

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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LIBERTARIAN PARTY OF MINNESOTA;  
CHRIS HOLBROOK; MASON MCELVAIN;  
CHRIS DOCK; BRIAN MCCORMICK,

*Petitioners,*

v.

STEVE SIMON, in his official capacity as the  
Minnesota Secretary of State, or his successor,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether a government during the election process, without violating the First and Fourteenth Amendments, can threaten criminal prosecution against voters who sign petitions supporting minor political party presidential candidates and others seeking elected office, when it fails to give notice that the criminal reprisal is wholly inapplicable if the signatory voters later change their minds to cast ballots in a major political party primary for the same candidate position.

## **PARTIES TO THE PROCEEDINGS**

Petitioners are the Libertarian Party of Minnesota, Chris Holbrook, Mason McElvain, Chris Dock, and Brian McCormick who were plaintiffs in the district court and appellants in the court of appeals.

Respondent Steve Simon, in his official capacity as the Minnesota Secretary of State was the defendant in the district court and appellee in the court of appeals.

## **CORPORATE DISCLOSURE STATEMENT**

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

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

Petitioners Chris Holbrook, Mason McElvain, Chris Dock, and Brian McCormick are individuals and are not a corporate entity nor affiliated with any corporate entity regarding their petition.

**LIST OF RELATED CASES**

*Libertarian Party of Minnesota v. Simon*, No. 19-cv-2312 for the U.S. District Court for the District of Minnesota. Judgment entered May 29, 2020.

*Libertarian Party of Minnesota v. Simon*, No. 20-2244, 2021, U.S. Court of Appeals for the Eighth Circuit. Judgment entered September 3, 2021.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioners Libertarian Party of Minnesota, Chris Holbrook, Mason McElvain, Chris Dock, and Brian McCormick respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.



**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eighth Circuit is an unpublished decision, is available at 2021 WL 4026159 (8th Cir. Sept. 3, 2021) and is reproduced in the Appendix (“App.”) at 1-6. The opinion of the United States District Court for the District of Minnesota is reported at *Libertarian Party of Minnesota v. Simon*, 463 F. Supp. 3d 936 (D. Minn. 2020) and is reproduced at App. 7-19.



**JURISDICTION**

The United States Court of Appeals for the Eighth Circuit rendered its decision on September 3, 2021. App. 1-6. This Court has jurisdiction under 28 U.S.C. § 1254(1).



**CONSTITUTIONAL AND  
STATUTORY PROVISIONS INVOLVED**

The First Amendment is incorporated against state and local governments by the Fourteenth Amendment:

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

The Fourteenth Amendment's Due Process and Equal Protection Clauses apply to state and local governments:

Section 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statutes § 204B.07, subd. 4 governing the oath for minority political party nominating petitions:

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

Minnesota Statutes § 204B.07, subd. 6 governing criminal prosecution penalty for a false oath as perjury:

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

Minnesota Statutes § 204B.08, subd. 3(a) stating the number required on a nominating petition for federal and statewide elected offices:

[F]or a federal or state office voted on statewide, one percent of the total number of individuals voting in the state at the last preceding state general election, or 2,000, whichever is less.

Minnesota Statutes § 204B.09, subd. 1(a) describing the due dates for nominating petitions prior to state primaries:

[N]ominating petitions for county, state, and federal offices filed at the state general election shall be filed not more than 84 days nor less than 70 days before the state primary.



## INTRODUCTION

Minnesota law mandates a specifically worded oath appear on every page of every minor political party candidate's petition in which signatories promise that they "do not intend to vote" in a major political party's primary for that particular elected office. Making a false oath is a felony. Under Minnesota's statutory scheme, minority political party candidates have a 14-day window to obtain the necessary signatures of eligible voters on a petition to appear on the general

election ballot, 70 days before any state primary and months before a general election.<sup>1</sup>

Minnesota voters who sign a petition are purposefully led to believe that voting later in a primary may result in criminal prosecution. No notice exists under statutory law, as the Minnesota Secretary of State asserts, that if the voter changes her mind, it's legal to vote in a major political party's primary. But, if true, the oath serves no purpose. The state verifies the eligibility of signatories as voters. Meanwhile, no major political party primary voter is subject to an oath regarding their future actions after a primary vote is cast.

The burden is upon the minority political party candidate to convince voters that signing a petition to place the candidate's name on the general election ballot will not relinquish their right to vote in any prior primary (for presidential candidates) or later major political party primaries (for all other offices).

Meanwhile, the Libertarian Party and individual petitioners contended that signing a nominating petition is the equivalent of casting a vote because under the state's statutory scheme the person promises not to vote in the primary while executing the petition without knowing all primary candidates. She does so without the same secrecy provided to voters who do cast a ballot in a major political party primary voters. And, while major political party primaries are afforded

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<sup>1</sup> The petition's format, paper, and font size are governed by Minn. R. 8205.1010, subp. 2.

absentee ballots, minor political parties are afforded no similar process.

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### STATEMENT OF THE CASE

Minnesota law governs, with specificity, the petition process under which minor political party candidates present to eligible voters to appear on the general election ballot. Minn. Stat. §§ 204B.07–.09. In particular, the oath requirement in the petition required each signatory to swear or affirm that she did not intend to vote in any subsequent primary for a candidate seeking the same elected office as the minor political party candidate, under threat of criminal prosecution. The Libertarian Party of Minnesota and certain eligible voters, supportive of minority political party candidates, sued the Minnesota Secretary of State challenging the statutory scheme under the First and Fourteenth Amendments seeking declaratory and injunctive relief. The district court granted the appellee’s motion to dismiss. Or. at App. 1–14. A panel of the court of appeals affirmed. App. at 2.<sup>2</sup>

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<sup>2</sup> Although briefed extensively in the district court and before the court of appeals issues directly related to the challenge to the underling statutory scheme, inclusive of the oath, the district court interpreted the Petitioners’ abandonment of the number of signatures required on the petition under Minnesota Statutes § 204B.08, subd. 3(a) involving the oath, as abandoning arguments expressly made. The district court decision considered the oath as constitutional declaring the oath reflected merely the present intent of the voter at the time of signing: “Because the oath is expressly limited to the intent at the time of signature, it does

### **A. Factual and statutory background.**

1. The Libertarian Party of Minnesota is considered a “minor political party” under Minnesota law. Minn. Stat. § 200.02, subd. 23. Minor political party candidates who wish to appear on the general election ballot must complete a nominating petition and submit the petition to the Minnesota Secretary of State. *Id.*, § 204B.03. Depending on the office sought, a candidate must secure a certain number of petition signatures to appear on the ballot. *Id.*, § 204B.08, subd. 3. Minor political party candidates have 14 days to obtain the minimal number of signatures required. *Id.*, § 204B.09, subd. 1. For instance, for federal or state offices voted statewide, 2,000 signatures are required. *Id.*

Minnesota law mandates that each petition include the following oath:

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

*Id.*, § 204B.07, subd. 4. No notarization or certification is required for the signer, who must be individuals

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not preclude signers from changing their minds thereafter. . . .” App. at 14. The court of appeals agreed with the district court’s interpretation and asserted the issue waived. *Id.*, at 3. However, the appellate court, regarding a challenge to the secrecy of voting via a petition signatory supporting a minor political party candidate, *opined on the meaning of the oath.* App. at 5.

eligible to vote. *Id.* Although not included in the petition itself, under Minnesota law, a person “who, in signing a nominating petition, makes a false oath is guilty of perjury.” *Id.*, § 204B.07, subd. 6.

Nominating petitions are subject to inspection through the Secretary of State’s office and the signatories verified accordingly. Or. 4-5; Am. Compl. ¶¶ 113; 140; 8th Cir. APP. 4–5. Notably, if the Secretary determines that a petition signatory is not an eligible voter, the signer’s “signature” is not counted, which the Petitioners characterized as a “challenged” voter. Or. 5; Am. Compl. ¶¶ 113–114; 8th Cir. APP. 5. There is no process for the signatory to refute the Secretary’s determination, unlike major political party primary voters who may refute a challenge to their voter registration at the polling place. *Id.*; Am. Compl. ¶ 115; 8th Cir. APP. 5. This means that if the number of signatures falls below the threshold number, the minor political party candidate’s name will not appear on the general election ballot.

2. The Libertarian Party, as a minor political party, is an association of members seeking to have its candidates appear on the general election ballot. Am. Compl. ¶ 4–14, 70; Minn. Stat. § 200.02, subd. 23(a). There are four major political parties in Minnesota; Minnesota Democratic-Farmer-Labor Party, the Republican Party of Minnesota, the Grassroots-Legalize Cannabis Party, and the Legal Marijuana Now Party. *Id.*, ¶ 69. Each of the individual Petitioners, Chris Holbrook, Mason McElvain, Chris Dock, and Brian McCormick, are Libertarian Party members and



have either run for elected office or were potential candidates for elected office as a Libertarian candidate in the 2020 election or future elections. *Id.*, ¶¶ 15–53. As members of the Party, they are associated with the Party, and as candidates or potential candidates wish to be associated with the Party and the electorate. *Id.* Like others, Holbrook, McElvain, Dock, and McCormick have signed Libertarian Party candidate petitions and have sought signatures from eligible voters for other petitioning candidates. In this regard, as signatories of a minor political party’s petition, they too associate with the particular petition candidate as they seek to have that candidate appear on the general election ballot. *Id.*

3. In an election year in Minnesota, potential candidates of a minor political party must attain a certain number of registered eligible voter<sup>3</sup> signatures before the candidate’s name will be placed on the general election ballot in November. A Libertarian Party presidential and vice presidential candidate must attain 2,000 signatures on a nominating petition, for U.S. Senate, 2,000 signatures, a state office voted statewide (*e.g.*, Governor, Attorney General), 2,000 signatures; for county or legislative office, 500 signatures. Minn. Stat. § 204B.08, subd. 3(a), 3(c); Am. Compl. ¶¶ 87–91.

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<sup>3</sup> An eligible voter is defined under Minnesota Statutes § 201.014, subd. 1. An eligible voter must be registered under Minnesota Statutes § 201.018. Am. Compl. ¶¶ 71-74.

Whatever office a potential Libertarian Party candidate may seek, but for the presidential nominating petition in 2020, the 14 days to acquire the necessary number of eligible voter signatures was May 19th to June 2nd.

While minor political party nominating petitions only have 14 days to gather the required number of signatures, a Libertarian Party nominating petition for a presidential candidate, requiring 2,000 signatures had 87 days, from May 19 to August 18, 2020 before filing the petition with the Minnesota Secretary of State, 77 days before the general election.<sup>4</sup> *See* Minn. Stat. § 204B.09. The general election was held on Tuesday, November 3, 2020. Am. Compl. ¶ 103. *See also* Minn. Sec. of State; [https://www.sos.state.mn.us/election-administration-campaigns/become-a-candidate/presidential-candidates/?searchTerm=minor party presidential candidate](https://www.sos.state.mn.us/election-administration-campaigns/become-a-candidate/presidential-candidates/?searchTerm=minor+party+presidential+candidate) (last visited Aug. 10, 2020). The major political party primary occurred on March 3, 2020.

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

I solemnly swear (or affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for the office for which this nominating petition is

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<sup>4</sup> *Id.* ¶ 103. *See* Minn. Stat. § 204B.09.

made, and that I signed this petition of my own free will.<sup>5</sup>

Minn. Stat. § 204B.08, subd. 3(a).

When voters read this oath on a petition, they become reluctant to sign and some would not sign at all. Am. Compl. *e.g.*, ¶¶ 154, 157, 164, 187; 8th Cir. APP. 50–52. As a result, minor political party candidates could not and did not reach the threshold number of signatures to appear on the general election ballot. *Id.*, *e.g.*, ¶¶ 158, 161; 8th Cir. APP. 51. The oath’s confusion also led voters to believe that, by signing the petition, they were in effect, casting a ballot for that candidate to appear on the general election ballot much like voting in a primary election. *Id.*, *e.g.* ¶¶ 77, 109; 8th Cir. APP. 35, 41.

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

**B. Prior proceedings in which the district court dismissed the underlying amended complaint.**

1. The district court granted the Secretary’s motion to dismiss. App. 7–19.<sup>6</sup> The court determined that

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<sup>5</sup> Am. Compl. ¶ 76; 8th Cir. APP. 35, Ex. B. *See also* Minn. Stat. § 204B.07, subd. 4.

<sup>6</sup> Contrary to the district court’s decision, the Libertarian Party *did not* abandon all claims regarding the oath; only the number requirements for the petitions. Compare Or. at App. at

the oath “only requires the signers to attest to a present intention not to vote in an upcoming primary. Because the oath is expressly limited to the intent at the time of signature, it does not preclude signers from changing their minds thereafter and from voting in a later primary.” App. 14. That laid the basis for dismissing the Libertarian Party’s other claims. *Id.*, at 14–17. The court made no reference or otherwise recognized the allegations asserted in the amended complaint regarding signatories’ belief as to their signatures constituting the reluctance or refusal to sign the minor political party petitions because of the oath, their fear of prosecution, or belief that they would be casting a vote and, hence, could not vote in a later primary. *Id.*

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

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

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14 and Lib. Prty. Opp. Memo. to Dismiss at 24 (U.S. Dist. Ct. Dckt. No. 25).

Hearing Transcr. 9:11–20 (May 19, 2020) (U.S. Dist. Ct. Dckt. No. 38); *see also id.*, at 26:11–15 and 27:7; 8th Cir. ADD.17–18. Yet, the Petitioners alleged that the government’s required oath caused voters to believe that their intent—their course of action—was not to vote in a later primary for that particular candidate’s office for fear of prosecution and believing they had already voted for that candidate to appear on the general election ballot. Am. Compl. *e.g.*, ¶¶ 154, 157, 164, 187; 8th Cir. APP. 50–52.

2. A panel of the court of appeals affirmed. App. at 2. The panel, reviewing the motion to dismiss *de novo*, “accepting as true the allegations set forth in the complaint and drawing all reasonable inferences in favor of” the plaintiffs (petitioners). App. at 3. As previously noted, although briefed extensively in the district court and with the court of appeals issues directly related to the challenge to the underlying statutory scheme, inclusive of the oath, the appellate court interpreted the Petitioners’ abandonment of the number of signatures required on the petition involving the oath, as abandoning arguments expressly made and thereby considered the issue waived. *Id.* Thus, the district court’s interpretation of the consequence of the oath remains intact for Petitioners and other minor political parties in Minnesota.

However, the appellate court, regarding a challenge to the secrecy of voting via a petition signatory supporting a minor political party candidate, found that because “the oath requires petition signers to have no existing intention to cast a primary-election

ballot . . . they are free to change their minds. And if they do so, their votes will be secret just like everyone else's." App. at 5. The panel also opined that signatures on nominating petitions, in light of the oath, are not "votes." The court determined that voters in primary election have to be registered to vote, whereas those signing a nominating petition must only be eligible to vote. *Id.*, comparing Minn. Stat. § 201.018 and § 204B.08, subd. 2. Therefore, the appellate court concluded that there is no Equal Protection Clause violation.

Meanwhile, the court of appeals opined that, while asserting nothing in Minnesota law requires any candidate to collect signatures in person, failed to address the absence of the availability of absentee voting for minor political candidates because a person can print a petition on line, sign it, and send it in. App. at 4. However, the arguments below revealed that the Secretary had provided no guidance of how a voter could accomplish this nor where a petition (absent the candidate's name) could be found on the Secretary's website—unlike the extensive statutory and regulatory scheme established for absentee balloting for primaries.



**REASONS FOR GRANTING THE PETITION**

**The petition raises a question of great importance and is of societal significance for the people of Minnesota.**

Petitioners' case presents an ideal vehicle for resolving a conflict over governmental oppression upon minority political parties through election laws that threaten criminal prosecution for future voting in major political party primary elections. Here, the facts are undisputed and the record is complete. The petition raises a question of great importance and is of societal significance in the election process regarding access to the ballot for alternative political party candidates. Here, the government imposes direct threats of criminal prosecution against voters supporting minor political party candidates, on the one hand; but, on the other hand, without notice, asserts that the initial criminal threat is extinguished when months later, her vote may be exercised in a major party primary election.

Confusion begins when voters believe that because they signed a minority political party candidate's petition, they forfeited their right to vote in any subsequent primary of a major political party. The government mandates what must appear on the petition. Every minor political party petition must state to which a voter must swear or affirm:

I solemnly swear (or affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for

the office for which this nominating petition is made, and that I signed this petition of my own free will.

Minn. Stat. § 204B.07, subd. 4. An individual who, in signing a nominating petition, makes a false oath is guilty of perjury. *Id.*, subd. 6. With a sufficient number of signatures on a petition it ensures the minor political party candidate will appear on the general election ballot. The Minnesota Secretary of State has taken the position, without any statutory or rule making pronouncement, that the oath does not threaten a voter from later casting a ballot in a later major political party primary even if she previously signed a minor political party petition. The district court agreed, finding the oath unquestionably requires only a “present intent.”

There is a substantial burden upon minor political party candidates to convince, when engaging voters to sign a petition, that the voters may sign the petition without (1) fear of criminal prosecution, and (2) by signing the petition it does not extinguish their later right to vote in a major political party primary. However, petition signatories are otherwise convinced of their exclusion from later primaries because of the statutory oath. Confusion further abounds regarding voters, having exercised their choice in a presidential primary, whether they may sign a minor political presidential petition that is not available until months after the major party primary.



Nowhere within the statutory scheme governing minor political parties does it provide *notice* to the voter of the assurance that as a minor political candidate petition signatory, she has not relinquished her right to vote in a months-later major political party primary. The statutory oath phrase “I do not intend to vote” is a state imposed prerequisite condition to signing a petition in exchange for a promise, under threat of prosecution, of future acts regarding participation in a primary election process. But, the district court disagreed, “the oath only requires signers to attest to a present intention not to vote in an upcoming primary. Because the oath is expressly limited to the intent at the time of signature, it does not preclude signers from changing their minds thereafter and from voting in a later primary.” *Libertarian Party of Minnesota v. Simon*, 463 F. Supp. 3d 936, 941 (D. Minn. 2020), *aff’d*, 20-2244, 2021 WL 4026159 (8th Cir. Sept. 3, 2021). App. 14.

As this Court has proclaimed, “[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.” *Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983) (citation omitted).

During a major political party primary, voters are not required to swear or affirm under oath with the threat of criminal prosecution regarding their future

actions (intent) in any subsequent election contest because they choose to cast a ballot in a primary. There is no issue here regarding the number of required signatories on a minor political party petition to place the candidate on the general election ballot. Notably, the eligibility of the petition signatory as a voter is confirmed by the Secretary of State. The oath does not question the voter's eligibility. Hence, the oath serves no purpose, but, as part of an election scheme, to burden a minor political party candidate's efforts to obtain the necessary number of petition signatories within the short 14-day limit provided under Minnesota's election law.

Governments have placed burdens upon minor political parties which have resulted repeated court battles to assert their rights under the First and Fourteenth Amendments. Examples abound. *See, e.g., Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008) (applying strict scrutiny to overturn Oklahoma prohibition on nonresident circulators of initiative petitions); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (declaring unconstitutional, as failing strict scrutiny, Ohio ban on nonresidents circulating nominating petitions); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (invalidating, pursuant to strict scrutiny analysis, Arizona deadline and residency provisions relating to nominating petitions and circulator-witnesses); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880 (3d Cir. 1997) (noting that an April deadline—60 days in advance of the primary—required minor parties to rally support “when the election is

remote and voters are generally uninterested in the campaign”); *Citizens to Establish a Reform Party of Ark. v. Priest*, 970 F. Supp. 690, 697–98 (E.D. Ark. 1996) (concluding that a January deadline prevented minor parties from finding volunteers, attracting media coverage and recruiting supporters, all of which impacted its ability to appear on the ballot); *McLain v. Meier*, 637 F.2d 1159, 1163–64 (8th Cir. 1980) (same—June deadline 90 days in advance of primary).

A state government’s election scheme that places unnecessary burdens upon minority political parties or their candidates with accompanying threats of criminal prosecution against voters is to open an avenue for constitutional abuse of associational rights affecting the right to vote for other states to replicate against those parties. There are no state interests to be served. So, the statutory obligation upon minority political parties remains untenable.

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## ARGUMENT

### **A. The lower courts erred in construing an election scheme involving an oath’s “intent” clause with criminal consequences as not affecting minority political party candidate petition processes under the First Amendment.**

This case presents a conflict between the constitutional rights of minor political parties and the authority of a state to regulate its elections. It is the combined effect of Minnesota’s election laws governing minor

political parties that is being challenged because they impermissibly burden rights to free speech and association under the First Amendment. Here, the practical consequences of the decisions of the lower courts are far-reaching in Minnesota. Difficult as it may be to acquire the necessary minimum number of signatures on a presidential or federal minority political party candidate's petition in the first instance within 14 days, some 65 days before a state primary,<sup>7</sup> statutory oath requirement unnecessarily burdens the minor political party and its candidates. This is because they must assure to the signatory, that the oath—with criminal consequences—means nothing if the person later chooses to vote in a subsequent major political party primary.

When analyzing statutes, this Court is cognizant that “the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). *See also Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (“[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical correlative effect on voters.”) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). The right to cast an effective vote “is of the most fundamental significance under our constitutional structure.” *Burdick v. Takushi*, 504 U.S.

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<sup>7</sup> But for a minor political party presidential candidate, the time period is extended. *See* Minn. Stat. § 204B.09.

428, 433 (1992). The rights of political association and free speech occupy a similarly hallowed place in the constitutional pantheon. See *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (“Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”).

While primaries and general elections have a strong interconnection as “a single instrumentality for choice of officers,” there is a difference between the effect of a primary and that of the general election. *Smith v. Allwright*, 321 U.S. 649, 660 (1944). This Court has recognized that the right to vote in a primary election for the nomination of candidates without discrimination by the state is, like the right to vote in a general election, a right secured by the Constitution so that the same tests to determine the character of the discrimination or abridgement should be applied to a primary election as are applied to a general election. *Id.*, at 661–62; *Terry v. Adams*, 345 U.S. 461 (1953). A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates—and of particular importance—against those voters whose political preferences lie outside the existing political parties. *Anderson*, 460 U.S. at 793–94. While a voter is not guaranteed that one of the political parties will reflect his or her values, “the right to vote is heavily burdened if that vote may be cast only for

one of two parties at a time when other parties are clamoring for a place on the ballot.” *Williams*, 393 U.S. at 31; *see also Anderson*, 460 U.S. at 787.

While it is understood that this Court must limit its analysis to whether the restrictions imposed on minor political parties fits within the outer limits of what the First Amendment requires, at the same time, it is understood that the State may not be a “wholly independent or neutral arbiter” as it is controlled by the political parties in power, “which presumably have an incentive to shape the rules of the electoral game to their own benefit.” *Clingman v. Beaver*, 544 U.S. 581 (2005) (O’Conner, J., concurring). Hence, it is necessary to look at the associational rights at issue, including whether alternative means are available to exercise those rights, the effect of the regulations on the voters, the parties and the candidates, evidence of the real impact the restriction has on the process, and the interests of the state relative to the scope of the election.

The Minnesota election scheme for minor political party candidates, in the petitioning process, provides for an oath that is invidious in disqualifying those who sign a petition and disqualifying the voter from later voting in a major political party primary under threat of criminal prosecution. By signing a minority political party candidate’s petition months before a statewide primary election for major political parties, the voter has no idea who might ultimately be on the primary ballot. Hence, because of the oath, the voter is led to believe that their respective signature is a vote to place the minority political party candidate on the general

election ballot, forfeiting any other right to vote in the subsequent primary election to place a major political party candidate on the general election ballot.

**B. Minnesota’s minority political party petitioning scheme unnecessarily burdens the party and its candidate by requiring them to explain the non-applicability of the mandated oath to the subsequent major political party primary.**

No statutory notice is provided to affirm that despite the oath not to vote in a subsequent primary, a voter may change their mind without criminal consequences. In *Socialist Workers Party v. Hechler*, 890 F.2d 1303 (4th Cir. 1989), the election law at issue provided that “the content [of nominating certificates] shall include the language to be used in giving written and oral notice to each voter that signing of the nominating certificate forfeits that voter’s right to vote in the corresponding primary election.” *Id.*, at 1308. The appellate court determined that the provision was entirely separate and apart from the requirement that subscribers state their “desire to vote” for the candidate. *Id.* In the court’s view, there was “only one interpretation of this language in the mind of a subscriber: that since he has been told separately that he cannot vote in the primary, the declaration of his intention to support the candidate can only apply to the general election.” *Id.* In other words, the signature of a voter on a nominating certificate was essentially another way of voting in the primary because it resulted in the

candidate's name being placed on the general election ballot. *Id.*

In *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court sustained a Texas election law that ensured that each qualified elector in fact exercised her political franchise by either voting or by signing a nominating petition, but not both. *Id.*, at 785. This Court opined that there is “nothing invidious in disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot position for its candidates for the same offices.” *Id.*, at 786. In other words, unlike in *Socialist Workers Party v. Hechler*, the prohibition of repeated support for different candidates for the same office in different primary processes (petitioning versus primary voting) was not the equivalent of a “vote” of support to place the candidate's name on the general election ballot.

Minnesota's statutory scheme takes a third approach. A voter may exercise the franchise by both signing a minority party petition and later vote in a major political party primary. But, it places the full burden on the minority political party and its candidate to explain the consequences or non-consequences of signing a nominating petition despite the required oath's “intent” phrase. However, no statutory law provides notice to the voter that she can change her mind and support another candidate in a major political party primary after signing a petition under the mandated oath. As a result of the oath, voters have refused to sign the petition. Am. Compl. ¶ 49.



Indeed, ballot access cases have emphasized that the states “have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections.” *Clements v. Fashing*, 457 U.S. 957, 964–65 (1982) (citations omitted). However, the nominating processes created by state law and applied to minor political parties, their candidates, and their voters, must be constitutionally analyzed for any detrimental effect on minor party candidates to gain access to the general election ballot. See *Libertarian Party v. Bond*, 764 F.2d 538, 541 (8th Cir. 1985) (“It has been recognized . . . that the entire election scheme must be analyzed to determine whether undue constraints on access to the ballot exist.”). And in analyzing the entire primary election scheme, Minnesota does place unnecessary constraints on the Libertarian Party, as a minor political party, and its candidates to gain access to the general election ballot.

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

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

“I solemnly swear (or affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for

the office for which this nominating petition is made, and that I signed this petition of my own free will.”

The oath also has legal consequences:

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

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

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

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

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

A pledge equivalent to an oath but without reference to a supreme being or to “swearing”;

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

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

Another dictionary source finds the meaning of an “oath” as “a solemn promise often invoking a divine witness, regarding one’s future action or behavior.” *New Oxford American Dictionary* 1209 (Agus Stevenson, Christian A. Lindberg eds., 3rd ed., Oxford University Press 2010). To “swear” is to “make a solemn statement or promise undertaking to do something or affirming that something is the case.” *Id.*, at 1755. And to “affirm” is to “state as a fact; assert strongly and publically.” *Id.*, at 27.

In *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002), the court noted that:

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

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

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

“Intend” means “have a course of action as one’s purpose or objective; plan . . . plan that (something) function in a particular way.” *Id.*, 903. “Intend,” according to *Black’s Law Dictionary*, means “to have in mind a fixed purpose to reach a desired result.” *Black’s Law Dictionary* 825. The oath has caused confusion and has caused people not to sign the petition. Any voter promises not to exercise her franchise in the later primary. Nowhere in the oath, nor in any other statute, does the government announce or give notice that after signing the petition, the voter may change their mind with no legal consequences. Nevertheless, the district court agreed with the state’s “forced” interpretation that the oath “only requires the signers to attest to a present intention not to vote in an upcoming primary. Because the oath is expressly limited to the intent at the time of signature, it does not preclude signers from changing their minds thereafter and from voting in a later primary.” App. at 14. The appellate court, in addressing issues related to the secrecy of a vote, agreed, “the oath requires petition signers to have no existing intention

to cast a primary election ballot. . . . But as the district court observed, they are free to change their minds. . . .” App. at 5.

In other words, the oath has no meaning and no legitimate state purpose. If for instance, the Secretary of State would claim the is to discourage a scheme of “party raiding” where 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, the argument would fail. It is difficult to decipher how the statute as interpreted by the lower courts prevents or discourages the so-called conspiracy of party raiding. If a signatory can immediately, after signing a minority party petition can “change their mind” as the lower courts agree it can, it does not prevent a later vote in a major political party primary for a candidate for the same office. The person can, immediately after signing the petition, vote in a major political party primary to ensure the candidate of her choice appears on the general election ballot.

The oath is legally and effectively meaningless and unenforceable. It nevertheless places an unnecessary burden on the minority political party candidate to decipher the meaning of the oath, and to explain to potential signatories.

In addition, if the Secretary of State were to suggest 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, it would be senseless. In fact, just the opposite occurs. Under the lower courts' interpretation, when a voter signs a petition to place a minor political party candidate on the general election ballot, she can legally cast a ballot in a major political party primary for another candidate to appear on the general election ballot for the same office because "she changed her mind." There is no barring of individual voters from multiplying their influence on the general election 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 minor political party petition has exercised greater influence on the election than a voter who did not sign a petition.

The intent portion of the oath effectively does not serve any government compelling interest. The oath *discourages* voters from signing a minor political party petition for *fear* of prosecution because of the intent portion of the oath. It is the state's election scheme that causes unnecessary confusion in the electoral process and hence is an unconstitutional burden on

minority political parties and their candidates under the First and Fourteenth Amendments.



**CONCLUSION**

The petition for a writ of certiorari should be granted.

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