Case No. 20-35734

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, TERESA HARSCH,
Plaintiffs-Appellants,

v.

COREY STAPLETON, in his official capacity as Montana Secretary of State,
Defendant-Appellee,

and

MONTANA DEMOCRATIC PARTY, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED,
Intervenor-Defendants.

On Appeal From An Order Denying A Preliminary Injunction Motion
District of Montana, Helena Division
The Honorable Dana Christensen, Presiding
Case No. CV-20-62-H-DLC

MOTION FOR INTERVENTION OR FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

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MOTION FOR INTERVENTION

Pursuant to Federal Rule of Civil Procedure 24(a) and (b), Applicants the Montana Green Party (MTGP) and the Howie Hawkins 2020 presidential campaign (the Hawkins Campaign; both together, the Green Party), respectfully move the Court to grant their intervention as a matter of right; or, in the alternative, to allow permissive intervention. The Green Party seeks intervention in support of Plaintiffs and Appellants, Royal Davis, et al. (Davis). The Motion for Intervention is limited to one substantive issue and one jurisdictional issue raised on appeal before the Court:

1. Whether striking MTGP from the 2020 Montana general election ballot violates the U.S. Constitutional rights of those 5,000 Montana voters who signed MTGP petitions.

2. Whether striking MTGP from the 2020 Montana general election ballot violates the U.S. Constitutional rights of those Montana voters who cast votes for MTGP candidates in the 2020 primary election.

3. Whether the Democratic Party of Montana is guilty of laches or estoppel in the extended period of time it waited to "spring their trap" in this case after the 2020 primary election had already occurred and Montana MTGP voters had no chance to vote for a different party and for a different candidate.

Undersigned counsel for the Green Party contacted counsel for the other parties with regard to this motion. Davis, et al., do NOT object. Defendant-Appellee Corey Stapleton does NOT object. Intervenor-Defendants, Montana Democratic Party, Ryan Filz, Madeline Neumeyer, and Rebecca Weed (Montana Democrats) DO object.

INTEREST OF APPLICANTS

The Montana Green Party is a state affiliate of the Green Party of the United States. MTGP consists of a progressive political organization, dedicated to grassroots democracy, social justice, decentralization, respect for diversity, and environmental and economic sustainability. "Our overall goal is not merely to survive, but to share lives that are truly worth living. We believe the quality of our individual lives is enriched by the quality of all of our lives. We encourage everyone to see the dignity and intrinsic worth in all of life, and to take the time to understand and appreciate themselves, their community and the magnificent beauty of this world."

MTGP is currently pursuing a pending and related appeal in *Montana Green Party, et al., v. Stapleton*, Cause No. 20-35340, United States Court of Appeals for the Ninth Circuit, in which the issues

include (a) whether Montana's ballot access law for recognition of new political parties is a severe burden upon the Constitutional rights of MTGP because of the combined effect of the 5,000 petition signature requirement, early deadline, and petition distribution requirement in at least 34 State House districts; and (b) whether the requirement of five percent of the statewide winning candidate for governor vote in at least 34 of the State House districts is unconstitutional because it violates equal protection and because it discriminates against voters in different State House districts and the principle of one person, one vote. (*See id.*, Appellant's Opening Br., pp. 1–2.)

MTGP is disappointed at the Montana Supreme Court decision to yet again remove it from the Montana ballot as a voting option in what is starting to become a trend to prevent green activism. (*See* MTGP Facebook posted dated August 17, 2020.)[1] Many thousands of registered voters signed petitions to include the party on the ballot both in 2018 and 2020—both times would have ensured statewide green ballot access for two election cycles. MTGP is in contact with Davis and Appellant Gary Marbut for Senate District 47 (Marbut) and the Howie

[1] https://www.facebook.com/MontanaGreenParty

Hawkins 2020 presidential campaign. At the next Virtual State Meeting MTGP will propose the following endorsements: Howie Hawkins and Angela Walker for President and Vice President of the United States. Roy Davis for Montana Attorney General. Gary Marbut for Montana Senate District 47. (*Id.*)

MTGP has submitted the names of three presidential elector candidates to the Montana Secretary of State. Howie Hawkins should therefore be included on the Montana ballot in November 2020. The Hawkins Campaign seeks to be included in the Montana election. The Hawkins Campaign, moreover, opposes Democratic Party efforts seeking to block Green Party opposition from the ballot this year in Wisconsin, Pennsylvania, and Montana. One purpose of the Hawkins presidential campaigns is to secure ballot lines, so the party can more readily run local, state, and federal candidates in the next election cycle. As the Campaign argues on its website:

> "The myth that the United States is a beacon of democracy is taught in American schools and reinforced by mainstream media. The reality is far different. The United States is one of only three democracies that do not use proportional representation, where legislative seats are allocated based on percentage of votes. Unlike other countries, campaigns are financed by the legalized bribery of private campaign funding by wealth special interests". . ."Porous campaign finance laws

> allow undisclosed dark money into election finances and Supreme Court rulings have said that electoral spending by the wealthy and special interests is a form of protected free speech. Then the two parties write ballot access laws that are far more onerous than other democracies to prevent challenges by third parties, independents, and insurgent candidates," . . . .
>
> "Party suppression is a form of voter suppression. Rather than seeking to limit voters' choices on election day to the candidates of the two corporate-financed parties, the Democrats need to join the Greens in fighting Republican efforts to prevent average Americans from voting. Trump's open assault on the US Post Office to make it harder to vote by mail is especially outrageous," . . . .[2]

ARGUMENT

1. MTGP and the Hawkins Campaign meet the criteria for intervention as a matter of right.

A. Intervention is governed by F.R.Civ.P. 24.

Intervention is governed by Federal Rule of Civil Procedure Rule 24(a)(2), which provides 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.

[2] https://howiehawkins.us/release-democrats-efforts-to-deny-ballot-lines-to-green-party-is-voter-suppression/

Under Rule 24(a), an applicant must establish that: (1) its motion is timely; (2) it has a cognizable interest in the litigation; (3) without intervention an adverse ruling may impair or impede the ability to protect that interest; and (4) its interest is not being adequately represented by the existing parties. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983). "Rule 24(a) traditionally receives liberal construction in favor of applicants for intervention." *Arakaki v. Cayetana*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). Moreover, in evaluating whether Rule 24(a)'s requirements are met, courts "are guided primarily by practical and equitable considerations." *Donnelly*, 159 F.3d at 409. In this respect, this Court frequently notes that:

> 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.

United States v. City of L.A., 288 F.3d 391, 397 (9th Cir. 2003) (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496

n.8 (9th Cir. 1995) (internal quotations omitted). The Green Party satisfies the criteria for intervention as of right.

B. The Green Party's motion is timely.

Whether a motion to intervene is timely must be determined based on the totality of the circumstances. *NAACP v. New York*, 413 U.S. 345, 366 (1973). "Timeliness is measured by reference to '(1) the stage of the proceedings at which applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the length of the delay.'" *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) (quoting *Cnty. of Orange v. Air Cal.*, 799 F.2d 535, 537 (9th Cir. 1986)). This appeal was filed last Thursday. (Docs. 1, 3.) While it involves emergency proceedings, an emergency briefing schedule was established only last week. (Doc. 8.) The briefing of the emergency relief will not be complete until next month. (*Id.*) There is time for the Court to consider the Green Party's issues and arguments without prejudice to any party. There has been no delay in the Green Party's effort to intervene.

C. The Green Party has a cognizable interest at stake.

Under Rule 24(a)(2), applicants for intervention must show that they have an interest "relating to the property of the transaction which is the subject of the action" and that this interest is "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). "Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established." *Green v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (citing *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir. 1989)). Instead, the interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)).

In order to establish a protectable interest sufficient to intervene as of right, applicants must establish: "(1) that the interest asserted is protectable under some law, and (2) that there is some relationship between the legally protected interest and the claims at issue." *Forest Conservation Council v. U.S. Forest Serv.,* 66 F.3d 1489, 1494 (9th Cir. 1995). The relationship requirement is met "if the resolution of the

plaintiffs' claims actually will affect the applicant." *Donnelly*, 159 F.3d at 409.

MTGP has a cognizable interest in seeing its officially endorsed candidates, Davis, Marbut and Hawkins on the Montana 2020 general election ballot. It is worth noting that the Montana Democratic Party, upon whose behest the Montana state courts struck MTGP candidates from the Montana ballot, did not file their action until after the primaries had already been held. MTGP has an interest in defending the votes and voting rights of those Montana voters who voted the Green Party ballot in the primaries. The Montana Democratic Party and the other plaintiffs who succeeded in persuading the Montana courts to strike MTGP candidates from general election ballot should be estopped from the untimely relief they sought in the state courts. MTGP and the Hawkins Campaign have an interests in seeing to it that their voters' primary votes are honored.

The interests asserted are plainly protectable under law. "All election laws necessarily implicate the First and Fourteenth Amendments." *Gonsalves v. New York State Bd. of Elections*, 974 F. Supp. 2d 191, 197 (E.D.N.Y. 2013) (internal quotation marks and

citation omitted). In this case, the challenged state court rulings have barred successful primary candidates from the general election. The rulings, therefore, "govern[ ] the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, ..." *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (internal quotation marks omitted)). Thus, the state action at issue "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Id.* The Green Party can clearly establish a cognizable interest because, without relief from the Court, neither the local MTGP candidates nor Hawkins will appear on the general election ballot, and MTGP and other Montana voters will be deprived of the right to cast a vote for an otherwise qualified candidate and the political views expressed by that candidate.

Finally, resolution of the Plaintiffs' appeal in this case will affect MTGP, the Hawkins Campaign, and their voters. Without an affirmative ruling, none of them will get to participate in the 2020 general election. *See Green*, 996 F.2d at 976 (demonstration of sufficient interest is a practical inquiry, and no specific legal or

equitable interest need be established); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819-20 (9th Cir. 2001). *See also* 7C WRIGHT, MILLER & KANE at § 1908 n. 42 ("In cases challenging various statutory schemes as constitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention."). Thus, the Green Party has a "cognizable interest" at issue in this appeal.

D. An adverse ruling may impair the Green Party.

The Montana Democratic Party has successfully persuaded the Montana state courts to eliminate the Green Party from the last two national elections. The Democratic Party's purpose, which has included compelling evidence of bullying Green Party petition signers into recanting their petitions, is to eliminate electoral competition for national offices and tip the balance of power in Congress in their favor. In its efforts to disenfranchise Green Party voters, the Montana Democratic Party has demonstrated that partisan politics is more important to it than are democratic principles. So be it. But these efforts have deprived voters of their constitutional rights because

Montana state courts have been unwilling to resist the Democrat Party efforts. The Montana courts have treated MTGP voters as rubes with no other meaning to their existence or rights than as pawns for sacrifice in the competition between the two major parties.

Federal courts should not be so misled. Their function is to vindicate the U.S. Constitutional rights of oppressed minorities when state courts refuse to act. An adverse ruling here would therefore continue to impair MTGP candidates from standing for office and deprive their voters of the choice of those candidates. G*reen*, 996 F.2d at 976; *Sw. Ctr. for Biological Diversity*, 268 F.3d at 819-20. *See* Cognizable Interest discussion, *supra*.

E. Existing parties do not adequately protect the Green Party's interests.

In assessing the adequacy of representation, a court considers three factors: (1) whether the interests of an existing party are such that it will undoubtedly make all of the intervenor's arguments; (2) whether the present party is able and willing to make such arguments; and (3) whether the intervenor would offer any necessary element to the proceedings that the other parties might neglect. *Sw. Ctr. For Biological Diversity*, 268 F.3d at 822. The burden of showing that

existing parties may not adequately represent a party's interests "is not a strenuous test," *League of Wilderness Defenders v. Forsgren*, 184 F. Supp. 2d 1058, 1061 (D. Or. 2002), and only a minimal showing is required. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). Any doubt regarding the adequacy of representation should be resolved in favor of the applicant. *See* 6 MOORE'S FEDERAL PRACTICE § 24.03[4][a][i] at 24-47 (3d ed. 1997) (citing *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993)).

The existing plaintiffs will undoubtedly make "some" of the Green Party's arguments. But not all of them. For example, the interests and position of Green Party national presidential candidate Hawkins, while complimentary, nevertheless differ from the interests and position of the two plaintiff candidates, Davis (seeking statewide office) and Marbut (seeking a house seat). The existing parties likely do not even have standing to argue on behalf of Hawkins or to seek to reinstate him on the 2020 ballot as a presidential candidate. The state and local candidates have little incentive or need to expend scarce resources

arguing the national scope of the Hawkins position. Without his participation, this aspect of the litigation will likely be neglected.

MTGP also has distinct interests as evidenced by the fact that it filed its own case arising from being excluded from the Montana ballot in 2018, and has its own claims and own injuries in this case. The Green Party has no control over how the existing plaintiffs argue their case on appeal. Not only does the Green Party have its own distinct interests and positions that are not raised by any other party, but they also have no way to ensure the arguments they would advance would in fact be made.

In short, MTGP and the Hawkins Campaign satisfy the criteria for intervention as of right at least as well as the other, successful intervenors in this action—the Democratic Party and its voters—who have no direct stake in the outcome. If those with no more than an indirect interest in the results of this action are properly intervened, then MTGP, which does have a direct stake in whether its candidates get on the ballot, and the Hawkins Campaign, which likewise has a direct interest in seeing Hawkins reinstated to the ballot, certainly ought to be added.

2. MTGP and the Hawkins Campaign meet the requirements for permissive intervention.

In the event this Court finds that the Green Party has not established the requirements for intervention as of right, MTGP and the Hawkins Campaign respectfully request that the Court allow permissive intervention. "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b). "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties." *Id.*; *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1972); 7C WRIGHT, MILLER & KANE, § 1913, at 379.

The Green Party seeks to intervene in this case for the purpose of addressing the one identical claim against identical defendants and the District Court's subject matter jurisdiction all at once, thus ensuring that the District Court and this Court do not have to address the same issues twice in successive cases. Under these circumstances, Rule 24(b)'s common question requirement is met. See *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002) (although

permissive intervention should be denied if the applicant raises no questions in common with those in the main action, "if there is a common question of law and fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention.").

The second half of the permissive intervention test looks to timeliness and prejudice to the parties. As stated above, the Green Party's motion is timely, there is no prejudice, and MTGP and the Hawkins Campaign bring perspectives to the litigation distinct from that of the other parties on the common questions of law and fact.

3. The Court should allow the Green Party to submit an Amicus Curiae brief.

As explained above, MTGP and the Hawkins Campaign have significant interests in the outcome of this case. They also have considerable experience in bringing such arguments to bear in this and other federal courts. They should be allowed to offer a brief to include their perspectives and legal analysis in this case.

CONCLUSION

Accordingly, the Court should allow intervention by the Montana Green Party and Howie Hawkins 2020 presidential campaign. In the

alternative, the Court should allow the Green Party to file an Amicus Curiae brief on the three issues identified herein.

DATED this 27th day of August 2020.

Respectfully submitted,
Rhoades, Siefert & Erickson, PLLC

By /s/ *Quentin M. Rhoades*
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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing MOTION FOR INTERVENTION complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(a)(A) because it contains 3253 words and the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(a)(E) because this brief has been prepared in a proportionally spaced typeface using 14-point Century typeface.

By /s/ *Quentin M. Rhoades*
Quentin M. Rhoades

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2020, the forgoing MOTION FOR INTERVENTION was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Quentin M. Rhoades*
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