State of Minnesota
In Court of Appeals
A20-0272

Jennifer Schroeder, Elizer Eugene Darris, Christopher James Jecevicus-Varner, and Tierre Davon Caldwell,

Respondents/Plaintiffs,

v.

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

Respondent/Defendant,

and

Minnesota Voters Alliance,
a nonprofit corporation,

Appellant/Proposed Defendant-Intervenor.

APPELLANT'S PRINCIPAL BRIEF

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March 23, 2020

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Trial court's ruling: The trial court held that the proposed intervenors did not meet the requirements of Rule 24.01 for intervention of right.
Preservation of issue: The parties opposed the notice of limited intervention. Appellant filed a motion, which after hearing, was denied by the lower court.
Apposite authorities: *Missouri-Kansas Pipe Line Co. v. U.S.*, 312 U.S. 502, 506 (U.S. 1941); *Engelrup v. Potter*, 224 N.W.2d 484, 488 (Minn. 1974); *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977); *Jerome Faribo Farms, Inc. v. Cty. of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990).

II. Whether the Attorney General's Office has shirked its duty to argue all successful, complete defenses on behalf of its clients?

How the issue was raised: The Appellant filed a motion for limited intervention after the Attorney General's Office omitted from its Answer a successful, complete defense on behalf of its clients.
Trial court's ruling: The trial court denied the motion for limited intervention.
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Apposite authorities: Minnesota Statutes § 8.06, Rule of Professional Conduct 3.1 and comment and Rule of Civil Procedure 12.02.

III. Whether the defense of no private cause of action is a successful, complete defense against all claims based on the government violating the Minnesota Constitution?

How the issue was raised: The Appellant filed a motion for limited intervention after the Attorney General's Office failed to file a successful, complete defense on behalf of its clients.
Trial court's ruling: The trial court denied the motion for limited intervention.
Preservation of issue: The parties opposed the notice of limited intervention. Appellant filed a motion, which after hearing, was denied by the lower court.
Apposite authorities: *Eggenberger v. West Albany Tp.*, 820 F.3d 938, 941–42 (8th Cir. 2016); *Davis v. Hennepin County*, 2012 WL 896409 at *2 (Minn.App. 2012); *Danforth v. Eling*, 2010 WL 4068791 at *6 (Minn.App. 2010); *Mlnarik v. City of Minnetrista*, 2010 WL 346402 at *1 (Minn.App. 2010).

STATEMENT OF THE CASE AND FACTS

Statement of the Case

In this case, the plaintiffs sued the Secretary of State, on the basis, that Minnesota statutes banning felons from voting violate the Minnesota Constitution. Compl. at 1-17 (Oct. 12, 2019). In the Secretary of State's Answer, the Attorney General's Office shirked its duties by failing to allege that the defense of no private cause of action to sue the government required dismissal. Answer at 1-24 (Nov. 12, 2019) In response, Minnesota Voters Alliance (MVA), as a taxpayer and as an associations, filed a motion for limited intervention with a proposed Defendant-Intervenor's Answer alleging the successful, complete defense. Not. of Lmtd. Interv. at 1-16 (Nov. 18, 2019).

MVA's motion papers for intervention identified multiple appellate court and federal decisions dismissing claims under the Minnesota Constitution based on the successful, complete defense of no private cause of action[1]: *Davis v. Hennepin County*, 2012 WL 896409 at *2 (Minn.App. 2012); *Danforth v. Eling*, 2010 WL 4068791 at *6 (Minn.App. 2010); *Mlnarik v. City of Minnetrista*, 2010 WL 346402 at *1 (Minn.App. 2010); *Eggenberger v. West Albany Tp.*, 820 F.3d 938, 941–42 (8th Cir. 2016); *Hummel v. Minnesota Dept. of Agriculture*, 2020 WL 32644 at *10 (D.Minn. 2020); *Hatton v. Piper*, 2019 WL 969787 at *1 (D.Minn. 2019); *Benson v. Piper*, 2019 WL 2017319 at *4 (D.Minn., 2019); *Ivey v. Johnston*, 2019 WL 3334346 at *3 (D.Minn. 2019). Memo. in Supp. of Mot. for Lmtd. Interv. at 2; Reply Memo. in Supp. of Mot. for Lmtd. Interv. at 2.

[1] For sake of brevity, throughout the brief, the phrase "successful, complete defense" refers to "successful, complete defense of no private cause of action."

MVA's motion papers also identified that Minnesota Declaratory Judgment Act, Minn. Stat. § 555.01, et seq., does not provide a cause of action to sue the government. *Hoeft v. Hennepin County*, 754 N.W.2d 717, 722 (Minn. App. 2008) (the Uniform Declaratory Judgment Act (UDJA) cannot create a cause of action that does not otherwise exist); *Alliance for Metropolitan Stability v. Metropolitan Council*, 671 N.W.2d 905, 915-16 (Minn. App. 2003) (the Uniform Declaratory Judgments Act is not an express independent source of jurisdiction); *Lighthouse Management Group, Inc. v. Deutsche Bank Trust Company of Americas*, 380 F.Supp.3d 911 (D. Minn. 2019) (the Minnesota Uniform Declaratory Judgment Act is not an express independent source of jurisdiction); *Mitchell on Behalf of X.M. v. Dakota County Social Services*, 357 F.Supp.3d 891 (D. Minn. 2019) (under Minnesota law, declaratory relief must be based on underlying cause of action); *Finnegan v. Suntrust Mortgage*, 140 F.Supp.3d 819 (D. Minn. 2015) (under Minnesota law, declaratory judgment is a remedy, not a cause of action); *Eggenberger v. West Albany Tp.*, 90 F.Supp.3d 860 (D. Minn. 2015), *affirmed* 820 F.3d 938, *certiorari denied*, 137 S.Ct. 200, 196 L.Ed.2d 131 (the Minnesota Declaratory Judgment Act cannot create a cause of action that does not otherwise exist; a party seeking a declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right). Memo. in Supp. of Mot. for Lmtd. Interv. at 2-3. There are no state appellate or federal cases that have stated that the Minnesota Constitution nor Minnesota Declaratory Judgment Act creates a separate private cause of action to sue the government.

The Attorney General's Office, by failing to cite these cases and failing to argue the successful, complete defense in its Answer, shirked its duties to zealously represent the state defendants in this case. Answer at 1-24. The Attorney General's Office's duty to argue

successful, complete defenses on behalf of its governmental clients is established by statutes and rules, including Minnesota Statutes § 8.06, Rule of Professional Conduct 3.1 and Rule of Civil Procedure 12.02. These statutes and rules require the Attorney General's Office to file all successful, complete defenses on behalf of its governmental clients.

Because of the conduct of the Attorney General's Office, MVA and the public, are left to wonder if the Attorney General's Office, in this high-profile voting rights case, is representing the narrower interests of the plaintiffs instead of the broader interests of the public. Further, has the Attorney General's Office's failings led the lower court to an unconstitutional usurpation of the legislative prerogative to waive sovereign immunity from lawsuits by enacting private causes of action?

So, in this appeal, MVA seeks reversal of the lower court's denial of the motion to intervene. First, MVA asserts that it is entitled to intervene in the lower court—even though, perhaps, not within the precise bounds of Rule 24.01 governing intervention of right—because there is a sound reason to allow the intervention—namely the Attorney General's Office shirking its duties leading to the lower court's constitutional usurpation. In absence of such intervention by MVA, the safeguarding of the taxpayers' interests and the public interests in this high-profile voting rights case is impermissibly left to the discretion of the Attorney General's Office and the lower court. Second, MVA's intervention must be allowed because MVA satisfies the Rule 24.01 criteria.

Facts

I. The Plaintiffs sued the Secretary of State for violating the Minnesota Constitution without specifying a private cause of action.

In the Complaint, the Plaintiffs sued the Secretary of State. Compl. at 1. The Complaint alleges numerous claims that Minnesota statutes banning felons from voting violate the Minnesota Constitution. Compl. at 1-17.

II. MVA, as taxpayers and as associations, support the constitutionality of Minnesota's challenged statutes regulating voting.

A. Minnesota Voters Alliance works in Minnesota for election integrity.

Minnesota Voters Alliance is a nonprofit organization with members who seek to ensure, as part of their collective objectives, public confidence in the integrity of Minnesota's elections, in election results and election systems, processes, procedures, and enforcement, and that public officials act in accordance with the law in exercising their obligations to the people of the State of Minnesota. Not. of Lmtd. Interv. at 6. Its membership includes individual registered voters and taxpayers. *Id.*

B. The MVA has a significant interest in the Attorney General's Office consistently and uniformly applying the defense of lack of private cause of action and believes the court will be aided by MVA participation as a party for the purposes of the limited defense.

MVA's interest is public in nature. *Id.* at 7. The MVA can bring to the court a unique and factual perspective in support of the State of Minnesota in the instant action as it pertains to the role the Attorney General plays in consistently and uniformly applying the defense of lack of private cause of action to claims brought under the Minnesota Constitution or brought under the Minnesota Declaratory Judgment Act. *Id.*

The MVA is an association of people organized in Minnesota to promote election integrity. *Id.* It uses private and public resources as a catalyst to investigate complaints arising from Minnesota's elections. *Id.* The complaints show where the government is acting contrary to the best interests of the people. *Id.* The MVA has sought to ensure that Minnesota's elections comply with the law. *Id.*

The MVA's expectations of the Attorney General, as embraced by others, is for the Attorney General to act as an advocate to ensure the lack of private cause of action defense is appropriately brought to dismiss every claim against the government brought under the Minnesota Constitution or brought under the Minnesota Declaratory Judgment Act. *Id.* When the Attorney General violates this neutrality, there is a waste of taxpayers' funds by unnecessary litigation. *Id.*

MVA is also a state taxpayer. *Id.*

III. The Attorney General's Office has a duty under Minnesota Statutes § 8.06, Rule of Professional Conduct 3.1 and Rule of Civil Procedure 12.02 to argue successful, complete defenses—there are no exceptions and there is no discretion.

The Attorney General's Office, in this case, represents the Secretary of State. Answer at 1. Minnesota Statutes § 8.06 requires that the attorney general "shall act as the attorney" for such a state officer:

> 8.06 ATTORNEY FOR STATE OFFICERS, BOARDS, OR COMMISSIONS; EMPLOY COUNSEL.
> The attorney general shall act as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties.

§ 8.06 has no exceptions and no discretion mentioned to the Attorney General's Office's statutory obligation to "act as the attorney" for the Secretary of State. Specifically, in this

case, the Attorney General's Office has a statutory duty under § 8.06 to "act as the attorney" for the Secretary of State in this case.

Minnesota's Rule of Professional Responsibility 3.1 establishes that the Attorney General's Office, as an attorney for the Secretary of State, "has a duty to use legal procedure for the fullest benefit of the client's cause." *Id.,* cmt. (2005). Rule 3.1 has no exceptions and no discretion mentioned for the Attorney General's Office's duty to "use legal procedure for the fullest benefit of the client's cause." Specifically, in this case, the Attorney General's Office as lawyers for the Secretary of State have a duty under Rule 3.1 to use all successful, complete defenses—as legal procedures—"for the fullest benefit of [its] client[s]."

Rule of Civil Procedure 12.02 requires the Attorney General's Office, as attorneys for the Secretary of State to use legal procedures to the fullest benefit of its clients' cause, by pleading all successful, complete defense. Rule 12.02 requires any civil defendant's counsel to plead the defendant's successful, complete defenses by using the phrase that every defense "shall be asserted":

> 12.02 How Presented
> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (a) lack of jurisdiction over the subject matter;
> (b) lack of jurisdiction over the person;
> (c) insufficiency of process;
> (d) insufficiency of service of process;
> (e) failure to state a claim upon which relief can be granted; and
> (f) failure to join a party pursuant to Rule 19.

Rule 12.02 has no exceptions and no discretion mentioned for the Attorney General's Office to omit successful, complete defenses. Specifically, in this case, the Attorney General's

Office under Rule 12.02, as attorneys for the Secretary of State, have a duty to present "every defense" on behalf of the Secretary of State, including the successful, complete defense of no private cause of action.

IV. The defense of no private cause of action has been successful in dismissing claims against all levels of government for violating the Minnesota Constitution.

In Minnesota, governments at all levels have obtained dismissal orders against claims brought under the Minnesota Constitution based on the successful, complete defense. The Attorney General's Office has won on behalf of state agencies. *See, e.g., Hummel v. Minnesota Dept. of Agriculture,* U.S. District Court for District of Minnesota, 2020 WL 32644 at *10 (D.Minn. 2020). The county attorneys have won on behalf of counties. *See, e.g., Davis v. Hennepin County*, 2012 WL 896409, at *2 (Minn.App. 2012). The city attorneys have won on behalf of cities. *See, e.g., Mlnarik v. City of Minnetrista*, 2010 WL 346402 at *1 (Minn.App. Feb. 2, 2010). The township attorneys have won on behalf of townships. *See, e.g., Eggenberger v. West Albany Tp.*, 820 F.3d 938, 941–42 (8th Cir. 2016).

V. The Attorney General's Office has prevailed on the successful, complete defense in four recent cases.

In four recent cases, the Attorney General's Office has raised the defense of lack of a private cause of action to obtain dismissals of claims based on violations of the Minnesota Constitution. Notice of Ltd. Intervention at 5-6; Reply Memo. in Supp. of Lmtd. Interv. at 2.

First, on March 20, 2017, Assistant Attorney General William Young in *Hatton v. Piper,* signed a memorandum supporting a motion to dismiss asserting that "Minnesota has no statutory scheme providing for private actions based on violations of the Minnesota constitution." *Id.,* Ex. A at 23 (citations omitted). The District Court agreed there was no

private cause of action and dismissed the claims based on violations of the Minnesota Constitution. *Hatton v. Piper*, 2019 WL 969787, at *1 (D.Minn., 2019). Kaardal Decl. Ex. A.

Second, on May 19, 2017, Assistant Attorney General Bradley Hutter in *Benson v. Piper,* signed a memorandum supporting a motion to dismiss asserting that "Minnesota has no statutory scheme providing for private actions based on violations of the Minnesota constitution." Notice of Ltd. Intervention, Ex. B at 5 (citations omitted). The District Court agreed there was no private cause of action and dismissed the claims based on violations of the Minnesota Constitution. *Benson v. Piper*, 2019 WL 2017319, at *4 (D.Minn., 2019). Kaardal Decl. Ex. B.

Third, on August 3, 2018, Assistant Attorney General James H. Clark in *Ivey v. Johnston,* signed a memorandum supporting a motion to dismiss asserting that "there is no private cause of action under the Minnesota Constitution." Notice of Ltd. Intervention, Ex. C at 9. The District Court agreed there was no private cause of action and dismissed the claims based on violations of the Minnesota Constitution. *Ivey v. Johnston*, 2019 WL 3334346, at *3 (D.Minn., 2019). Kaardal Decl. Ex. C.

Fourth, on July 19, 2019, Assistant Attorney General Colin P. O'Donovan signed a memorandum supporting a motion to dismiss plaintiff's claims, in part, brought under the Minnesota Constitution. The District Court on January 2, 2020, dismissed claims against the Minnesota Department of Agriculture for violating the Minnesota Constitution because of the successful, complete defense. *Hummel v. Minnesota Dept. of Agriculture*, 2020 WL 32644 at

*10 (Jan. 2, 2020) ("There is, however, no private cause of action for violations of the Minnesota Constitution."). [2]

VI. In the case below, the Attorney General's Office waived the successful, complete defense.

A. The Plaintiffs' Complaint for Declaratory and Injunctive Relief, paragraph 14, appears to plead an implied private cause of action under the Minnesota Constitution—and the Defendant's Answer admits to jurisdiction and fails to plead the successful, complete defense.

The Plaintiffs' pleading, the Complaint for Declaratory and Injunctive Relief, appears to have pled an implied private cause of action under Minnesota Constitution. Paragraph 14 states:

> 14. This Complaint raises claims under the Minnesota Constitution and the laws of the State of Minnesota. Thus, this Court has jurisdiction over all of Plaintiff's claims.

Id. at 4.

But, the Attorney General's Office at page 6 of the Answer admits that the Court has jurisdiction over an implied private cause of action under the Minnesota Constitution:

> ANSWER: Defendant admits that Plaintiffs assert these allegations and that the Court has jurisdiction, but denies that Plaintiffs can establish any claims.

Answer at 6. The Attorney General's Office also omits the successful, complete defense from its affirmative defenses.

MVA's proposed intervention objects to the Defendant admitting that the district court has subject matter jurisdiction where there is no private cause of action to sue the

[2]The fourth decision in *Hummel* was issued after MVA's notice of intervention was filed.

government and omitting the successful, complete defense from the affirmative defenses. Not. of Lmtd. Interv. at 1-16.

B. The Attorney General's Office's opposition memorandum does not attempt to cure the waiver of the successful, complete defense.

The Attorney General's Office's opposition memorandum did not attempt to cure Defendant's waiver in the Answer of its right to assert the lack of private cause of action defense. Instead, the Attorney General's Office refers to the difference with MVA as "disagreements with litigation strategy." Def's Memo. at 8.

C. The Attorney General's Office's oral argument did not attempt to cure the waiver of the successful, complete defense.

At oral argument on January 30, 2020, the Attorney General's Office did not attempt to cure the waiver of the lack of private cause of action defense. Instead, the Attorney General's Office claimed that a private cause of action under the Minnesota Constitution existed for declaratory and injunctive relief:

> THE COURT: The only other question I had, Mr. Kaardal did attach a number of cases from -- that your office has represented parties involving this private cause of action. Can you just briefly respond to that. And I know you may have, or maybe the plaintiffs did in their brief.
> [Assistant Attorney General]: Certainly. And I think that's where Judge Gilligan also properly noted those were three cases where the Department of Human Services was the party. There's also been some conflation of the attorney general. These are cases where --representational capacity. The attorney general's not a party to this case either; the secretary's the party. But in each of the three cases attached to the motion, elsewhere in the memo it's also clear that damages were being alleged in those cases, so I think they are distinguishable.

Tr. at 28 (Jan. 30, 2020).

D. In response, MVA sought intervention to plead the successful, complete defense.

On November 12, 2019, the Attorney General's Office filed their Answer without alleging the successful, complete defense. Answer at 1-24. In response, about one week later, on November 18, 2019, MVA filed their notice of limited intervention to allege the defense of no private cause of action in a proposed Defendant-Intervenor's Answer. Not. of Lmtd. Interv. at 1-16. The parties objected to the intervention. Pl.'s Obj. at 1 (Dec. 18, 2019); Def.'s Obj. at 1 (Dec. 18, 2019). Then, MVA filed its motion to approve the limited intervention. Mot. for Lmtd. Interv. at 1-2 (Dec. 26, 2019).

E. The lower court denied MVA's motion to intervene for failure to meet the requirements for intervention.

On February 12, 2020, the lower court denied MVA's motion for limited intervention for failure to meet the requirements for intervention. Add. 1-2.

The lower court at pages 5 through 10 of the memorandum analyzed the Rule 24.01 criteria for intervention of right. (Add. 5-10) On page 5, the Court found that the proposed intervenor made a timely application. Add. 5. On pages 5 through 7, the Court held that the proposed intervenor had not demonstrated an interest sufficient to intervene. (Add. 5-7) On pages 7 through 8, the Court held that the proposed intervenor had failed to demonstrate an interest that would be impaired or impeded by the disposition of the lawsuit. (Add. 7-8) On pages 8 through 10, the Court held that the proposed intervenor had failed to demonstrate that the Defendants' representation was inadequate. (Add. 8-10).

Relief Requested

The Appellant seek reversal of the lower court's decision denying limited intervention.

ARGUMENT

The Appellant make their first argument, than an alternative argument, for reversal of the lower court decision denying limited intervention. The first argument is that MVA is entitled to intervene in district court, because, even though, perhaps, not within the precise bounds of Rule 24.01 governing intervention of right, there is a sound reason to allow the intervention. The sound reason is that whether the successful, complete defense is to be applied cannot be left to the discretion of public officials and the district court. The second argument is, alternatively, MVA is entitled to intervene in district court under Rule 24.01 governing intervention of right because MVA satisfies the requirements therein. The remainder of the argument pertains to the Ramsey County District Court's new private cause of action in this case violating the Minnesota Constitution and the U.S. Constitution.

I. Legal standards.

Orders concerning intervention as a matter of right, pursuant to Minn. R. Civ. P. 24.01, are subject to de novo review and are independently assessed on appeal. *State Fund Mut. Ins. Co. v. Mead*, 691 N.W.2d 495, 499 (Minn.App. 2005), citing *Norman v. Refsland,* 383 N.W.2d 673, 676 (Minn.1986). Moreover, this court is "not held to a standard of review requiring a clear abuse of discretion before [it] may reverse the district court denial for a petition for intervention as of right." *Id.* In order to intervene as of right, a nonparty must demonstrate under Rule 24.01 the following:

(1) timely application for intervention;
(2) an interest relating to the property or transaction which is the subject of the action;
(3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and
(4) a showing that the party is not adequately represented by the existing parties.

Blue Cross/Blue Shield of Rhode Island v. Flam, 509 N.W.2d 393, 395–96 (Minn.App.1993) (citing Minn. R. Civ. P. 24.01), *review denied* (Minn. Feb. 24, 1994).

II. A sound reason exists to require the intervention of right; so, it is not left to the discretion of the Court and the Attorney General's Office whether to apply the successful, complete defense.

"Rule 24 should be construed liberally and . . . technicalities should not be invoked to defeat intervention." *Engelrup v. Potter*, 224 N.W.2d 484, 488 (Minn. 1974) (internal marks and alterations omitted). Minnesota's Rule 24.01 regarding intervention follows the Federal Rule 24(a)(2). Minn.R.Civ.P. 24.01, Adv. Note (1968). The Minnesota Supreme Court has held, "When our rules of practice are modeled after the federal rules, federal cases interpreting the federal rule are helpful and instructive but not necessarily controlling on how we will interpret our state counterpart." *Johnson v. Soo Line R. Co.,* 463 N.W.2d 894, 899 (Minn.,1990), *citing Leer v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.,* 308 N.W.2d 305, 308 (Minn.1981). Under Federal Rule 24:

> A person can be entitled to intervene in an action in a federal court where, even though not within the precise bounds of the provisions governing intervention, there is a sound reason to allow the intervention.
> Ordinarily, whether a person can intervene in an action in the federal courts is controlled by provisions in the Federal Rules of Civil Procedure; however, failure to come within the precise bounds of such provisions does not necessarily bar intervention if there is a sound reason to allow it. Thus, even though grounds for intervention under a literal interpretation of Rule 24 do not exist, a court … can even permit intervention by private groups in unusual cases where the public interest is sufficiently imperative.

35A C.J.S. Federal Civil Procedure § 167 (citations omitted)(emphasis added).

Accordingly, the U.S. Supreme Court held in *Missouri-Kansas Pipe Line Co. v. U.S.*, 312 U.S. 502, 506 (U.S. 1941) that under certain circumstances intervention of right applied, even though the technical requirements of Federal Rule 24 were not precisely met for intervention, because safeguarding parties' interests can't be left to only public officials' and the courts' discretion:

> Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.

Id. In other words, in certain public law cases, a party may have a right of intervention because a matter can't be left solely to the public authorities' and the court's discretion.

This case is similar to *Missouri-Kansas Pipe Line Co.* because it is a public law case, where the public official and court, under the circumstances, should not be left to determine the outcome. Whether the successful, complete defense is applied cannot be left to the discretion of the public officials and the court. The Attorney General's Office and the district court are not in a position to safeguard the taxpayer interests and public interests represented by MVA in this case.

Further, the Attorney General's Office is acting as if they can choose to apply or not to apply the successful, complete defense—despite the Attorney General's statutory obligation to do so under Minnesota Statutes § 8.06, Rule of Professional Conduct 3.1 and

Rule of Civil Procedure 12.02. The lower court's response, by denying the motion for intervention, has deferred to the Attorney General Office's discretion—where there is none.

A. The defense that the Minnesota Constitution does not provide a cause of action to sue the government is successful and complete.

The Minnesota Constitution does not provide a private cause of action to sue the government because the government is immune from such lawsuits. "[T]here is no private cause of action for violations of the Minnesota Constitution." *Guite,* 976 F.Supp. at 871, *aff'd on other grounds*, 147 F.3d 747 (8th Cir.1998); *Eggenberger*, 820 F.3d at 941–42 (8th Cir. 2016). Regardless of the provision or allegation that appellant relies on to support his Minnesota constitutional claims, Minnesota does not allow private actions based on alleged violations of the Minnesota Constitution. *Davis*, 2012 WL 896409, at *2. *See Mlnarik*, 2010 WL 346402 at *1 (explaining "no private cause of action for a violation of the Minnesota constitution has yet been recognized" and "[t]herefore appellant's complaint fails to state a claim"); *Danforth*, 2010 WL 4068791 at *6 (noting "there is no private cause of action for violations of the Minnesota Constitution" and plaintiff's claims were properly dismissed as frivolous).

B. The defense that the Minnesota Declaratory Judgment Act does not provide a cause of action to sue the government is successful and complete.

The Minnesota Declaratory Judgment Act, Minn. Stat. § 555.01, et seq., does not provide a cause of action to sue the government because the statute does not waive sovereign immunity from lawsuit. *Hoeft*, 754 N.W.2d at 722 (the Uniform Declaratory Judgment Act cannot create a cause of action that does not otherwise exist); *Alliance for Metropolitan Stability,* 671 N.W.2d at 915-16 (the Uniform Declaratory Judgments Act is not an express independent source of jurisdiction); *Lighthouse Management Group, Inc.*, 380

F.Supp.3d at 919 (the Minnesota Uniform Declaratory Judgment Act is not an express independent source of jurisdiction); *Mitchell on Behalf of X.M. v. Dakota County Social Services*, 357 F.Supp.3d at 907 (under Minnesota law, declaratory relief must be based on underlying cause of action); *Finnegan,* 140 F.Supp.3d at 842 (under Minnesota law, declaratory judgment is a remedy, not a cause of action); *Eggenberger v. West Albany Tp.*, 90 F.Supp.3d at 863 (the Minnesota Declaratory Judgment Act cannot create a cause of action that does not otherwise exist; a party seeking a declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right).

C. The Attorney General's Office has waived a successful, complete defense to all Plaintiffs' claims: lack of private cause of action.

The Attorney General's Office in its Answer waived a successful, complete defense to all Plaintiffs' claims: lack of private cause of action.

Generally, a party's failure to address an argument in its Answer results in waiver of that defense. In fact, a "court will not consider an affirmative defense not raised in the pleadings." *Loppe v. Steiner*, 699 N.W.2d 342, 348 (Minn.App. 2005), citing *Minnesota–Iowa Television Co. v. Watonwan T.V. Improvement Ass'n,* 294 N.W.2d 297, 305 (Minn.1980) and *Septran, Inc. v. Indep. Sch. Dist. No. 271, Bloomington,* 555 N.W.2d 915, 919 (Minn.App.1996), *review denied* (Minn. Feb. 26, 1997).

Under this case law, the Attorney General's Office omitting the defense of lack of private cause of action in its Answer constitutes waiver. On November 12, 2019, the Attorney General's Office filed an Answer omitting a complete defense to all Plaintiffs' claims: lack of private cause of action. The defense, if asserted, according to the cases cited above, requires dismissal of all Plaintiffs' claims because all of the Plaintiffs' claims are based

on violations of the Minnesota Constitution. The defense of lack of private cause of action is black letter case law used routinely by the Attorney General's Office in other cases—as shown by the three examples above. But, the Attorney General's Office omitted the defense in this case.

Here, the defense of lack of private cause of action is a complete defense to all of the Plaintiffs' claims requiring their dismissal. In contrast, the three affirmative defenses that the Attorney General's Office has raised in the Answer are not complete defenses. The first affirmative defense, failure to state a claim, is not sufficiently specific for review. The second affirmative defense, that the Secretary of State is not responsible for criminal charging or sentencing that affects a person's right to vote, does not directly address the merits of Plaintiff's claims of violations of the right to vote. The third affirmative defense is limited to dismissing the damages claims, not the claims for declaratory and injunctive relief.

The point is that the Attorney General's Office's three affirmative defenses are all partial defenses to the Complaint. The only complete defense is the lack of private cause of action—which the Attorney General's Office omitted. So, the presence of the defendant-intervenor is necessary to present the complete defense to all Plaintiffs' claims—lack of a private cause of action. The defendant-intervenor wants to present the same defense that the Attorney General's Office routinely, successfully presents in other similar cases.

D. MVA may intervene as a matter of right as taxpayers and as an association, based on the Attorney General's Office's failure to assert the successful, complete defense, even if they do not meet the requirements of Rule 24.01, because there is a "sound reason to allow it."

MVA may intervene as a matter of right as taxpayers and as an association based on the Attorney General's Office's failure to assert the successful, complete defense, even if they do not meet the requirements of Rule 24.01 because there is a "sound reason to allow it." In this case, whether the successful, complete defense is adjudicated cannot be left to the discretion of the public officials and the court to safeguard the private interests represented by MVA.

This case is similar to *Missouri-Kansas Pipe Line Co.* because it is a public law case, affecting private interests, where the public official and court, under the circumstances, should not be left to determine the outcome.

In this case, the Attorney General's Office is acting as if they can choose to apply or not to apply the successful, complete defense—despite the Attorney General's obligation to do so under Minnesota Statutes § 8.06, Rule of Professional Conduct 3.1 and Rule of Civil Procedure 12.02. The lower court's response to date, by denying the motion for intervention, has deferred to the Attorney General Office's discretion—where there is none. The Court of Appeal should reverse the denial of the intervention of right because there is a "sound reason to allow it."

E. Minnesota's Constitution has delegated to the state legislature the exclusive function of creating private causes of action.

Article III of the Minnesota Constitution sets out the separation of powers among the branches of our state government:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Minn. Const. art. III, § 1. The Supreme Court in *State ex rel. Patterson v. Bates* stated that this provision includes three elements: a distributive clause that identifies the three branches; a prohibitive clause that prevents one branch from exercising the powers of another branch; and an exceptions clause, which allows one branch to exercise another type of power when the constitution expressly provides for it. 96 Minn. 110, 104 N.W. 709, 712 (1905). "Together, these clauses create not merely a separation of functions, but also, importantly, a balance of powers among the branches of our government." *Ninetieth Minnesota State Senate*, 903 N.W.2d at 629.

In Minnesota, it is axiomatic that the state legislature has the exclusive power to waive sovereign immunity from lawsuits by enacting private causes of action to sue the government. *See, e.g.,* Administrative Procedures Act, Minnesota Statutes § 14.001, et seq.; Environmental Rights Act; Minnesota Statutes § 116B.01, et seq., the Data Practices Act, Minnesota Statutes § 13.01, et seq.; Minnesota Tort Claims Act, Minnesota Statutes § 466.01, et seq. Minnesota Constitution, Article III, section 1, only allows for express constitutional exceptions to this legislative power:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Minn. Const. art. III, § 1 (emphasis added). *See also Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 629–30 (Minn. 2017); *State ex rel. Decker v. Montague*, 195 Minn. 278, 262 N.W. 684, 689 (1935); *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 229 N.W. 313, 314 (1930); *State ex rel. Patterson v. Bates*, 104 N.W. 709, 712 (1905). Since there is no express constitutional provision for the judiciary to recognize private causes of action and since article III, § 1 forbids any judicially-recognized implied private cause of action, the lower court's decision usurps the legislative prerogative to waive sovereign immunity from lawsuits by enacting private causes of action.

Any lower court decision recognizing a new private cause of action to seek declaratory and injunctive relief against the government for violations of the Minnesota Constitution violates the separation of powers requirements under Minnesota Constitution, Article III, section 1. Add. 7.

According to the Minnesota Supreme Court, "[p]rinciples of judicial restraint preclude [courts] from creating a new statutory cause of action that does not exist at common law where the legislature has not either by [a] statute's express terms or by implication provided for ... liability." *Bruegger v. Faribault County Sheriff's Dep't,* 497 N.W.2d 260, 262 (Minn.1993). Even "[a] statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication." *Valtakis v. Putnam,* 504 N.W.2d 264, 266 (Minn.App.1993) (citing *Larson v. Dunn,* 460 N.W.2d 39, 47 n. 4 (Minn.1990)). Under the Minnesota Constitution, Article III, section 1, a cause of action cannot be implied as with a statute; a private cause of action under the Minnesota Constitution must be expressed.

Minnesota's constitutional design involves delegating to the state legislature the important function of creating private causes of action. Minnesota's Constitution does not authorize any lawsuits against the government. Instead, the Minnesota legislature is to control who sues the government by enacting or not enacting laws authorizing lawsuits against the government.

When the lower court suggests that Ramsey County District Court can adjudicate constitutional claims for declaratory and injunctive relief against the government, it usurps legislative prerogatives. When Ramsey County District Court awards the plaintiffs their requested declaratory or injunctive relief against the government, all Minnesotans and their state legislative representatives will be denied any further say in that subject matter forever. Such a result is contradictory to Minnesota's constitutional design and threatens Minnesota's democratic tradition in every subject matter at the state, county, city and school district level forever. No longer will the law-making bodies of the state, county, city and school district be called to amend laws for their unconstitutionality in the first instance; instead, it will be the courts—a democratic tragedy if there ever was one.

To be sure, the Constitution is routinely applied in the state courts even though the Constitution does not have a private cause of action to sue the government. To begin, in Minnesota courts, parties can assert against a government entity their rights under the Minnesota Constitution when they are prosecuted or sued by the government and when statutes or the common law provide a private cause of action.

The Minnesota Constitution guarantees criminal defendants procedural rights when prosecuted. For example, under the Minnesota Constitution, Article I, section 6 guarantees a criminal defendant the right to "the assistance of counsel in his defense":

> Sec. 6. Rights of accused in criminal prosecutions.
> In all criminal prosecutions …. The accused shall enjoy the right …to have the assistance of counsel in his defense.

The Supreme Court has extended the constitutional right to the assistance of counsel in his defense to include a right to appellate counsel in one review of a criminal conviction, either by direct appeal or by petition for postconviction relief, because appellate review is not meaningful without the assistance of counsel. *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006).

Surely, a civil defendant sued by a government entity can raise legal defenses based on the Minnesota Constitution. For example, Minnesota Rules of Civil Procedure 12 and 56 permit the civil defendant to raise constitutional defenses against the government entity's claims to have them dismissed.

But, most importantly for this case, as part of the Minnesota's constitutional design, Minnesota statutes do authorize many different types of lawsuits against the government entities involving claims under the Minnesota Constitution. In fact, the Minnesota Constitution does not limit the state legislature in enacting statutes creating private causes of action to sue the government. For example, Minnesota has codified the common law writ of mandamus at Minnesota Statutes § 586.01, et seq. This statutory private cause of action authorizes lawsuits to compel public officials to perform their legal obligations in every subject area:

> 586.01 ISSUANCE OF WRIT, JUDICIAL DISCRETION NOT CONTROLLED. The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

Examples of other statutory private causes of action include the Administrative Procedures Act, Minnesota Statutes § 14.001, et seq., Environmental Rights Act, Minnesota Statutes § 116B.01, et seq., the Data Practices Act, Minnesota Statutes § 13.01, et seq.

Minnesota statutes also authorize certain lawsuits, with statutory limitations, against the government entities for common law torts under the Minnesota Tort Claims Act, Minnesota Statutes § 466.01, et seq.

In addition, Minnesota provides statutory remedies for the municipal taking, destruction, or damage of private property. *See* Minn. Const., art. I, § 13 ("Private property shall not be taken, destroyed or damaged for public use without just compensation therefore, first paid or secured."); Minn. Stat. ch. 117 (2014) (governing eminent domain); *Wegner v. Milwaukee Mut. Ins. Co.,* 479 N.W.2d 38, 42 (Minn.1991) ("Once a 'taking' is found, compensation is required by operation of law").

Notably, Minnesota common law also authorizes certain writs to sue government entities. Those common law remedies would include the writs of "injunction, ne exeat, certiorari, habeas corpus, mandamus, quo warranto"—which are referenced in Minnesota Statutes § 484.03.[3] The Minnesota Rules of Civil Procedure, Appendix A, references the common law writ of certiorari and writ of habeas corpus. Additionally, the Minnesota Supreme Court has recognized the writ of quo warranto to challenge government entities for

[3]The common law writ of mandamus has codified at Minnesota Statutes § 586.01, et seq.

legally unauthorized activities by the government. *See, e.g., Rice v. Connolly,* 488 N.W.2d 241, 247 (Minn. 1992).

It is important to note that the federal civil rights statute, 42 U.S.C. § 1983 has no application to state constitutional violations. Although 42 U.S.C. § 1983 is a private cause of action authorizing lawsuits against state and local officials, it is limited to claims of violations of federal law, not state law:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

(Emphasis added.) So, the federal civil rights statute is a private cause of action to sue state and local officials for violating the federal constitution, but not the state constitution.

If Minnesotans want to have lawsuits against the government for violations of the Minnesota Constitution, the state legislature would have to enact a statute authorizing such lawsuits—basically a state "civil rights act"—or there would have to be a voter-approved constitutional amendment authorizing such lawsuits. This case should not be a vehicle for Minnesota's courts to usurp the state legislature's and the people's prerogatives.

III. MVA may intervene as a matter of right as taxpayers and associations based on satisfying the requirements of Rule 24.01.

"Rule 24 should be construed liberally and . . . technicalities should not be invoked to defeat intervention." *Engelrup*, 224 N.W.2d at 488 (internal marks and alterations omitted).

Moreover, "Rule 24.01 establishes four requirements for intervention as of right: (1) a timely application; (2) an interest in the subject of the action; (3) an inability to protect that interest unless the applicant is a party to the action; and (4) the applicant's interest is not adequately represented by existing parties." *League of Women Voters Minnesota v. Ritchie*, 819 N.W.2d 636, 641 (Minn. 2012). "In determining whether conditions for intervention have been met, the court will look to the pleadings and, absent sham or frivolity, a court will accept the allegations in the pleadings as true. . . . Secondly, on motion to intervene of right, the merits of the proposed [pleading] are not to be determined." *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162, 164 (Minn. 1974).

Given Minnesota's policy of liberally granting intervention under Rule 24.01, MVA satisfy all four requirements because (1) this application is timely; (2) absent intervention, no party will be asserting the lack of a private cause of action defense to end the case; (3) MVA have an interest, even standing, in ending the meritless litigation as state taxpayers and associations; and (4) the existing parties to the litigation have ignored the legal requirement of a private cause of action to impermissibly proceed on a claim based on violations of the Minnesota Constitution.

MVA did not seek full intervention because it is unnecessary. The limited intervention, if granted, would end the case. The lower court could have granted limited intervention as to the defense of lack of private cause of action as requested by MVA. *SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (1979) (the court "could exercise its discretion by allowing limited intervention if existing parties would not be prejudiced. 7A C. Wright &

A. Miller, Federal Practice and Procedure s 1922 (1972)"); *see also* § 1922 Conditions on Intervention, 7C Fed. Prac. & Proc. Civ. § 1922 (3d ed.).

The lower court at pages 8 through 13 of the memorandum denying intervention analyzed the "merits of the lack of private cause of action" defense. On page 8, the Court found that the proposed intervenor made a timely application. On pages 8 through 10, the Court held that the proposed intervenor had not demonstrated an interest sufficient for intervention of right. On pages 10 through 11, the Court held that the proposed intervenor had failed to demonstrate an interest that would be impaired or impeded by the disposition of the lawsuit. On pages 12 through 13, the Court held that the proposed intervenor had failed to demonstrate that the Defendants' representation was inadequate.

The lower court did not apply the Rule 24.01 criteria correctly. When the Rule 24.01 criteria is applied correctly, MVA is entitled to intervene.

A. MVA's intervention of right is timely.

The lower court agreed that MVA's intervention was timely. Add. 5. The timeliness of an application to intervene depends on "all the circumstances shown." *Engelrup*, 224 N.W.2d at 488. Intervention is allowable even "several years after commencement of suit." *Id.* (quoting Moore, 3B Federal Practice (2 ed.), p. 24-523). "A timely application generally involves a motion to intervene under circumstances where the additional party's presence will not unduly and adversely affect the rights of the existing parties." *Id.* at 489. In *Engelrup*, "[a]lthough almost 10 months passed between the commencement of the action and the attempted intervention," because "no rights have yet been adjudicated between the original parties and no new issues have been introduced which will prejudice either of the original

parties," intervention was timely given the requirement that courts liberally construe Rule 24. *Id.*

The lower court is correct on timeliness; the intervention was timely here. The proposed defendant-intervenor acted with due diligence to file their intervention motion. The Attorney General's Office's Answer giving rise to this intervention, was filed on November 12, 2019. MVA filed their notice of intervention about one week later on November 18, 2019.

B. MVA has taxpayer standing and public interests in the challenged voting laws—interests sufficient for intervention of right.

MVA has taxpayer standing and public interests in the challenged voting laws which are the subject matter of this litigation.

"Intervention as a matter of right requires an interest relating to the property or transaction which is the subject of the action. Minn. R. Civ. P. 24.01." *Heller v. Schwan's Sales Enterprises, Inc.*, 548 N.W.2d at 292 (Minn. Ct. App. 1996) (internal marks omitted). An interest in a subject of the litigation arises when the Intervenor has "a beneficial interest in the subject matter in suit . . . even though the Intervenor may have another remedy." *Veranth v. Moravitz*, 284 N.W. 849, 851 (Minn. 1939).

The lower court denied limited intervention, in part, because the proposed intervenor had not demonstrated an interest sufficient for intervention of right. Add. 5-7. The lower court stated that MVA's alleged interest as a taxpayer and association in ending the meritless litigation over felon voting rights under the Minnesota Constitution was legally insufficient for intervention of right. *Id.*

To begin, the lower court provided a conclusory definition, "the subject of the action is whether Minnesota law preventing individuals convicted of crime from voting until their sentences have been fully discharged are constitutional." Add. 6. Then, the lower court identified MVA's professed interests in the case stating that they did not relate to the "subject of the action" as the court defined.

First, the lower court stated that MVA's interests as taxpayers in conserving Attorney General's Office and judicial resources in a known, meritless case was not the same as the challenged government expenditures in *State, by Peterson v. Werder,* 273 N.W. 714, 715 (Minn. 1937). To the contrary, because MVA has taxpayer standing to prevent the government's continued legal spending on a meritless case with a well-known successful, complete defense the Attorney's General Office refuses to allege, MVA has an interest in the subject matter of the litigation as taxpayers.

As MVA pointed out in its motion papers, MVA has taxpayer standing in Minnesota in this case—which is a much higher threshold than "interest." Taxpayer standing has been recognized in virtually every subject area where there is legally unauthorized spending. *See, e.g., McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977) (recognizing taxpayer standing); *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 175 (Minn. Ct. App. 2009) (recognizing taxpayer standing). Taxpayer standing should be applied equally to the subject area of the Attorney General's Office violating duties under statutes and rules, as any other subject area. Otherwise, the object of taxpayer standing—to enable the Court to stop legally unauthorized government spending—is foiled.

Second, the lower court created a straw man argument that MVA was arguing than any taxpayer could intervene in any case involving government counsel:

> To assert that MVA has an interest in the litigation solely because taxpayer funds are being used to retain counsel would mean that MVA has the right to intervene in every lawsuit where counsel paid by public funds are hired (e.g., criminal matters, matters with representation by legal aid attorney, civil matters filed against the State of Minnesota, etc.). Plaintiffs note that MVA is claiming taxpayer standing on the basis that the Attorney General's office is causing unnecessary litigation by failing to argue MVA's favored defense (lack of private cause of action)..

Add. 6. But, the MVA has never made that straw man argument. MVA's claim of interest, i.e., standing, is based on the government-funded Attorney General's Office shirking its duties as attorneys for the Secretary of State to file the successful, complete defense. MVA informed the lower court that nine state appellate and federal court decisions have applied the successful, complete defense to dismiss all claims brought under the Minnesota Constitution. So, if the District Court were to sua sponte follow these nine decisions to dismiss the Plaintiffs' complaint, the continuing litigation would end; and, an unnecessary expenditure of Attorney General's Office's resources and judicial resources would end. And, stopping such unnecessary government expenditures is what the Minnesota courts have said taxpayer standing is about.

The lower court ironically identifies the "lack of private cause of action" defense as "MVA's favored defense." But, MVA's motion papers cite nine state appellate and federal court decisions that applied the successful, complete defense to dismiss all claims brought under the Minnesota Constitution. So, it is not the MVA's favored defense; instead, it is the favored defense of all government attorneys in Minnesota who are defending against claims under the Minnesota Constitution—except for the Attorney General's Office in this case.

But, even the Attorney General's Office, as detailed above, has prevailed in four recent cases using the successful, complete defense.

The lower court concludes:

> Whether the Minnesota Constitution or Minnesota Declaratory Judgment Act provide private causes of action to sue the government is not the subject matter of the litigation before this Court.

Add. 7. But, the lower court never addresses why claims under the Minnesota Constitution continue where the plaintiffs according to the above-cited appellate precedents do not have a cause of action under the Minnesota Constitution nor the Minnesota Declaratory Judgment Act. How is it in the public interest for a case to proceed against the government without a private cause of action?

Thankfully, Minnesota has a long history of recognizing taxpayer standing when things may go awry in the courts:

> There can be no question that the three taxpayers could have sought injunctional relief in an appropriate separate action. This proceeding being in rem, the judgment entered not beyond the power of the court, and the only question being as to those who might ask for it, we perceive no reason why taxpayers should not be permitted to appear, in any proper manner, to invoke judicial action. Generally, 'it is not absolutely essential that a person shall be a party to an action in order that he may be allowed to make a motion therein'. 19 R.C.L. 673. That rule was applied in Haley v. Eureka County Bank, 21 Nev. 127, 26 P. 64, 12 L.R.A. 815, so as to permit an attorney to move for the dismissal of an action on the ground of collusion, although he did not represent any party to the case.

State, by Peterson v. Werder, 200 Minn. 148, 151 (Minn. 1937). The lower court acknowledged that in *Werder* a taxpayer intervenor was recognized for a potential $5,000 discrepancy in government payments. In this voting rights case, the continuing proceedings in the lower

court are costing the Attorney General's Office and the judiciary much more than $5,000 for a meritless case.

Further, as explained in detail above, the Attorney General's Office has duties under the statutes and the rules to argue the successful, complete defense. There is no discretion, nor allowable litigation strategy, justifying the Attorney General's Office's conduct here. If the Attorney General's Office had argued the successful, complete defense, the Complaint would have been dismissed in its entirety. The limited intervention would not be necessary.

So, when the Attorney General's Office failed to file the successful, complete defense, the taxpayer's right to intervene was triggered because subsequent expenditures on a meritless case are challenged as unauthorized, unnecessary, unlawful or wasteful. So, under the unique circumstances here, MVA has taxpayer standing for the purpose of limited intervention because the Attorney General's Office has failed to file a successful, complete defense in violation of its duties to the state under the above-cited statutes and rules.

There is yet another reason for the Court to recognize taxpayer standing in these situations. The Court should view taxpayer standing intervention as a specific judicial tool utilized when government attorneys fail to file the successful, complete defense against claims under the Minnesota Constitution. Absent this tool, the Attorney General's Office—or any other government attorneys—could apply its "discretion" regarding this successful, complete defense to choose litigation winners and losers based on favored constitutional theories. This technique could apply to advance favored views of rights against not only the state, but it would also open the door for claims under the Minnesota Constitution against

the counties, cities, school districts and townships. The judiciary needs this tool to counteract such politization of the courts statewide.

Finally, MVA has public interests in Minnesota's challenged voting statutes. MVA has a long history of promoting election integrity. The challenged voting laws are the subject matter of the lawsuit. Rule 24.01's phrase "property or transaction" is inclusive of public law cases—as intervention is available for intervenors in public law cases. MVA seeks intervention to argue that the case challenging the statute's constitutionality should be dismissed based on the successful, complete defense.

C. Absent limited intervention, MVA cannot assert the successful, complete defense of lack of private cause of action to protect their interests in the litigation.

The lower court denied limited intervention, in part, because the proposed intervenor had failed to show any interest in the action that would need protecting. Add. 7-8. The lower court reasoned, having failed the "interest" criteria for intervention, "there is no interest to be protected from the disposition of the case." Add. 8. So, the lower court's analysis mostly relies on the earlier "interest analysis." However, the Court does add, even if the MVA has an interest in the case, its need to protect the interest is non-existent because of the "parties' and Court's ability to raise the issue of subject matter jurisdiction at any time." Add. 8.

But, the lower court's reasoning is off that MVA should rely on the Attorney General's Office and the lower court to later raise the defense of no private cause of action to dismiss the case. First, there is reason to doubt that the Attorney General's Office will raise the successful, complete defense. At the time of the Answer, the Attorney General's Office knew the U.S. Court of Appeals for the Eighth Circuit had recently summarized

Minnesota law on the defense of lack of a private cause of action under the Minnesota Constitution:

> "[T]here is no private cause of action for violations of the Minnesota Constitution." *Guite v. Wright,* 976 F.Supp. 866, 871 (D.Minn.1997), aff'd on other grounds, 147 F.3d 747 (8th Cir.1998); *see also Mlnarik v. City of Minnetrista,* No. A09–910, 2010 WL 346402 at *1 (Minn.App. Feb. 2, 2010) (explaining "no private cause of action for a violation of the Minnesota constitution has yet been recognized" and "[t]herefore appellant's complaint fails to state a claim"); *Danforth v. Eling,* No. A10–130, 2010 WL 4068791 at *6 (Minn.App. Oct. 19, 2010) (noting "there is no private cause of action for violations of the Minnesota Constitution" and plaintiff's claims were properly dismissed as frivolous). Accordingly, Eggenberger has no cause of action under the Minnesota Constitution.

Eggenberger v. West Albany Tp., 820 F.3d 938, 941–42 (8th Cir. 2016). But, the Eighth Circuit's decision and the other eight cases cited above did not cause the Attorney General's Office to reconsider.

Further, the Attorney General's Office, after the Notice of Intervention was served, knew that MVA wanted the Attorney General's Office to argue the successful, complete defense. But, MVA's intervention did not cause the Attorney General's Office to reconsider—even at oral argument on January 30, 2020. Instead, the Attorney General's Office objected to the MVA's intervention—and later opposed it.

Second, as to the lower court claiming that it can raise sua sponte the subject matter jurisdiction later, the Court is in error. If there are subject matter jurisdiction issues, they need to be dealt with first. The Court is not left with discretion to determine sooner or later whether there is subject matter jurisdiction when the issue is raised. Such an approach politicizes the judiciary—where it can show favor to one plaintiff over the next. Subject

matter jurisdiction is a threshold issue which needs to be dealt with upfront. So, MVA cannot rely on the lower court to raise the successful, complete defense—when it hasn't.

In summary, MVA, absent intervention, do not have an avenue to assert the defense of lack of private cause of action to protect their interests in the litigation. For example, MVA cannot bring a petition for a writ of mandamus under Minnesota Statutes § 586.01, et seq., or a federal civil rights lawsuit under 42 U.S.C. § 1983 against the Attorney General to bring the successful, complete defense in this case. Instead, Rule 24 intervention is the narrow, prescribed route for intervention to assert successful, complete defenses which have been omitted by the Attorney General's Office.

Finally, the Court's decision also creates a Catch-22 for applicants for intervention. Recall that intervention must be timely under Rule 24.01. The Court states that the applicants for intervention can rely on the defendants and the court to later make the successful, complete defense. But, then if the applicants wait too long to file their notice of intervention, then the application for intervention won't be timely.

The Court should recognize that the best litigation practice for applicants for intervention in public law case is to file the notice of intervention as soon as the inadequate representation of applicant's interest is exposed in court—as was done here. The Court should not want applicants for intervention in public law cases to "wait and see" if the courts or the parties fix the exposed problem—particularly when it involves a governmental omission of a successful, complete defense in a public law case.

D. The existing parties do not adequately represent MVA's interests.

Finally, the lower court denied limited intervention, in part, because the proposed intervenor had not demonstrated that the Defendants' representation is inadequate. Add. 8-10. The lower court agreed that MVA must only "carry the 'minimal' burden of showing that the existing parties 'may' not adequately represent their interests." *Jerome Faribo Farms, Inc. v. Cty. of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990). But, the lower court also relied on a more stringent federal law standard for demonstrating inadequacy of government attorneys under *Stenehjem v. United States,* 787 F.3d 918, 921 (8th Cir. 2015). Under *Stenehjem,* there is a presumption in favor of government attorney competency unless the government is "shirking its duty" to advance the "narrower interest" of a group at "the expense of its representation of the general public interest":

> The putative intervenor under Rule 24(a) must show that none of the parties adequately represents its interests. Although the burden of showing inadequate representation usually is minimal, "when one of the parties is an arm or agency of the government, and the case concerns a matter of sovereign interest, the bar is raised, because in such cases the government is presumed to represent the interests of all its citizens." *Mausolf,* 85 F.3d at 1303 (emphasis and internal quotation marks omitted). The government represents the interests of a movant "to the extent his interests coincide with the public interest." *Chiglo v. City of Preston,* 104 F.3d 185, 187–88 (8th Cir.1997). Where the government would be "shirking its duty" to advance the "narrower interest" of a prospective intervenor "at the expense of its representation of the general public interest," then no presumption of adequate representation applies. *Mille Lacs Band of Chippewa Indians v. Minnesota,* 989 F.2d 994, 1000 (8th Cir.1993) (quoting *Dimond v. District of Columbia,* 792 F.2d 179, 193 (D.C.Cir.1986)).

787 F.3d at 921. But, under this more stringent test, contrary to what the lower court indicated, the Attorney General's Office also fails.

Yes, based on the facts, the Attorney General's Office's conduct satisfies both the *Jerome Faribo Farms, Inc.* state legal standard and the higher *Stenehjem* federal legal standard. As detailed above, the Attorney General's Office is "shirking its duty" under statutes and rules to not file the successful, complete defense to represent the "narrower interest" of the plaintiffs "at the expense of its representation of the general public interest." *Id.* The Attorney General's Office by selectively omitting the successful, complete defense in this case—according to its claimed "discretion"—is choosing the plaintiffs as the winners over its own client-defendants—in violation of its duties under the above-cited statutes and rules.

In four other recent cases, the Attorney General's Office prevailed in motions to dismiss based on the lack of private cause of action. But the Attorney General's Office has failed to assert that defense in this case—showing impermissible favoritism to the Plaintiffs' claims the voting statutes are unconstitutional.

By omitting the defense of lack of private cause of action, the Attorney General's Office has demonstrated that it does not adequately represent the interests of the general public, including the state's taxpayers, who want all unnecessary litigation against the government to end. The Attorney General's Office has not adequately represented MVA's interests in upholding the constitutionality of Minnesota's voting statutes. The Attorney General's Office has given the appearance of favoring the narrower interests of the plaintiffs than the broader interests of the public. The Attorney General's Office's representation is inadequate because the Attorney General's Office has shirked its duties representing the governmental defendants as the statutes and rules require.

IV. The Court of Appeals does not have the power to discover a new cause of action under the Minnesota Constitution—only the Minnesota Supreme Court does.

One troubling aspect of the continuing proceeding in the case below is the implicit recognition of a new cause of action under the Minnesota Constitution without Supreme Court case support and while nine state appellate court and federal decisions have held otherwise. In Minnesota, the Minnesota Supreme Court, not the Court of Appeals nor state district courts, discovers new causes of action. So, the Court of Appeals does not have the power to agree with the district court to discover a new cause of action under the Minnesota Constitution.

The Supreme Court alone has the power to recognize and abolish common law doctrines, as well as to define common law torts and their defenses. *Larson v. Wasemiller*, 2007, 738 N.W.2d 300, rehearing denied. *See Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.,* 456 N.W.2d 434, 439 (Minn.1990) ("Creating a new tort is a function properly reserved for the supreme court based upon appropriate facts and record."). It is axiomatic that the Minnesota Supreme Court is the final interpreter of the Minnesota Constitution. And, "[i]n resolving any substantive issues of state law, [federal courts] are bound by the decisions of the Minnesota Supreme Court." *Integrity Floorcovering, Inc. v. Broan-Nutone, LLC,* 521 F.3d 914, 917 (8th Circ. 2008).

It appears at least to one observer that the Minnesota Supreme Court has never clearly adjudicated whether an implied private cause of action exists under the Minnesota Constitution to sue government entities for violations of the Minnesota Constitution. Baker, John M., "The Minnesota Constitution as a Sword: The Evolving Private Cause of Action,"

20 William Mitchell Law Review 2: 4 (1994). To MVA, the most logical place for such an implication to arise from would be the Minnesota Constitution, Article I, Section 8, Remedies Clause, which provides:

> **Sec. 8. Redress of injuries or wrongs.**
> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

But, heretofore, according to the Court of Appeals, the Remedies Clause of the Minnesota Constitution does not guarantee redress for every wrong, but instead enjoins the legislature from eliminating those common law remedies that have vested at common law, without a legitimate legislative purpose. *Hoeft v. Hennepin County*, 754 N.W.2d 717 (Minn. Ct. App. 2008), review denied.

Significantly, the Minnesota Supreme Court in 2015 rejected as untimely an Appellant' Remedies Clause implied private cause of action theory because the Appellant raised it for the first time only after their appeal had reached the Supreme Court. *Dean v. City of Winona*, 868 N.W.2d 1, 8 (Minn. 2015). The Supreme Court noted in a footnote that the Appellant were seeking a private cause of action under the Remedies Clause:

> In two section headings of their response to the City's motion to dismiss, Appellant explicitly state that they seek a private cause of action under the Remedies Clause. Appellant also argue that "the Minnesota Constitution, through its Remedies Clause, provides a cause of action for constitutional torts by which [Appellant] are entitled to nominal damages," and state that the "Remedies Clause protects rights ... by providing an independent basis for seeking relief, i.e., a private cause of action." Clearly, Appellant are requesting that we recognize a private cause of action under the Remedies Clause. Contrary to the concurrence's characterization, this is not merely our "understanding" of Appellant' position—rather, it is the express argument that Appellant make multiple times in their response to the City's motion to dismiss.

868 N.W.2d at 8, n. 4 (Minn. 2015) The Supreme Court in that case did not reach the merits of the Remedies Clause implied private cause of action theory. *Id.* at 8. However, Justice Lillehaug wrote a separate concurrence rejecting the Remedies Clause implied private cause of action:

> I see nothing in the Remedies Clause as commanding (at least in the absence of implementing legislation) that the judicial remedy of purely nominal damages be available against a municipality.

868 N.W.2d at 9.

Unlike the Supreme Court, the Court of Appeals does not have the power to affirm a new cause of action under the Minnesota Constitution. Only the Supreme Court discovers new causes of action. Thus, the Court of Appeals should reverse the lower court's decision denying the limited intervention requested.

V. Any lower court decision identifying a private cause of action to sue the government without a foundation in the Minnesota Constitution, statutes or common law violates the federal Fourteenth Amendment's Due Process and Equal Protection Clauses.

It is axiomatic that the Minnesota Supreme Court is the final interpreter of the Minnesota Constitution. And, "[i]n resolving any substantive issues of state law, [federal courts] are bound by the decisions of the Minnesota Supreme Court." *Integrity Floorcovering, Inc. v. Broan-Nutone, LLC,* 521 F.3d 914, 917 (8th Circ. 2008). However, if any lower court decision identifying a private cause of action to sue the government is without a foundation in the Minnesota Constitution, Minnesota statutes, nor Minnesota common law—and obviously the legal standard of "justiciability" is rooted elsewhere—then the lower court's decision recognizing a private cause of action violates the Fourteenth Amendment's Due

Process and Equal Protection Clauses because it doesn't give constitutionally adequate notice of people's right to sue the government and, without a legal standard, does not provide equal protection of the laws.

Under these circumstances, the "[s]tate courts are not merely free to—they are bound to—interpret the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8–9 (U.S. 1995). Thus, the Court, if it affirms the Ramsey County District Court's identification of a private cause of action under the legal doctrine of "justiciability"—that is without a foundation in the Minnesota Constitution, statutes or common law—it must adjudicate, with constitutionally-required clarity, Appellants' claims that such private cause of action (1) violates the federal Fourteenth Amendment's Due Process Clause because it lacks adequate notice to the public of what lawsuits can be brought (i.e., which plaintiffs can sue which defendants in which subject areas?) and (2) violates the Fourteenth Amendment's Equal Protection Clause because it will be inherently implemented in a discriminatory and prejudicial manner against different plaintiffs and different defendants in different subject area.

CONCLUSION

The Court should reverse the lower court's decision denying limited intervention. The Attorney General's Office has shirked its duties under statutes and rules in failing to bring the successful, complete defense against Plaintiffs' claims against the state for violating the Minnesota Constitution. The Attorney General Office's conduct is leading the Ramsey County District Court into recognizing a new private cause of action under the Minnesota Constitution, where there is none, usurping the state legislature's constitutional prerogative

to waive sovereign immunity from lawsuits by enacting private causes of action. If the Court affirms the Ramsey County District Court's identification of a private cause of action without foundation in the constitution, statute or common law, such private cause of action violates the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Dated: March 23, 2020

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 11,963 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional space font size of 13 pt. The word count is stated in reliance on Microsoft Word 2013, the word processing system used to prepare this Brief.

Dated: March 23, 2020

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