intervene is hereby GRANTED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 5206722

TAB 14

2020 WL 8573863
Only the Westlaw citation is currently available.
United States District Court, W.D. Michigan, Southern Division.

DONALD J. TRUMP FOR PRESIDENT, INC., et al., Plaintiffs,
v.
Jocelyn BENSON, et al., Defendants.

Case No. 1:20-cv-1083
|
Signed 11/17/2020

Attorneys and Law Firms

Mark F. Hearne, II, True North Law LLC, St. Louis, MO, for Plaintiffs.

Erik Alexander Grill, Heather S. Meingast, MI Department of Attorney General (Civil/Emp/Elections), Lansing, MI, Janet L. Anderson-Davis, Wayne County Corporation Counsel, Detroit, MI, for Defendants.

MEMORANDUM OPINION AND ORDER

JANET T. NEFF, United States District Judge

***1** Pending before the Court are three unopposed motions to intervene filed by the Michigan State Conference NAACP, Wendell Anthony, Yvonne White, and Andre Wilkes (ECF No. 6); the Democratic National Committee and the Michigan Democratic Party (ECF No. 10); and the City of Detroit (ECF No. 14). The proposed intervenors received concurrence in their motions from counsel anticipated to make appearances for Defendants, but the proposed intervenors did not receive concurrences from Plaintiffs (ECF Nos. 8, 11 & 16). Plaintiffs have since filed a joint response, indicating that they also do not oppose the motions (ECF No. 19). For the following reasons, the Court grants the unopposed motions to intervene.

I

Eight Plaintiffs initiated this action on November 11, 2020. Plaintiff "Donald J. Trump for President, Inc." is the campaign committee for the reelection of President Donald J. Trump and Vice President Michael R. Pence (Compl. ¶ 6). The remaining seven Plaintiffs—Matthew and Alexandra Seely, Philip O'Halloran, Eric Ostergren, Marian Sheridan, Mercedes Wirsing, and Cameron Tarsa—are Michigan citizens and registered voters (*id.* ¶ 7). With the exception of Cameron Tarsa, the individual Plaintiffs voted in the November 3, 2020 presidential election and served as credentialed election challengers in that election (*id.*).

Plaintiffs filed this action in this Court against Jocelyn Benson, Michigan's Secretary of State; the Michigan Board of State Canvassers; Wayne County; and the Wayne County Board of County Canvassers. In their "Complaint for Declaratory, Emergency and Permanent Injunctive Relief," Plaintiffs allege the following three claims:

I. Secretary of State Benson and Wayne County violated the Equal Protection Clause of the United States Constitution and the corollary clause of Michigan's Constitution

II. Secretary of State Benson and Wayne County violated the rights of these Michigan voters under the federal Elections and Electors Clauses

III. Secretary of State Benson and Wayne County violated Michigan's Election Code

Plaintiffs seek the following relief:

A. An order directing Secretary Benson and the Michigan Board of State Canvassers to not certify the election results until they have verified and confirmed that all ballots that were tabulated and included in the final reported election results were cast in compliance with the provisions of the Michigan Election Code as set forth herein.

B. An order prohibiting the Wayne County board of county canvassers and the board of state canvassers from certifying any vote tally that includes:

(1) fraudulently or unlawfully cast ballots;

(2) ballots tabulated using the Dominion tabulating equipment or software without the accuracy of individual tabulators having first been determined;

(3) any ballots that were received after Election Day (November 3, 2020) where the postmark or date of receipt was altered to be an earlier date before Election Day; and

(4) any ballots that were verified or counted when challengers were excluded from the room or denied a meaningful opportunity to observe the handling of the ballot and poll book as provided in MCL 168.733.

***2** C. An order directing the Wayne County board of county canvassers to summon and open the ballot boxes and other election material, as provided in MCL 168.823, and, in the presence of challengers who can meaningfully monitor the process, to review the poll lists, absent voter ballot envelopes bearing the statement required by MCL 168.761, and other material provided in MCL 168.811.

D. An order directing that challengers be allowed to be physically present with a meaningful opportunity to observe when the accuracy of each piece of tabulating equipment is determined, and if the accuracy of each piece of tabulation equipment used by Wayne County is not confirmed to be accurate, an order directing a special election be held in the affected precincts as provided by MCL 168.831-168.839.

E. An order directing the board of county canvassers and the board of state canvassers, with challengers present and meaningfully able to observe, to obtain and review the video of unattended remote ballot drop boxes.

(ECF No. 1 at PageID.30-31).

Regarding the timing of their requested relief, Plaintiffs allege that consistent with MICH. COMP. LAWS § 168.822(1), the county board of canvassers shall conclude its canvass not later than November 17, 2020 (Compl. ¶ 71). Plaintiffs allege that consistent with MICH. COMP. LAWS § 168.842, the Michigan Board of State Canvassers will announce its determination of the canvass not later than December 3, 2020 (*id.* ¶ 72). Plaintiffs allege that the federal provisions governing the appointment of electors to the Electoral College, 3 U.S.C. § 1-18, "require Michigan Governor Whitmer to prepare a Certificate of Ascertainment by December 14, [2020,] the date the Electoral College meets" (*id.* ¶ 73). Last, Plaintiffs point out that the United States Code, 3 U.S.C. § 5, provides that if election results are contested in any state, and if the state, prior to election day, has enacted procedures to settle controversies or contests over electors and electoral votes, and if these procedures have been applied, and the results have been determined six days before the electors' meetings, then these results are considered to be conclusive and will apply in the counting of the electoral votes (*id.* ¶ 74). Plaintiffs represent that this date—the "Safe Harbor" deadline—falls on December 8, 2020 (*id.*). However, despite setting forth these looming deadlines and despite having characterized their pleading as one requiring "emergency" relief, Plaintiffs have, to date, neither served their Complaint on Defendants nor filed any motions for immediate injunctive relief.

On Saturday, November 14, 2020, the Michigan State Conference NAACP (NAACP–MI), Wendell Anthony, Yvonne White, and Andre Wilkes filed their Motion to Intervene (ECF No. 6). That same day, the Democratic National Committee (DNC) and the Michigan Democratic Party (MDP) filed their Motion to Intervene (ECF No. 10), attaching, in pertinent part, a proposed Pre-Motion Conference Request (ECF No. 10-1) and a proposed Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(1) and (6) (ECF No. 10-3). On Monday, November 16, 2020, the City of Detroit filed a Motion to Intervene (ECF No. 14), indicating that it also intends to move to dismiss Plaintiffs' Complaint if intervention is granted (*id.* at PageID.656). As noted, Plaintiffs have not opposed the motions to intervene.

II

***3** Intervention is governed by Federal Rule of Civil Procedure 24. Rule 24(a) provides in pertinent part that on timely motion, the court "must permit" anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a)(2). Under Rule 24(b), the court "may" permit anyone to intervene who files a timely motion and "has a claim or defense that shares with the main action a common question of law or fact," provided "the court ... consider[s] whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b).

There is no question that the proposed intervenors' motions, filed within a matter of only a few days after Plaintiffs initiated this case, are timely. Further, as set forth in their motions and which are unopposed by Plaintiffs, the proposed intervenors have substantial legal interests in the subject matter of this case. The Court determines that the distinct

interests of these proposed intervenors may be impaired absent intervention and that these interests may not be adequately represented by the parties already before the Court.

Even assuming arguendo that granting intervention as of right under Rule 24(a) is not appropriate, the Court, in its discretion, grants the proposed intervenors' motions under Rule 24(b). Granting permissive intervention to these movants will certainly not delay or prejudice the adjudication of the original parties' rights, particularly where Plaintiffs have yet to serve the named Defendants. Additionally, as set forth more fully in their respective motions to intervene, the proposed intervenors seek to assert defenses that squarely address the factual and legal premise of Plaintiffs' claims. In sum, the motions to intervene are properly granted. Further, the Court will issue a briefing schedule on the motion to dismiss proposed by the Democratic National Committee and the Michigan Democratic Party, without the usual in-chambers conference, and will require service of Plaintiffs' Complaint on Defendants.

Therefore:

IT IS HEREBY ORDERED that the Motions to Intervene (ECF Nos. 6, 10 & 14) are GRANTED, and the movants may file responsive pleadings, motions and briefs on the same schedule as Defendants.

IT IS FURTHER ORDERED that Plaintiffs shall serve a copy of the Complaint and summons upon Defendants not later than 5:00 p.m. on Tuesday, November 17, 2020, and timely file proof of service of the same. Failure to timely serve Plaintiffs may provide the Court justification to dismiss their "Complaint for Declaratory, Emergency and Permanent Injunctive Relief" for failure to diligently prosecute this case.

IT IS FURTHER ORDERED that the Clerk of the Court shall ACCEPT the proposed Motion to Dismiss of the Democratic National Committee and the Michigan Democratic Party (ECF No. 10-3) ("the Motion to Dismiss") for docketing.

IT IS FURTHER ORDERED that any concurrences in the Motion to Dismiss shall be filed not later than 12:00 noon on Wednesday, November 18, 2020.

IT IS FURTHER ORDERED that Plaintiffs' response to the Motion to Dismiss shall be filed not later than 5:00 p.m. on Thursday, November 19, 2020.

IT IS FURTHER ORDERED that replies, if any, to Plaintiffs' Response shall be filed not later than 5:00 p.m. on Friday, November 20, 2020.

IT IS FURTHER ORDERED that the parties shall adhere to this Court's Local Civil Rule 10.9 when referencing a page of the record. *See* W.D. Mich. LCivR 10.9.

IT IS FURTHER ORDERED that Intervenors-Defendants Democratic National Committee and Michigan Democratic Party shall provide chambers with one three-ring binder containing single-sided paper courtesy copies of the respective dispositive motion papers, including their Motion to Dismiss, any concurrences, the response, any replies, and any exhibits, after electronic filing (i.e., with the CM-ECF PageID header), and properly tabbed. The binder shall be submitted to the Clerk's Office.

***4 IT IS FURTHER ORDERED** that the time for Defendants to file their answers/responsive pleadings to the Complaint is extended until fourteen days after the Court's decision on the Motion to Dismiss, or further Order of the Court.

All Citations

Slip Copy, 2020 WL 8573863

End of Document

TAB 15

2020 WL 6580739
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

LIBERTARIAN PARTY OF PENNSYLVANIA; the Constitution Party of Pennsylvania; Green Party of Pennsylvania; Steve Scheetz; Kevin Gaughen; Alan Smith; Timothy Runkle; Bob Goodrich; and Justin Magill, Plaintiffs,

v.

Tom WOLF, in his official capacity of Governor of the Commonwealth of Pennsylvania; Kathy Boockvar, in her official capacity as Secretary of the Commonwealth of Pennsylvania; and Jonathan M. Marks, in his official Capacity as Deputy Secretary for Elections and Commissions, Defendants.

CIVIL ACTION NO. 20-2299
|
Filed 07/08/2020

Attorneys and Law Firms

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Daniel T. Brier, Donna A. Walsh, Richard L. Armezzani, Myers Brier & Kelly LLP, Scranton, PA, for Defendants.

ORDER

EDWARD G. SMITH, J.

***1 AND NOW**, this 8th day of July, 2020, after considering: (1) the complaint filed by the plaintiffs, Libertarian Party of Pennsylvania, The Constitution Party of Pennsylvania, Green Party of Pennsylvania, Steve Scheetz, Kevin Gaughen, Alan Smith, Timothy Runkle, Bob Goodrich, and Justin Magill (Doc. No. 1); (2) the first motion to intervene filed by the proposed intervenor, Pennsylvania Democratic Party ("PADEMS") (Doc. No. 12); (3) the response in opposition to the first motion to intervene filed by the plaintiffs (Doc. No. 13); (4) the supplemental brief in support of the motion to intervene filed by PADEMS (Doc. No. 18), (5) the response to the motion to intervene filed by the defendants, Tom Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth of Pennsylvania, and Jonathan M. Marks, in his official capacity as Deputy Secretary for Elections and Commissions (Doc. No. 19), and (6) the PADEMS' proposed answer to the complaint (Doc. No. 22), it is hereby **ORDERED** that the motion to intervene (Doc. No. 12) is **GRANTED**. [1]

1 The PADEMS move to intervene both as a matter of right, and as a matter of permissive intervention. *See* Br. in Supp. of Mot. to Intervene ("PADEMS' Br.") at 1–5, Doc. No. 12-1. The court first examines whether the PADEMS can satisfy the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure to intervene as a matter of right. Rule 24(a)(2) provides that a court must permit intervention on timely application by anyone: (1) who "claims an interest relating to the property or transaction that is the subject of the action," and (2) whose interest may be "impair[ed] or impede[d]" by disposition of the action, "unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). A prospective intervenor as a matter of right must establish:

> "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation."

In re Cmty. Bank of N. Va., 418 F.3d 277, 314 (3d Cir. 2005) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)).

In addressing the aforementioned elements, the court first examines the timeliness of the application for intervention based on the totality of the circumstances. *See United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir. 1994) (addressing timeliness of intervention application first). Factors to consider in making the timeliness determination include: "(1) the stage of the proceeding; (2) the prejudice that delay may cause

the parties; and (3) the reason for the delay." *In re Cmty. Bank of N. Va.*, 418 F.3d at 314 (citing *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995)).

Here, the plaintiffs argue that time is of the essence, and the fact that the PADEMS waited two weeks following their filing of the emergency action to seek a temporary restraining order/ preliminary injunction renders the request for intervention untimely. Pls.' Resp. in Opp. to Intervention ("Pls.' Opp.") at 6, Doc. No. 13. While the court agrees that resolving the emergency motion for a temporary restraining order and preliminary injunction is certainly time-sensitive and important, the court does not find that a delay of two weeks in filing for intervention is untimely given the state of flux that Pennsylvania is currently in when it comes to constantly evolving restrictions and circumstances in light of the COVID-19 pandemic. The fact that the defendants' counsel first entered appearances on the day the motion to intervene was filed and that no responses had been filed by the defendants at the time of the motion to intervene also supports finding that the request to intervene is timely.

The court next examines whether the PADEMS has the sort of "sufficient interest" that could justify intervention of right. A proposed intervenor's interest need not be a legal interest, provided that he or she "will be practically disadvantaged by the disposition of the action." *Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 951 (3d Cir. 2012) (citation and internal quotation marks omitted). "However, rather than merely showing some impact, the applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene." *Id.* (citation and internal quotation marks omitted).

In the instant case, the PADEMS argues that it "(1) has an interest in any matter where the courts will alter the requirements of the Pennsylvania Election Code; (2) has that interest threatened where the proposed alterations lessen the burdens for other political entities while keeping the burdens level for PADEMS." PADEMS' Br. at 4. While the PADEMS could certainty have an interest in various cases where the court alters the requirements of the Pennsylvania Election Code as it pertains to them, in the instant case, the court does not find that the PADEMS would necessarily be impacted by potential changes requested by the plaintiffs. This is because "[t]he last day for Political Party candidates – *i.e.*, Republicans and Democrats – to circulate and file nomination petitions to qualify for the primary election ballot was February 18, 2020. Mem. in Supp. of Pls.' Emergency Mot. for TRO and Prelim. Inj. ("Mem. in Supp. of Pls.' Emergency Mot.") at 7–8, Doc. No. 3. Therefore, such candidates were not impacted by Governor Wolf's various executive orders imposing emergency measures to contain the COVID-19 outbreak, and the Republican and Democratic nominees selected by means of Pennsylvania's recently held primary election are automatically qualified to appear on the 2020 general election ballot. In contrast, political bodies such as the named plaintiffs in this case were not allowed to collect signatures until February 19, 2020. The PADEMS' argument that the interest they have is threatened where the proposed alterations lessen the burdens for other political entities while keeping the burdens level for the PADEMS ignores the impact of the current COVID-19 pandemic on the ability to collect in-person signatures only affects political bodies that have not yet qualified their candidates for the November ballot, and did not impact the PADEMS' ability to do so prior to the pandemic.

Additionally, in its supplemental brief in support of its motion for intervention, the PADEMS asserts that "[t]he Pennsylvania Democratic Party has an interest in protecting its candidates to compete in free and fair elections." Suppl. Br. in Supp. of Mot. to Intervene ("PADEMS' Suppl. Br.") at 9, Doc. No. 18. The PADEMS relies on the case of *Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983), to argue that political associations have standing to protect the interests of their candidates, including challenges to general election balloting procedures. *Id.* at 10. While the district court granted the motion for intervention in *Orloski*, the changes to the general election balloting procedures directly impacted the interests of the PADEMS, as the statute at issue provided that when there were three vacancies for judges, a political party could only nominate two candidates. 564 F. Supp. at 529. This directly impacted PADEMS' interests in endorsing

and supporting candidates for each and every statewide judicial office in the Commonwealth. In contrast, any changes to the election code in the instant case would only impact requirements pertaining to political bodies, and not political parties such as the PADEMS. While PADEMS argues that it has an interest in protecting its own voters and members, the court fails to see how these interests come into play directly. While the PADEMS are worried about their candidates losing votes to minor party candidates, the court does not find that this is a sufficient interest that justifies intervention as a matter of right.

Lastly, the court agrees with the plaintiffs' arguments that there is no right to keep competitors off the ballot. Rather, "the public interest clearly favors the protection of constitutional rights, including the voting and associational rights of alternative political parties, their candidates and their potential supporters." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3rd Cir. 1997). With regard to the third prong of the Rule 24(a)(2) analysis, no interest of the PADEMS can be impaired by the disposition of this action, as they have already successfully qualified their candidates.

As for the final prong, *i.e.* whether the other parties already in the litigation can represent the PADEMS' interest, the burden of showing inadequacy of representation is satisfied by demonstrating that "(1) the interest of the applicant so diverges from those of the representative party that the representative party cannot devote proper attention to the applicant's interest; (2) there is collusion between the existing parties; or (3) the representative party is not diligently prosecuting the suit." *Alcan Aluminum*, 25 F.3d at 1185 n.15. Here, while the PADEMS argues that the existing defendants cannot adequately represent their interests, the court finds that the already existing defendants can in fact adequately represent, and are in the best position to represent, any interest in the holding of a free and fair election, and in preserving election integrity and the competitive environment in which its nominees seek election. Therefore, because the PADEMS have failed to carry their burden, the court must deny the motion to intervene as a matter of right. The court also notes that other courts throughout the country have denied intervention by political parties as a matter of right when it comes to challenges pertaining to various election codes in wake of the COVID-19 pandemic. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) ("Because neither the RNC/RPW nor the Wisconsin Legislature has demonstrated any 'concrete conflict,' they have not overcome the presumption of adequate representation, and therefore have failed to demonstrate that they are entitled to intervene as of right under Rule 24(a)."), *modified on recons.*, No. 20-cv-249-wmc, 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020); *see also League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-24, 2020 WL 2090678, at *2 (W.D. Va. Apr. 30, 2020) (allowing the Republican Party of Virginia to intervene, but as matter of permissive intervention, not as matter of intervention as of right). The court therefore turns to the question of whether the court should grant permissive intervention.

Rule 24(b)(1)(B) permits permissive intervention on timely motion by anyone who has "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Intervention is within the court's discretion and the court considers "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). Here, the court has already found that the PADEMS timely sought intervention in this matter. The court also finds there can be little doubt that the PADEMS' claims pertaining to the complaint share a common factual and legal basis with the action. Specifically, the PADEMS' claims directly relate to the same code sections and nomination processes under which the plaintiffs seek relief. The PADEMS' argument that the requested relief by the plaintiffs, which could give any minor party candidate an automatic name on the ballot, has the effect of diluting Democratic votes directly addresses the complaint and the plaintiffs' requested relief. *See League of Women Voters*, 2020 WL 2090678 at *3–4 ("Second, there can be little doubt that the RPV's proposed answer to Plaintiffs' complaint shares a common factual and legal basis with the main action. The RPV introduces no unrelated, additional claims into this

suit, and its argument that enjoining the witness signature requirement will dilute the votes of its members is a direct counter to the main thrust of Plaintiffs' complaint."). The court further finds that allowing the PADEMS to intervene could aid the court when it comes to adding "adversarial testing" to the parties' dispute. *See id.* at *5 ("[T]he RPV's inclusion in this action would ensure helpful adversarial testing to the parties' proposed partial consent decree, which would be beneficial to the Court and the overall adjudication of this action."); *see also Kitzmiller v. Dover Area Sch. Dist.*, 388 F. Supp. 2d 484, 486 (M.D. Pa. 2005) (holding that in granting permissive intervention, "courts consider whether the proposed intervenors will add anything to the litigation" (citations omitted)).

The court also does not find that intervention would unduly delay or prejudice the adjudication of the rights of the original parties. While the court acknowledges that time is of the essence in this case as the August signature deadline for political body candidates is approaching, and the court does not wish to overcomplicate the proceedings or any resolution that may be reached, the court finds that because the PADEMS offer no counter or crossclaims and appear willing to abide by the court's deadlines and participate in the court's scheduling conferences, involvement by the PADEMS will not impact the court's ability to quickly resolve the parties' dispute with respect to the November general election. Therefore, the requirements of Rule 24(b) are satisfied, and the court in its discretion permits the PADEMS to intervene.

All Citations

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