

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

**ANGELA CRAIG, and
JENNY WINSLOW DAVIES**

Plaintiffs,

v.

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

Defendant.

Case No.: 0:20-cv-02066 WMW/TNL

**MEMORANDUM IN SUPPORT OF
PROPOSED DEFENDANT TYLER
KISTNER’S MOTION TO
INTERVENE**

Proposed defendant Tyler Kistner respectfully submits this Memorandum in Support of his Motion to Intervene in the above-captioned action to defend Minnesota’s “Vacancy in Nomination” provision and protect his critical interest in the outcome of this matter.¹ *See* Minn. Stat. § 204B.13 (the “Vacancy Provisions” or “Provisions”). Plaintiffs seek a declaration that would severely impair Mr. Kistner’s interests; specifically, that the Vacancy Provisions—which passed through the legislature with bipartisan support—are unconstitutional. Plaintiffs ask the Court to order the Secretary of State to upend state control of how it elects its representatives to Congress by (1) requiring that the Secretary certify the results of the November general election, including those votes for the deceased Legal Marijuana Now Party’s candidate (“LMNP”), Adam Weeks; (2) remove signage informing voters of the reason for the

¹ As required by Rule 24(c), Mr. Kistner’s proposed Answer is attached as “Exhibit A” to his Motion to Intervene.

vacancy in nomination and the procedures for filling the vacancy; and (3) cease any notification to Minnesotans about the procedures for a special election.

The Court should grant Mr. Kistner's motion to intervene as of right. Mr. Kistner has a right to intervene because he satisfies the requirements of Article III standing, the motion is timely, and, as the Republican Party of Minnesota's candidate for Congress in Minnesota's Second Congressional District, Mr. Kistner has a substantial interest in the validity of Minnesota's election laws that can only be protected through participation in this case. Fed. R. Civ. P. 24(a)(2). Alternatively, the Court should exercise its discretion to allow Mr. Kistner to intervene because his defenses address questions already before the Court. Fed. R. Civ. P. 24(b).

BACKGROUND

Mr. Kistner is the Republican Party of Minnesota's nominee for Congress in Minnesota's Second Congressional District in the upcoming general election, and February 9, 2021, special election. The Republican Party of Minnesota is a major political party, as defined by Minn. Stat. § 200.02 subd. 7. Mr. Kistner seeks to intervene on his own behalf as a candidate of a major political party in the Second District Race.

This case is near its inception. Plaintiffs sued the Secretary of State to challenge Minn. Stat. § 204B.13 on September 28, 2020. The Secretary of State has yet to answer the complaint. Mr. Kistner seeks to intervene at this early stage to protect his interests and to avoid any prejudice or delay to the parties and to the Court's resolution of the case.

ARGUMENT

I. MR. KISTNER HAS ARTICLE III STANDING.

In this Circuit, a party seeking to intervene must satisfy the requirements of Article III standing. *Mausolf v. Babbitt*, 85 F.3d 1295, 1298-304 (8th Cir. 1996). “First, the would-be litigant must have suffered an ‘injury in fact’; that is, an ‘invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.’” *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (ellipses omitted). “Second, the would-be litigant must establish a causal connection between the alleged injury and the conduct being challenged.” *Id.* Third, the litigant “must show that the injury is likely to be redressed by a favorable decision.” *Id.*

Mr. Kistner easily satisfies the requirements of Article III standing. Mr. Kistner has a legally protected interest in ensuring that the vacancy-in-office provisions under Minnesota law are fully enforced. The Vacancy Provisions provide a critical remedy in the form of a special election in the event that a major party’s candidate for a partisan office is ineligible to run for the office after the seventy-ninth day before the election. *See* Minn. Stat. § 204B.13. Indeed, the special-election remedy “preserves the right of the major political parties to nominate a candidate for the office and the voters’ choice of eligible candidates at the election for this office.” *Monaghan v. Simon*, 888 N.W.2d 324, 331 (Minn. 2016). “It also gives election officials ample time to prepare for the special election without causing disruptions to the other elections taking place on the day of the general election.” *Id.* And finally, the Vacancy Provisions ensure that Mr. Kistner has the opportunity to campaign for and receive the votes of those within the Second

Congressional District who have already completed ballots for the deceased major party nominee. As a voter and a major party candidate in the Second Congressional District, Mr. Kistner has a legally protected interest for purposes of standing in ensuring the integrity of these critical statutory remedies.

Mr. Kistner's injury is also real, imminent, and concrete. Plaintiffs' claims seek to gut application of the Vacancy Provisions through a declaration that such provisions are preempted by federal law. *See* Compl. ¶¶ 44-50. Plaintiffs further seek to enjoin the Minnesota Secretary of State from enforcing the Vacancy Provisions, including certifying the special election vote totals for the Second Congressional District seat in lieu of the general election vote totals. *See* Pls.' Mot. for Preliminary Injunction at 1, Dkt. 14. Therefore, Mr. Kistner would suffer a real, concrete, and particularized injury "[i]f the court grants the relief requested in the complaint." *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 975 (8th Cir. 2014); *accord South Dakota v. Ubbelohde*, 330 F.3d 1014, 1024–25 (8th Cir. 2003) (holding that prospective intervenors met the imminence requirement when they alleged that an injury would occur upon the success of the plaintiffs' lawsuit).

Mr. Kistner also meets the requirements of causation and redressability. The Eighth Circuit found that a proposed intervenor "satisfies the traceability requirement" if "the defendant will be compelled to cause the alleged injury to the intervenor if the plaintiff prevails." *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1093 (8th Cir. 2011). Similarly, the impending injury "would be redressed by a judicial determination that the policies are permitted." *Id.* Here, if Plaintiffs prevail, the

Secretary would be necessarily forced to injure Mr. Kistner by ceasing enforcement of the Vacancy Provisions. And that impending harm would be redressed by a decision upholding those very provisions as lawful.

II. MR. KISTNER IS ENTITLED TO INTERVENE AS OF RIGHT.

“Federal Rule of Civil Procedure 24(a)(2) provides that a court must permit anyone to intervene who: (1) files a timely motion to intervene; (2) ‘claims an interest relating to . . . the subject of the action’; (3) is situated so that disposing of the action may, as a practical matter, impair or impede the movant’s ability to protect that interest; and (4) is not adequately represented by the existing parties.” *Nat’l Parks*, 759 F.3d at 975. Rule 24 “should be liberally construed with all doubts resolved in favor of the proposed intervenor.” *South Dakota ex. rel Barnett v. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) (citing *Turn Key Gaming, Inc., v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999)). Mr. Kistner meets each of these requirements.

A. The Motion is Timely.

Mr. Kistner’s motion to intervene is timely. The Eighth Circuit has listed several factors to consider regarding the timeliness of a motion to intervene, including “(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor’s knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties.” *In re Wholesale Grocery Products Antitrust Litigation*, 849 F.3d 761, 767 (8th Cir. 2017) (quoting *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011)). Mr. Kistner satisfies all four requirements. The complaint was

filed just days ago on September 28, 2020. The Secretary of State has yet to answer. Given the preliminary nature of the proceedings, Mr. Kistner's intervention will cause no prejudice to any party. This motion is timely.

B. Mr. Kistner has an Interest in the Subject Matter of this Litigation.

As the candidate for the Republican Party of Minnesota in this election, has “a recognized interest in the subject matter of the litigation.” *See Mausolf*, 85 F.3d at 1300. As discussed, *see supra*, Section I, Mr. Kistner has a strong interest in ensuring that the critical remedies that the Vacancy Provisions provide are enforced by the Secretary, including his ability to campaign for and receive the votes of those within the Second Congressional District who have already completed ballots for the deceased major party nominee. The remedies afforded by the Vacancy Provisions are protected interests accruing to voters and candidates under Minnesota law, the recognition of which is the central issue in this case.

Kistner also has an interest in avoiding voter confusion by following the statutorily-prescribed special election procedures under the Vacancy Provisions. Gutting the Vacancy Provisions at this late stage in the election process would undoubtedly create voter confusion by upending election procedures well-rooted in state law just weeks before the election. After all, “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls,” and that risk increases “[a]s an election draws closer.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). As a candidate, Mr. Kistner has a strong interest in avoiding voter confusion by ensuring that

the election process for the seat he is seeking comports with the expectations of voters in the Second Congressional District memorialized in existing state law.

C. Mr. Kistner May be Impaired by the Disposition of the Case.

A decision in favor of Plaintiffs would unquestionably impair Mr. Kistner's ability to protect his interests. In *National Parks*, the Eighth Circuit explained that "if the [plaintiffs] are successful in receiving [their requested] relief, [the intervenor's] recognized interests . . . would be directly impacted by the court order." *Nat'l Parks*, 759 F.3d at 976; see *Utahns for Better Transp.*, 295 F.3d at 1116 (reasoning that the intervenor satisfied the impairment element of Rule 24(a)(2) through focus on the relief sought in the complaint against the identified interest). If Plaintiff's prevail, Mr. Kistner has no way to protect his interest in ensuring the remedies afforded by the Vacancy Provisions.

Like the intervenors in *National Parks*, Mr. Kistner is entitled to intervene because if Plaintiffs obtain the relief they seek, he "would be directly impacted by the court order." *Nat'l Parks*, 759 F.3d at 976. Without intervention, Mr. Kistner has no way to protect his interest in ensuring application of the remedies afforded by the Vacancy Provisions, avoiding voter confusion, and maintaining the opportunity required under the Vacancy Provisions to receive the vote of those who have already cast a ballot for a candidate who cannot be seated.

D. Mr. Kistner's Interests are Not Adequately Protected by the Existing Parties.

Finally, no current party can represent Mr. Kistner's interests. The burden to show inadequate representation "should be treated as minimal." *Trbovich v. United Mine*

Workers, 404 U.S. 528, 538 n.10 (1972). Although a presumption of adequacy exists when the state is a party, “[t]his presumption will be overcome, however, where the state must balance the [proposed intervenor’s] ‘narrower and more parochial interests’ that are ‘not shared by the general citizenry’ against the broad public interest, and the balance may compromise the [proposed intervenor’s] interests.” *Standard Heating and Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 572 (8th Cir. 1998) (quoting *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993)). Courts have “often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.” *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003). Additionally, the Secretary “is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest[s]” of Mr. Kistner. *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001). These could include “the expense of litigation to defend the existing system, and the social and political divisiveness of the election issue.” *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993), *abrogated on other grounds by Dillard v. Chilton Cty. Comm’n*, 495 F.3d 1324 (11th Cir. 2007) (per curiam). Mr. Kistner’s distinct and individualized interests will likely diverge from the Secretary’s during the course of this litigation. This meets the requirements for inadequate representation under Fed. R. Civ. P. 24(a)(2). Accordingly, Mr. Kistner should be allowed to intervene as a matter of right under Fed. R. Civ. P. 24(a).

III. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION.

If the Court denies intervention as of right, it should allow for intervention as a matter of discretion under Fed. R. Civ. P. 24(b). Additionally, the Court may grant permissive intervention without addressing Rule 24(a). *See League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 577 (6th Cir. 2018) (because the parties “are entitled to permissive intervention, we address only those arguments”). “On timely motion, the court may permit anyone to intervene 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). “The decision to grant or deny a motion for permissive intervention is wholly discretionary.” *South Dakota ex rel Barnett*, 317 F.3d at 787. “In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

Permissive intervention is warranted. First, as explained in detail above, the motion is timely. *See supra* Section II.A. Second, the entire focus of the Complaint is on an election in Minnesota’s Second Congressional District for which Mr. Kistner is now only one of two major party candidates. Third, Mr. Kistner will raise defenses that share common questions of fact and law with those of existing parties. For example, Plaintiffs allege, among other things, that the Vacancy Provisions are unconstitutional. Mr. Kistner disagrees and contends that the Vacancy Provisions are valid and enforceable. Finally, Mr. Kistner’s intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties to the action, as the litigation has just commenced.

Accordingly, and in the alternative, Mr. Kistner should be granted permissive intervention under Fed. R. Civ. P. 24(b).

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Kistner's motion to intervene as a defendant (i) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (ii) permissively pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

DATED: September 30, 2020

Respectfully submitted,

/s/ R. Reid LeBeau II

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CERTIFICATE OF COMPLIANCE

I, Reid LeBeau, certify that the Memorandum in Support of proposed Defendant Tyler Kistner's Motion to Intervene complies with the limits in Local Rule 7.1(f) and with the type-size limits of Local Rule 7.1(h).

I further certify that, in preparation of the above document, I used the word processing program Microsoft Word 2016 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above document contains the following number of words:
2,413.

Date: September 30, 2020

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