United States Court Of Appeals For The Eighth Circuit

No. 20-2244

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

Plaintiffs - Appellants

v.

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

Defendant – Appellee

APPELLANTS' REPLY BRIEF

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October 13, 2020

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Introduction

A short reply to the Appellee Minnesota Secretary of State's brief is necessary. Contrary to the Secretary's argument and the district court's decision, the oath requirement violates free speech, associational and equal protection rights. The oath's requirement that a person does "not intend to vote at the primary election for the office for which this nominating petition is made…" fails to give notice to an elector that she may *vote again* in a major political party primary and not be prosecuted for perjury—as the Secretary has admitted. In fact, the Secretary has all but admitted the oath is legally meaningless. To the government's end of requiring petitions for minor political party candidates, the oath's threat of criminal sanctions based on intent is an unnecessary burden on petitioners. Because the intent portion of the oath is unnecessary to accomplish the government's end, the oath is unconstitutional. The intent portion of the oath is not narrowly tailored to meet a compelling state interest.

Argument

I. The intent provision of the oath under § 204B.07, subdivision 4, is unconstitutional.

It is well-established that the loss of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). The Libertarian Party's Amended Complaint is replete with examples of how the oath,

Minnesota Statutes § 204B.07, subdivision 7, deprives it of First and Fourteenth Amendment protected rights.[1]

The Secretary claims the "core idea of this portion of the oath—intent—is vague ("at best") is absurd."[2] The usage of the word "absurd" by the Secretary is unfortunate as the record declarations suggest otherwise. To the contrary, the record declarations show a public which is confused by the intent portion of the oath. Meanwhile, the Secretary asserts, without evidence, that "[i]ntent is a foundational concept in American law that is well and broadly understood, including by countless laypeople."

Regardless, in the context of an election primary process, the allegations of the Amended Complaint assert that an unnecessary burden is applied to minor political party candidate petition signers by the intent provision of the oath of § 204B.07, subdivision 4, which confuses people with its threat of felony prosecution.[3] The lower court and the government essentially agreed that people who signed the minor political party candidate petitions, although they swore an oath to do otherwise, were legally entitled to vote in the primary election. Thus, the intent portion of the oath is an unnecessary burden on petition signers, because petition signers can vote in the primary anyway. Because the oath places an unnecessary burden on petition signers,

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[1] *E.g.* Amend. Compl. ¶¶ 154, 157, 164, 187; APP. 50–52.
[2] Sec. of State Br. 16.
[3] *E.g.* Amend. Comp. ¶¶ 301–324; APP.77–80.

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the intent portion of the oath violates free speech, associational and equal protection rights.

And, what the Secretary states to support the legality of the intent portion of the oath is revealing. The Secretary claims that the oath is to discourage a scheme of "party raiding" as one purpose of the intent portion of the oath:

> One purpose of the intent portion of the petition oath…is to discourage a particular form of party raiding—that is, a scheme in which supporters of a particular major-party candidate conspire to place a minor-party candidate on the general election ballot with the intent of drawing votes away from an opponent of the candidate that they actually support.[4]

If "intent" means only at the time of signing the petition, it is difficult to decipher how this prevents or discourages the so-called conspiracy of party raiding. The Libertarian Party had contended that the signature was the equivalent of a "vote" committing that person to that candidate to appear on the general election ballot, preventing a later vote in a major political party primary for a candidate for the same office. The Secretary vigorously opposed the idea that a petition signer was prohibited from voting in the later primary election. The district court agreed. So, he Secretary won on the point that the oath was legally and effectively meaningless.

Consistently, the Secretary continues to admit a person cannot be prosecuted for voting in the primary election after signing the petition. So, even after carrying out the "party raiding" scheme the Secretary alleges, the person can, immediately after

[4] Sec. of State Br. 17.

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signing the petition, vote in a major political party primary to ensure the candidate of her choice appears on the general election ballot.

There is no deterrence of party raiding because, in essence, the Secretary has essentially admitted that "intent" in the oath is meaningless and unenforceable. If at the moment the voter claims support of the minor party candidate by her signature and, a second after signing the petition, she is able to vote in a primary for a major party candidate for the same office, there is no deterrence. Again, it is difficult to understand how the "intent" portion of the oath at issue discourages the alleged scheme the Secretary is worried about.

The second rationale of the Secretary is also questionable at best. The Secretary asserts that "the intent portion of the petition oath upholds the constitutional 'one person, one vote' principle…by barring individual voters from intentionally endeavoring to multiply their influence over the names to be placed on Minnesota's general-election ballot."[5] Just the opposite occurs when a voter signs a petition to place a minor political party candidate on the general election ballot, and without repercussion, casts a ballot in a major political party primary for another candidate to appear on the general election ballot for the same office. There is no barring of individual voters from multiplying their influence on the general election

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[5] *Id.* Citation omitted.

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ballot by signing minor political party candidate petitions and later voting in major political party candidate primaries.

Since there is no criminal prosecution for signing the minor political party candidate's petition and later voting in a major political party candidate primary, that voter has essentially voted twice. There are no legal repercussions even though that one voter has influenced the number of possible candidates to appear on the general-election ballot by a factor of two. The voter who signed a petition has exercised greater influence on the election than a voter who did not sign a petition.

Oddly, while the Libertarian Party arguments argued to prevent this double influence, the Secretary's position, throughout the case, actually encouraged the practice. Nevertheless, by the Secretary's own examples to show how the intent provision is not unconstitutional, the Secretary confirms the superfluous nature of the oath itself.

In other words, the intent portion of the oath effectively does not serve any government compelling interest. The petitioner "honestly" changing her mind plays no role.[6] Note that the Secretary later states that "[a] Minnesota voter who signs a Libertarian Party candidate's nominating petition *while actually* supporting a different candidate at the next primary election is not…a 'supporter' of the Libertarian Party candidate."[7] She might be at the time of signing, but later is not. Here, the Secretary

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[6] *Id.*
[7] *Id.* 18. Emphasis added.

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then asserts that "the intent portion of the oath…does nothing more than ensure the individuals signing nominating petitions are actual supporters of the petitioning candidate."[8] That may be true if the signatory could not later exercise her vote in a later primary for the same office.

In short, it appears the Secretary's position allows minor political party candidates to state to potential signatories that they can sign the petitions in support of the candidate and later change their mind and vote in the major political party primary without fear of prosecution. The statement is not verified because this is not how voters see the oath. And as the Libertarian Party has alleged, the oath *discourages* voters from signing a minor political party petition for *fear* of prosecution because of the intent portion of the oath:

> Specifically, the Plaintiffs experienced potential signers were confused about the necessity of swearing to the mandatory oath and promising not to vote in a primary election contest with the potential for criminal penalties when there was no Minnesota presidential primary in 2016.[9]

The Secretary's example affirms the unconstitutionality of the "intent" provision of the oath.

Finally, the Libertarian Party has not taken issue with the number of signatures required for a petition to appear on the general election ballot. The issues pertain to

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[8] *Id.*
[9] *E.g.* Amend. Compl. ¶157; APP. 51.

the limited 14-day period to obtain them and the exclusion of viable alternatives to obtain those numbers during the COVID-19 health crisis.

Instead, the Secretary asserts the oath provision plays a role in the gathering of the number of signatures required. The oath is to ensure "that the individuals signing a candidate's petition are their actual supporters."[10] Obtaining a "quantum of support by requiring such parties to file petitions" is to demonstrate "actual supporters."[11] The "support" refers to getting the candidate on the general ballot, nothing more. There is no need to "support" the party or the candidate herself, only to offer an opportunity to appear on the ballot. Yet, the oath, as the Libertarian Party alleges, is interpreted to promise not to do something in the future, here, to vote in the major political party primary. But, the Secretary admits the two acts are legal. Therefore, the intent portion of the oath is not narrowly tailored to meet any compelling state interest.

II. The constitutional problems of the confusing and vague oath are not new.

The Secretary accuses the Libertarian Party [12] of raising a new issue that the statutory provision under § 204B.07, subdivision 4, is unconstitutionally vague.[13] But, the confusing, unnecessary and vague oath is not a new issue to this case. This Court

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[10] Sec. of State Br. 18.
[11] *Id. quoting Lubin v. Panish,* 415 U.S. 709, 718-19 (1974).
[12] The "Libertarian Party" includes all Plaintiffs for the sake of reading convenience unless otherwise noted.
[13] Sec. of State Br. 13–14.

has opined that if the argument is not new but merely constitutes a shift in approach, the Court may consider it. *Universal Title Ins. Co. v. United States,* 942 F.2d 1311, 1314 (8th Cir.1991). Moreover, the Court has the discretion to consider an issue for the first time on appeal "when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case." *Id.* at 1314–15. *See also Universal Title Ins. Co. v. United States,* 942 F.2d 1311, 1314 (8th Cir.1991) ("Although, as a general rule, we do not consider issues not presented to the district court, a blanket statement condemning new arguments is far too broad."). The Libertarian Party's argument based on the confusing, unnecessary and vague oath is purely legal.

Conclusion

The district court's order to dismiss the underlying Amended Complaint should be reversed.

Dated: October 13, 2020

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CERTIFICATE OF COMPLIANCE

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Dated: October 13, 2020

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