No. 20-2244

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH Circuit

Libertarian Party of Minnesota, et al.

Appellants,

vs.

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

Appellee.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
CASE NO. 19-CV-2312 (DSD/DTS)

BRIEF OF APPELLEE

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Appellants, who are a Minnesota minor political party and four individuals who are officials in or past candidates for that party, challenge the constitutionality of particular Minnesota statues regulating the process by which minor-party candidates are permitted to secure a place on Minnesota's November general election ballot. They sued Appellee Minnesota Secretary of State Steve Simon in his official capacity. The district court dismissed the complaint for failure to state a claim on which relief can be granted. *Libertarian Party of Minn. v. Simon*, No. 19-2312, ___ F. Supp. 3d ___, 2020 WL 3046020, at *3-5 (D. Minn. May 29, 2020) (App. 7-13).

The Secretary agrees that oral argument is appropriate in this matter but believes that fifteen minutes per side will be sufficient.

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LEGAL ISSUES

I. Is a statute requiring each signer of a nominating petition to swear or affirm that he or she does not intend to vote at the primary election for the office for which the petition is made unconstitutionally vague or confusing?

Appellants did not raise this issue below.

Apposite authority:

Clements v. Fashing, 457 U.S. 957 (1982)

Lubin v. Panish, 415 U.S. 709 (1974)

Wever v. Lincoln Cnty., Neb., 388 F.3d 601 (8th Cir. 2004)

II. Is the fourteen-day period Minnesota law provides for signing and filing nominating petitions unconstitutional for lack of an absentee-ballot-like option when state law permits petitioning candidates to collect petition signatures remotely?

The district court answered this question in the negative.

Apposite authority:

In re Kemp, 894 F.3d 900 (8th Cir. 2018)

Libertarian Party of N.D. v. Jaeger, 659 F.3d 687 (8th Cir. 2011)

Klinger v. Dep't of Corr., 31 F.3d 727 (8th Cir. 1994)

III. May Minnesota constitutionally allow the public to access signed nominating petitions when the petitions do not contain a statement that a signer desires to vote for the petitioning candidate and state law places no restrictions on signers' right to vote in any election?

The district court answered this question in the affirmative.

Apposite authority:

Socialist Workers Party v. Hechler, 890 F.2d 1303 (4th Cir. 1989)

STATEMENT OF THE CASE

Every minor-party or independent candidate seeking to appear on ballots in Minnesota's November general election must complete a nominating petition and submit it to election officials. Minn. Stat. §§ 204B.03, .07, .11 (2018). Each page of the nominating petition must state the candidate's name and address, the office he or she seeks, and the name of the candidate's political party or principle. *Id.* § 204B.07, subd. 1. Each page of the petition must also contain the following printed 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., subd. 4.

The Secretary provides copies of nominating-petition forms meeting the above requirements to the public on his Office's website. (*See* Compl. Ex. B (Secretary's petition form), Dkt. #6-1, App. 104.) These forms contain the oath that is required by state law. *Compare id. with* Minn. Stat. § 204B.07, subd. 4. Any person who has an Internet connection can access the Secretary's website, download a petition form, print it, fill it out, and send it to a candidate or minor political party that is collecting petition signatures. Alternatively, a candidate or party can provide partially completed petition pages, either electronically or by U.S. Mail, for supporters to sign and return.

In light of the COVID-19 pandemic, the Minnesota Legislature amended state law regarding nominating petitions for the November 2020 general election: the Secretary and other Minnesota election officials were required to accept nominating petitions signed electronically by voters and those submitted electronically to officials. 2020 Minn. Laws ch. 77, § 1, subd. 4(a)(2), at 1-2.

To be included on the November ballot, a petitioning candidate must collect a certain number of signatures that varies based on the particular office the petitioner seeks. Minn. Stat. § 204B.08, subd. 3 (2018). In an election for state legislative office, a petition must have at least 500 signatures; a petition for U.S. Representative must carry 1,000 signatures; and petitions for President, U.S. Senator, or a state office voted on statewide must carry 2,000 signatures.[1]

To validly sign a nominating petition, an individual need only be eligible to vote for the petitioning candidate. *Id.*, subd. 2. An individual need not have registered to vote to be an eligible voter. *See id.* § 201.014, subds. 1-2 (providing criteria for voter eligibility in Minnesota). As a result, whether an individual is currently registered to vote is irrelevant to the validity of his or her signature on a nominating petition.

[1] The minimum signature requirements are calculated as a fraction of the votes cast in the previous general election if that fraction is smaller than the number specified in the statute. *See, e.g.*, Minn. Stat. § 204B.08, subd. 3(a). The district court held (and the parties agree) that "the numbers set forth in the statute, rather than the percentages, govern in this case." (App. 3 n.1.)

In order to appear on the general-election ballot for an office other than President or Vice President,[2] a minor-party or independent candidate is required to collect signatures on nominating petitions during the fourteen-day period during which petitions may be filed. Minn. Stat. § 204B.08, subd. 1. That period begins 84 days before the August state primary and ends 70 days before the primary. *Id.* § 204B.09, subd. 1; *see also id.* § 204D.03, subd. 1 (setting primary date as second Tuesday in August of each even-numbered year). In 2020, the period for signature collection ran from May 19 to June 2.

Appellants sued the Secretary, alleging that the statutory petition oath unconstitutionally barred petition signers from voting in a subsequent primary election, contending that Minnesota election law thus violated Appellants' First and Fourteenth Amendment rights to have the petition process treated in precisely the same manner as a primary election, and seeking injunctive relief requiring significant changes to state law. (Am. Compl., Dkt. #6, App. 16-100.) The district court granted the Secretary's motion to dismiss, holding that all of Appellants' claims were based on misreadings of the provisions of Minnesota law at issue or

[2] Nomination materials for minor-party candidates for President and Vice President are submitted by individuals who seek to run for election as these candidates' presidential electors. Minn. Stat. § 204B.09, subd. 1(c). Electors' nominating petitions must be filed at least 77 days before the November general election. *Id.* In 2020, this deadline fell on August 18.

barred by binding case law. (App. 7-13.) The court denied Appellants' cross-motion for summary judgment as moot. (*Id.* at 14.)

SUMMARY OF ARGUMENT

The Court should affirm the dismissal of Appellants' lawsuit. The district court correctly held that their claims were founded on incorrect interpretations of Minnesota law and were refuted by controlling precedent.

Abandoning most of the legal theories they propounded below, Appellants limit their appeal to three narrow arguments, one of which they have never made before. First, they contend for the first time that the petition oath required by Minn. Stat. § 204B.07 is unconstitutional because it is "at best vague" and because it allegedly creates voter confusion regarding whether a petition signer is permitted to vote at a primary election. (Appellants' Br. 15.) Second, Appellants argue that the fourteen-day period during which Minnesota law permits minor-party candidates to collect petition signatures and file petitions is unconstitutional on the specific and narrow grounds that, according to Appellants, Minnesota election law does not permit signatures to be submitted remotely in a manner analogous to absentee balloting. Third, they assert that state law unconstitutionally permits the contents of nominating petitions to be disclosed to the public.

This Court should reject Appellants' narrow arguments on appeal. First, Appellants' argument about the oath is waived and, even if they had preserved the

issue, the oath is neither vague or confusing. Second, Appellants' argument regarding remote signature-gathering is based on false premises both factual and legal: state governments have no constitutional obligation to permit nominating petition signatures to be collected by an absentee-like process, but even if they did, Minnesota law indisputably permits exactly that. Third, Appellants' contention that their nominating petitions should be treated like secret ballots is devoid of legal support; the sole case they rely on is readily distinguishable on the facts.

ARGUMENT

This Court reviews de novo a district court's dismissal for failure to state a claim. *Trooien v. Mansour*, 608 F.3d 1020, 1026 (8th Cir. 2010). When reviewing a decision on a motion to dismiss, this Court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The Court, however, need not accept as true wholly conclusory allegations or legal conclusions drawn by the pleader from the facts alleged. *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). The Court may consider the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint in reviewing a dismissal under Rule 12(b)(6). *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

Appellants assert that "[u]nder a Rule 12 analysis, plaintiffs are required only to show the factual basis of their claims—not the legal basis." (Appellants' Br. 9.) They are incorrect. The central purpose of a motion under Fed. R. Civ. P. 12 is to test the *legal* sufficiency of the complaint. *Peck v. Hoff*, 660 F.2d 371, 374 (8th Cir. 1981); *see also id.* ("A motion to dismiss does not test the facts to support the claim."). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." *Id.* at 555. The "claim" and "right to relief" referenced in *Twombly* are both concepts defined by substantive law; a plaintiff must coherently state such a legal claim and support it with sufficient factual allegations in order to defeat the motion to dismiss. *See id.*

As an initial matter, it is important to note that Appellants have abandoned most of the legal arguments they propounded below. Because proper judicial administration relies upon an appellant raising all claims of error in its opening brief, this Court ordinarily gives no consideration to any question that is not raised, briefed, or argued there. *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 740-41 (8th Cir. 1985).

In their memoranda on the parties' dispositive cross-motions below, Appellants stated a number of legal arguments that they omitted from their brief in this appeal. Most notably, Appellants below contended:

- That the petition oath required by Minn. Stat. § 204B.07, subd. 4, is facially unconstitutional because it requires petition signers to give up the right to vote at a subsequent primary (Pls.' Mem. Supp. Mot. Summ. J. 10-11, Dkt. #14);
- That, on similarly facial terms, the Minnesota statute requiring minor-party candidates to collect and file petition signatures within a fourteen-day period is per se unconstitutional because the brevity of the petition period unduly burdens the rights of minor parties and their candidates (*id.* at 19-25); and
- That Minnesota law unconstitutionally allows election officials to disqualify a petition signature on the grounds that the signer's voter registration is subject to an eligibility challenge but does not provide the signer an opportunity to contest the disqualification (*id.* at 29-33).

Appellants' brief makes none of these arguments, and as a result the Court should disregard them.[3]

[3] The district court held that these and Appellants' remaining arguments, including other ones they did not include in their appellate brief, were without merit because (Footnote Continued on Next Page.)

None of Appellants' claims state a legal claim. Even if Appellants had raised vagueness and voter confusion below, the statutory oath is not vague or confusing; Appellants identify no legal authority (nor is the Secretary aware of any) supporting the contention that a statutory ballot-access restriction is unconstitutional if it may confuse voters; and the complaint shows that the only voter confusion present in this case was created by Appellants themselves. Appellants' argument regarding absentee signature-gathering and Minnesota's fourteen-day period suffers from fatal mistakes of both law and fact: no law requires states to permit petitioning candidates to collect signatures in a manner analogous to absentee balloting—and even if there were such a law, this state's election statutes indisputably *do* permit such a process. Finally, the sole precedent Appellants cite for the proposition that states must treat nominating petition signatures like secret ballots is plainly factually distinguishable.

For these reasons, the Court should affirm the district court's decision.

(Footnote Continued From Previous Page.)
the arguments were founded on misinterpretations of Minnesota law or were contrary to controlling case law. (*See, e.g.*, App. 7-8 (holding that plain language of statutory oath does not preclude signers from voting in subsequent primary election), 11 (holding that claim regarding disqualified signatures fails for, "among other things, lack of standing"); 12-13 (holding that facial attack on 14-day period fails pursuant to the rule of *American Party of Texas v. White*, 415 U.S. 767, 786 (1974), and related precedent).) These holdings are correct in every particular and would deserve to be affirmed—except that Appellants elected not to contest them on appeal.

I. LEGAL STANDARD FOR CHALLENGES TO STATE BALLOT-ACCESS RESTRICTIONS

Appellants allege that various requirements of Minnesota election law are unconstitutional. The U.S. Constitution guarantees to states the power to regulate their own elections. U.S. Const. Art. I, § 4; *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). State election regulations inevitably impose some burdens on individuals' rights to vote and to associate with others for political purposes. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). States are permitted to impose reasonable procedural limitations on who can appear on a state election ballot. *Lubin v. Panish*, 415 U.S. 709, 718-19 (1974). The Supreme Court has held that, as a practical matter, substantial regulation of elections is necessary "if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson*, 460 U.S. at 788. A state's "important regulatory interests" are "generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* Finally, state governments "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). In pursuit of these interests, a state may constitutionally impose restrictions such as requiring a

candidate to make a showing of substantial support before being allowed on the ballot. *Anderson*, 460 U.S. at 788 n.9.

Appellants' lawsuit focuses on Minnesota's requirements for nominating petitions. The *Lubin* Court held that nominating-petition requirements substantially identical to Minnesota's are constitutional:

> [W]e note that there are obvious and well-known means of testing the 'seriousness' of a candidacy which do not measure the probability of attracting significant voter support solely by the neutral fact of payment of a filing fee. States may, for example, impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election.

Lubin, 415 U.S. at 718-19; *see also Clements*, 457 U.S. at 964-65 (collecting cases upholding requirements that minor-party candidates "demonstrate a certain level of support among the electorate before the minor party or candidate may obtain a place on the ballot").

When reviewing First and Fourteenth Amendment challenges to ballot-access requirements involving nominating petitions, federal courts apply a "reasonableness" test to determine whether (a) the challenged laws "freeze the status quo by effectively barring all candidates other than those of major parties," or, instead, (b) a "reasonably diligent" minor-party candidate can be expected to satisfy the requirements. *McLain v. Meier*, 851 F.2d 1045, 1050 (8th Cir. 1988). Under this test, "for a ballot access restriction to be found unconstitutional, a

challenger first must establish that the law imposes a substantial burden" on minor-party candidates. *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 694 (8th Cir. 2011). A restriction that imposes a substantial burden is nonetheless constitutional if it is narrowly drawn to serve a compelling state interest. *Id.* at 693.

For the reasons explained below, as a matter of law, none of the requirements at issue in this appeal impose a substantial burden on minor-party candidates. As a result, the district court order dismissing Appellants' complaint should be affirmed.

II. THE OATH REQUIRED BY MINN. STAT. § 204B.07 IS CONSTITUTIONAL.

The district court rejected the construction of Minn. Stat. § 204B.07, subd. 4, that formed the core of Appellants' lawsuit. (App. 7-8.) It held that Appellants' claim that the oath requires petition signers to swear they will not vote in a primary election misreads the statute. (*Id.*) In fact, the court held, "the oath simply requires nominating petition signers to attest that they do not 'intend' to vote in the primary election for the office underlying the petition." (*Id.* at 8.)

This holding is clearly correct—as Appellants implicitly concede by not disputing it on appeal. Instead, they argue for the first time that the statutory oath is unconstitutional because it is "at best vague" and because it supposedly causes voter confusion. The Court should reject these arguments because they were not

raised below and because they lack any basis in law or in allegations in the complaint.

A. The Court Should Disregard Appellants' New Challenge to the Statutory Oath Because They Did Not Raise it Below.

This Court does not ordinarily consider legal issues raised for the first time on appeal. *Wever v. Lincoln Cnty., Neb.*, 388 F.3d 601, 608 (8th Cir. 2004). The Court makes exceptions to this rule only if a new issue "is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result." *Orr v. Wal–Mart Stores, Inc.*, 297 F.3d 720, 725 (8th Cir. 2002).

In this case, the district court correctly concluded that the statutory oath provided by Minn. Stat. § 204B.07, subd. 4, merely requires petition signers to affirm that they do not intend to vote in a particular subsequent primary election. (App. 8.) Appellants now contend that the concept at the heart of the challenged portion of the oath—that is, intent—"is at best vague." (Appellants' Br. 15.) They further argue that the terms of the oath confuse voters, leading them to incorrectly believe that they are not permitted to vote in a subsequent primary election. (*Id.*) Appellants have never before raised the issues of vagueness or voter confusion in this litigation, and as a result these issues should be disregarded.

Neither the amended complaint nor any of the memoranda Appellants filed below regarding the parties' dispositive cross-motions mentions vagueness as an objection to the petition oath provided by Minn. Stat. § 204B.07, subd. 4. (*See,*

e.g., Am. Compl., App. 16-100; Pls.' Mem. Supp. Summ. J., Dkt. #14; Pls.' Mem. Opp. Mot. Dismiss, Dkt. #25; Pls. Reply Mem. Supp. Summ. J., Dkt. #27.) Likewise, these filings do not contend that the statutory oath may confuse or mislead a voter to the mistaken belief that signing a nominating petition disqualifies him or her from voting in a subsequent primary election. Instead, the core premise of all of Appellants' submissions below was that this construction of the oath text is the self-evidently *correct* one: the amended complaint, most notably, alleges Appellants' misinterpretation of section 204B.07 as a fact more than thirty times. (*See* Am. Compl. pp. 2, 3, 5, ¶¶ 77, 80, 82, 93, 111, 133, 134, 138, 170, 181, 193, 196, 214, 216, 219, 239, 242, 264, 284, 287-88, 292, 306, 310-12, 332, 334, 358, App. 17-86.)

Because Appellants introduced their contentions regarding supposed statutory vagueness and voter confusion for the first time on appeal, the Court should not consider them.

B. There is No Factual or Legal Basis to Invalidate the Oath Statute for Supposed Vagueness or Confusion.

Even if the Court considers Appellants' new argument, it should affirm. Appellants never alleged the statute is vague or that it misleads voters into believing that signing the petition oath means forfeiting the right to vote in a primary. To the contrary, Appellants described only one reason Minnesota voters

believed that state law forces them to choose between signing a nominating petition and voting in a primary—and that is *because Appellants told them so*:

> In 2014, [Appellant Chris] Dock and the other [Appellants] during the 14-day period of time available, while collecting petition signatures, experienced the need to explain to electors, when asked, that they could be subject to criminal prosecution if they sign the petition and later participate in a major political party primary months later. As a result, voters were reluctant to sign and some did not sign at all.

(Am. Compl. ¶ 154, App. 50.) Thus, Appellants admitted that the only "confusion" regarding the supposed risk of criminal prosecution resulted from their incorrect representations to potential petition signers.

Appellants now further (and for the first time) assert that the statutory oath has been "purposefully" designed to confuse and mislead voters. (Appellants' Br. i, 16-17.) Appellants provide no factual or legal support for this assertion.

For these reasons, even if Appellants had raised vagueness or voter confusion below, the district court would inevitably have been required to dismiss any such claim on the grounds that the complaint did not allege facts that could support a claim to relief that is plausible on its face. *See Twombly*, 550 U.S. 544, 570 (2007).

Next, even if Appellants had alleged in their pleadings that section 204B.07, subdivision 4, was vague or confusing to voters, at no time have they provided legal authority to support a claim that such alleged defects render it unconstitutional.

Federal courts have recognized a "constitutional vagueness doctrine" that requires criminal laws to state explicitly and definitely what conduct is punishable. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 412 (2010). The doctrine requires criminal statutes to state the nature of prohibited conduct explicitly and definitely to protect against arbitrary and discriminatory prosecutions. *See id.* In the election context, however, the Secretary is unaware of any precedent in which a court has held that a statute is void for vagueness. As noted, Appellants cite no law at all.

Regardless, the oath provided by Minn. Stat. § 204B.07, subd. 4, is neither vague nor confusing. An affirmation that a voter "do[es] not intend to vote at the primary election for the office for which [a particular] nominating petition is made" is not confusing to anyone who reads the statutory terms carefully to determine their plain meaning: at the time he or she signs the petition, the voter does not intend to vote at primary election for the office for which the nominating petition is made. Meanwhile, Appellants' contention that the core idea of this portion of the oath—intent—is vague ("at best") is absurd. Intent is a foundational concept in American law that is well and broadly understood, including by countless laypeople. Appellants' contentions are thus unfounded.

C. The Oath Requirement is Constitutional on its Face.

Regardless of the nature of Appellants' new attacks on the statutory oath, the district court correctly concluded that the oath is facially constitutional.

Longstanding federal case law holds that states may constitutionally enact policies for the purpose of preventing "party raiding," which is "the organized switching of blocks of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson*, 460 U.S. at 789 n.9. One purpose of the intent portion of the petition oath in section 204B.07 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. Minnesota's petition oath discourages such a scheme by making it unlawful for persons who intend to vote for a particular candidate in the primary to carry it out.

Moreover, the intent portion of the petition oath upholds the constitutional "one person, one vote" principle, *see Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964), by barring individual voters from intentionally endeavoring to multiply their influence over the names to be placed on Minnesota's general-election ballot. While the intent element of the oath permits an eligible voter to support a minor-party or independent candidate for an office in May but then honestly change his or her mind and support a major-party candidate in the August primary election, any *intentional* attempt to double an individual voter's electoral influence in this manner is properly illegal. *See also* Minn. Stat. § 204B.08, subd. 2 (barring

individual from signing more than one nominating petition for candidates for same single office).

Finally, as noted above, it is settled law that states are constitutionally permitted to require minor political parties to "demonstrat[e] the existence of some reasonable quantum of voter support by requiring such parties to file petitions" signed by a number of the state's voters. *Lubin*, 415 U.S. at 718-19. It is inherent in any such demonstration-by-petition that the individuals signing a candidate's petition are their actual supporters. 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, in the sense the *Lubin* Court contemplates, a "supporter" of the Libertarian Party candidate. In other words, if Appellants cannot find a sufficient number of eligible Minnesotans who honestly support them, in light of the basic purpose of nominating petitions it is within Minnesota's constitutional authority to deny them a place on the general election ballot. *See id.*; *see also Clements*, 457 U.S. at 964-65.

In sum, the intent portion of the oath set forth in Minn. Stat. § 204B.07 does nothing more than ensure that individuals signing nominating petitions are actual supporters of the petitioning candidate. In light of the fundamental and legitimate purpose of nominating petitions (that is, to require minor-party candidates to "demonstrate the existence of some reasonable quantum of voter support," *Lubin*,

415 U.S. at 718-19), this portion of the oath does not impose a substantial burden on Appellants or their supporters. As a result, Appellants' attack on the statutory oath fails under any legal theory, and it was therefore properly dismissed.

III. THE MINNESOTA LAW RESTRICTING THE TIME FOR CIRCULATING NOMINATING PETITIONS IS CONSTITUTIONAL.

Appellants contend that Minn. Stat. § 204B.09, subd. 1, the Minnesota statute mandating that minor-party nominating petitions be signed and filed within a fourteen-day period in May and June, is unconstitutional. In the district court, Appellants stated a broad, facial challenge to the statute, contending that the fourteen-day period was per se unconstitutional. The court below correctly rejected this challenge on the basis of binding federal precedent, most importantly *Jenness v. Fortson*, 403 U.S. 431 (1970) and *American Party of Texas v. White*, 415 U.S. 767 (1974). (App. 12-13.) On appeal, Appellants assert only a narrow claim that the fourteen-day period is unconstitutional because minor parties allegedly cannot spend the allotted fourteen days collecting signatures on nominating petitions in a manner analogous to absentee balloting.

This narrower claim is incorrect for the reasons the district court provided. (*See* App. 8-11.) First, the claim would fail even if Minnesota did bar petitioning candidates from collecting signatures from distant supporters, because there is no legal basis for Appellants' contention that they are constitutionally entitled to be treated in precisely the same manner as major-party candidates running in primary

elections are. Second, the factual premise of Appellants' argument is wrong: Minnesota law indisputably permits eligible voters to sign nominating petitions without ever meeting a signature gatherer face-to-face, indeed even from thousands of miles away. The district court's decision should therefore be affirmed.

A. Appellants' Equal Protection Theory Has No Basis in Law or Fact.

Appellants' argument regarding absentee signature gathering is one application of their broader contention that any and all differential treatment of nominating-petition signatures and primary-election votes violates the equal protection clause of the Fourteenth Amendment. In order to state an equal-protection claim, a plaintiff must show that he or she was treated differently than others who were similarly situated. *In re Kemp*, 894 F.3d 900, 909-10 (8th Cir. 2018). "Dissimilar treatment of dissimilarly situated persons does not violate equal protection." *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994).

On the most basic level, Appellants' claims regarding the supposed disparate treatment of nominating petition signers and primary election voters fail because these two groups of persons are not similarly situated. Individuals signing nominating petitions are taking part in a process that exists so that an independent or minor-party candidate may demonstrate a certain minimum level of support among the electorate before being allowed a place on the general-election ballot. *See Clements*, 457 U.S. at 964-65. Primary-election voters, meanwhile, are casting

ballots to determine *which* of a list of candidates the electorate prefers to advance to the general election—where that candidate will make use of the ballot access that his or her major party has already proven that it is entitled to by securing a large number of votes in one or more prior elections. *See* Minn. Stat. § 200.02, subd. 7 (2018). As the district court correctly held, the respective functions of a nominating petition and a primary election are fundamentally different, and as a result the Equal Protection Clause does not require petition signatures to be treated precisely identically to primary election votes. (*See* App. 9-10.)

It appears that the central reason that Appellants believe petition signatures and primary votes are functionally equivalent is their misinterpretation of the petition oath requirement in Minn. Stat. § 204B.07. Appellants assert that because individuals signing nominating petitions cannot vote in a primary election, a petition signature is equivalent to a primary vote. (*See, e.g.*, Am. Compl. ¶ 239, App. 67.) But Appellants' premise is wrong: neither Minn. Stat. § 204B.07 nor any other Minnesota law bars an individual from both signing a nominating petition and voting in a primary election for the same office, as long as the individual does not take that series of actions as part of an intentional scheme. As a result, Appellants' argument fails. No law requires Minnesota to treat nominating-petition signatures and primary-election votes precisely equivalently.

B. Appellants' Claims Regarding Absentee Processes are Contradicted by Minnesota Law.

Even if the law mandated equal protection of nominating petitions and primary elections, Appellants' claim regarding absentee processes and Minnesota's fourteen-day filing period would still fail, because state law permits absentee petition-signing by many different methods. It is in fact considerably *easier* for an individual voter to sign a nominating petition from afar than it is for the same voter to cast an absentee ballot.

As Appellants recognize, the Secretary provides the public with sample forms for nominating petitions on his website. (*See* Am. Compl. Exs. B, C, App. 104-05.) Nothing prevents any eligible Minnesota voter, no matter where in the world he or she is located, from downloading the sample form from the Secretary's site, filling it out with a minor-party candidate's name and other required information, signing the form, and sending it to the party or candidate, who can then submit it to election officials. *See* Minn. Stat. § 204B.07, subd. 1 (stating requirements for petition pages).[4] Alternatively, minor-party candidates can make an absentee petition signer's task even easier by sending partially

[4] Special pandemic-related legislation made this process even easier during the 2020 petition period. 2020 Minn. Laws ch. 77, § 1, subd. 4(a)(2), at 1-2 (requiring state election officials, during 2020 petition period, to accept nominating petitions submitted electronically and petition signatures created by electronic means).

completed petition pages to their supporters either electronically or by U.S. Mail so that the supporters can sign and return them.

Either one of these solutions indisputably constitutes a process that is comparable to absentee balloting. But in fact, the processes described above place substantially *less* of a burden on absentee petition signers than absentee voters face, because each person who votes absentee is generally required to submit an application for an absentee ballot to his or her local election office, have his or her completed ballot witnessed by a fellow Minnesota voter,[5] and use various ballot envelopes properly. *See id.* §§ 203B.04, subds. 1-6, .08, subd. 1. As a result, even if the Constitution required nominating-petition signers to have the option of using an absentee process, such a process is easily available to petitioning candidates and petition signers alike.

Notwithstanding the clear terms of Minnesota law, Appellants deny that the state permits petitions to be signed on an absentee basis. They cite no statute, administrative rule, or other legal provision that would bar (1) an eligible Minnesota voter from signing a nominating petition from far away or (2) a petitioning candidate from collecting petition signatures remotely. Instead,

[5] In 2020, for reasons stemming from the pandemic emergency, Minnesota has temporarily suspended the absentee-ballot witness requirement pursuant to a court consent decree. *LaRose v. Simon*, No. 62-CV-20-3149, Partial Consent Decree (Minn. Dist. Ct. Aug. 3, 2020); *appeal dismissed*, No. A20-1040 (Minn. Aug. 18, 2020).

Appellants' denial is based solely on factual misstatements and non sequiturs and has no foundation in legal authority.

Appellants first declare that the absentee petition processes state law permits are "illusory" because no such process is separately described in the statute. (Appellants' Br. 20.) But they cite no law, and the Secretary is aware of none, requiring states to explicitly describe in statute every detail of every step that candidates could possibly take to gain access to the ballot. Appellants do not deny that Minnesota law *permits* the absentee processes described above, and they do not explain why that is insufficient as a matter of constitutional law.

Second, Appellants vaguely assert that the absentee processes are "illusory because the Secretary has promulgated rules that hinder an individual from meeting the requirements he has imposed on the petitioning process." (*Id.*) The only support they offer for this statement is a citation to a Minnesota administrative rule requiring that particular portions of election petitions be in 10-point type and 12-point bold type. (*Id.* n.28 (citing Minn. R. 8205.1010, subps. 2(B), (F)).) Appellants do not explain how these typeface requirements hinder candidates from filing valid nominating petitions or why such a hindrance is unconstitutional. *See also United States v. Darden*, 915 F.3d 579, 586 n.9 (8th Cir. 2019) (holding that Court generally does not consider arguments raised for first time in reply brief).

Third, Appellants claim that the Secretary's example petition form violates Rule 8205.1010 because the form does not contain the required notice stating that information on the petition is subject to public inspection. (*Id.* at 20 (citing Minn. R. 8205.1010, subp. 2(I)).) But this is plainly false, as the exhibits to Appellants' own complaint demonstrate: the notice is printed in large type, all-caps and boldfaced, in the middle of the example form. (Am. Compl. Ex. B, App. 104; *see also id.* Ex. C, App. 105 (annotated version of example form adding, in right-hand margin, explanation that public-inspection notice printed on form is required by Minn. R. 8205.1010, subp. 2(I)).)

Fourth, Appellants contend that major political parties have access to military and overseas voters, while minor parties do not. (Appellants' Br. 21.) This is also false: Minnesota law allows Appellants to collect petition signatures from eligible Minnesota voters located anywhere in the world. Moreover, the fourteen-day petition period imposes no serious burden on such an effort, because it is only the signing and the filing of the petition that must take place during the period. Appellants can solicit petition signers at any time, and nothing prevents them from sending petition materials to potential signers, either electronically or by mail, before the fourteen-day period begins.

Finally, Appellants complain that the Secretary publishes instructional materials to assist Minnesotans in casting absentee ballots in primary elections but

does not provide specific guidance pertaining to absentee petition signing. (Appellants' Br. 21-22.) In fact, the Secretary provides petition gatherers and signers with extensive guidance regarding the petition process. (*See, e.g.*, Am. Compl. Exs. B, C, App. 104-05.) Appellants provide no legal authority holding that such guidance is a constitutional obligation, much less that the guidance must contain the level of elaborate detail that Appellants demand.

For these reasons, the fourteen-day petition period set by Minn. Stat. § 204B.09, subd. 1, does not impose a substantial burden on Appellants. It is therefore constitutional. *See Libertarian Party of N.D.*, 659 F.3d at 694.

IV. PUBLIC ACCESS TO NOMINATING PETITIONS IS CONSTITUTIONAL BECAUSE PETITION SIGNERS AND PRIMARY VOTERS ARE NOT SIMILARLY SITUATED.

Appellants contend that Minnesota law allowing members of the public to access data from nominating petitions is unconstitutional because it treats nominating petitions differently than primary elections. There is no support for this proposition in statute or relevant case law, and as a result the Court should reject it.

Minnesota nominating petitions and the information contained on them are generally accessible by the public. *See* Minn. Stat. § 13.03, subds. 1, 3 (2018) (stating general presumption that Minnesota government data are public and requiring state agencies to permit public to inspect and copy such data). While Minnesota law does permit individuals to protect their personal information—including information that may be included on a nominating petition—from public

disclosure under particular circumstances, *see, e.g.*, *id.* § 5B.05(d) (authorizing participant in Secretary's Safe at Home Program to prohibit disclosure of certain personal information), the general rule is that government data are public. *Id.* § 13.03, subd. 1. Meanwhile, Minnesota structures election procedures so that the sensitive information contained on each ballot—that is, information regarding which voters voted for which candidates—is never collected and thus does not become government data at all, rendering it not even theoretically subject to disclosure. *See, e.g.*, *id.* § 204C.18 (prohibiting (1) collection of data regarding political party any voter belongs to or voted for and (2) placement of identifying marks on any ballot).

As the district court held, Appellants' equal-protection claim regarding public access to petition signatures fails because, as explained in Part III-A, above, petition signers and primary voters are not similarly situated. (App. 9-12.)

Appellants rely on a non-binding Fourth Circuit decision in which a divided appellate panel held that West Virginia could not require an individual supporting a minor-party candidate to declare, on a nominating certificate that was subsequently made available for public inspection, that he or she "desire[d] to vote" for the candidate. *Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1310-11 (4th Cir. 1989). Such a requirement, the court held, violated the individual's right to cast election ballots in secret. *Id.* at 1308-09.

This case is distinguishable from the current appeal. The central legal provision at issue in *Socialist Workers Party* was the statute mandating the "desires to vote" declaration. *Id.* at 1308. The law required each nominating certificate to contain both this declaration and a further notice that "signing . . . the nominating certificate forfeits th[e] voter's right to vote in the corresponding primary election." *Id.* Minnesota law is entirely different. First, nominating petitions in this state contain no language about any person's "desire to vote" for the petitioning candidate; instead, the petition need only state that the signers *nominate* the candidate—that is, that they support placing the candidate's name on the general-election ballot. (*See* Am. Compl. Ex. B, App. 104.) Moreover, Minnesota law does not bar a person who signs a nominating petition from voting in any subsequent election. For that reason, Minnesota nominating petitions, unlike the challenged West Virginia certificates, do not notify signers that they "forfeit" their right to vote in a primary. (*Cf. id.*) Because the facts of the current case are exactly the opposite of the core facts of *Socialist Workers Party*, that case does not support Appellants' legal theory here.

Finally, the Secretary notes that the Fourth Circuit majority did not order the relief that Appellants demand here—that is, the court did not order West Virginia to treat certificate signatures as confidential information akin to secret ballots. Instead, the court ruled that the "desire to vote" declaration required by the West

Virginia statute was unconstitutional, forcing the state to change it. *See id.* at 1310-11.[6] Such relief would be impossible in the current lawsuit, because there is no "desire to vote" language in Minnesota law to strike down.

Appellants' contention that they are entitled to have signatures on their nominating petitions treated as secret ballots lacks a basis in law, and as a result the district court was correct to reject it.

CONCLUSION

For the above reasons, the district court properly dismissed Appellants' complaint. The oath that Minnesota law requires signers of nominating petitions to assent to is neither vague nor confusing, and even if Appellants had properly pleaded and raised those issues below, voter confusion caused by Appellants' own misrepresentations of the oath statute does not render the statute unconstitutional. The fourteen-day petition period provided by state law is not unconstitutionally burdensome on minor parties and their candidates, either facially or on the basis of Appellants' mistaken belief that Minnesota law does not permit petition signatures to be gathered remotely. No statute or case law requires nominating-petition signatures to be treated as secret ballots if, as is the case here, the petition forms do

[6] Thirty-one years later, the West Virginia statute has been amended so that it now sets forth a nomination process that is functionally identical to Minnesota's. W. Va. Code § 3-5-23(d) (2018). Nothing in current West Virginia law requires signed nominating certificates to be treated as confidential.

not contain "desire to vote for" language and the applicable law permits petition signers to vote in subsequent elections without restrictions.

The Secretary therefore respectfully requests that the Court affirm the decision below to dismiss this action for failure to state a claim for which relief can be granted.

Dated: September 17, 2020

Respectfully submitted,

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WITH FED. R. APP. P. 32

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/s/ **Nathan J. Hartshorn**
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