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June 7, 2012

Via Messenger

OFFICE OF  
APPELLATE COURTS

Ms. Bridget C. Gernander  
Clerk of Appellate Courts  
Minnesota Supreme Court  
305 Minnesota Judicial Center  
25 Rev. Dr. Martin Luther King, Jr. Blvd  
Saint Paul, Minnesota 55155

JUN - 7 2012

FILED

Re: League of Women Voters Minnesota, et al. v. Mark Ritchie  
Appellate Case No. A12-0920

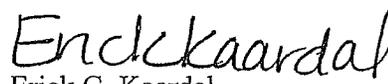
Dear Ms. Gernander:

Enclosed for filing in the above referenced matter are fourteen (12 bound/2 unbound) copies of the following:

1. Application for Intervention by Individual Legislators.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

  
Erick G. Kaardal

EGK/mg  
Enclosures

cc: William Z. Pentelovitch (w/enc)(via messenger, email and mail)  
Alan I. Gilbert (w/enc)(via messenger, email and mail)  
Teresa Nelson (w/enc)(via messenger, email and mail)

STATE OF MINNESOTA  
IN SUPREME COURT  
Case No. A120920

OFFICE OF  
APPELLATE COURTS

JUN -7 2012

FILED

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League of Women Voters Minnesota; Common Cause, a District of Columbia nonprofit corporation; Jewish Community Action; Gabriel Herbers; Shannon Doty; Gretchen Nickence; John Harper Ritten; Kathryn Ibur, Petitioners,

vs.

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Mark Ritchie, in his capacity as Secretary of State of the State of Minnesota, and not in his individual capacity, Respondent

and

State Senator Scott J. Newman and  
State Representative Mary Kiffmeyer,

Applicants for Intervention as Intervenor-Respondents,

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**APPLICATION FOR INTERVENTION  
BY INDIVIDUAL LEGISLATORS**

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(612) 341-1074  
Dated: June 7, 2012

*Counsel for Applicants State Senator Scott J. Newman  
and State Representative Mary Kiffmeyer*

## **PURPOSE OF APPLICATION**

The Applicants Scott Newman and Mary Kiffmeyer as individual state legislators who authored and voted for the Voter Identification Constitutional Amendment (passed on or about April 5, 2012) respectfully move under Rule of Civil Procedure 24 that the Court allow the Applicants to intervene in the above-referenced case as intervenor-respondents because they have individual legislator standing and will suffer special injury if the relief requested by the petitioners is granted.

Additionally, counsel for the Applicants moves for leave to file a responsive brief and to participate in oral argument.

## **STATEMENT OF FACTS**

The Petitioners Scott Newman and Mary Kiffmeyer are duly elected officials of the state legislature. Scott Newman is a Senator. Mary Kiffmeyer is a Representative.

Both Senator Newman and Representative Kiffmeyer authored and voted, in their respective legislative departments, for the Voter Identification Constitutional Amendment. On or about April 5, 2012, the 87<sup>th</sup> Minnesota Legislature passed Chapter 167, House File 2738 of the 2012 Session Laws. The legislatively-enacted constitutional ballot question is set to be on the November 2012 general election ballot.

On or about May 30, 2012, the Petitioners filed this petition to strike the Voter Identification Constitutional Amendment from the 2012 general election

ballot. Petition at 16. The Petitioners did not name the Minnesota Senate nor Minnesota House of Representatives as parties.

Upon information and belief, the Minnesota Senate and Minnesota House of Representatives will not be filing applications to intervene as intervenor-respondents.

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## ARGUMENT

The Applicants meet the requirements of Rule 24.01 for intervention.

**I. The Legal Standards for Intervention of Right of Rule 24.01 Are to Be Applied Liberally.**

Rule 24.01 of the Rules of Civil Procedure states the requirements for intervention of right:

Rule 24.01. Intervention of Right

Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24.01 permits a party to intervene in a pending action as a matter of right if the requirements are met. If those requirements are satisfied, the court has no discretion in permitting intervention. Rule 24.01 permits a party to intervene if the applicant claims an interest relating to the subject matter of the action and the applicant is so situated that the applicant may not be able to adequately protect that

interest without being a party. This rule permitting intervention as a matter of right is to be liberally applied because the courts generally encourage intervention.<sup>1</sup>

Accordingly, “if [the applicant's] interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but [the applicant] ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.”<sup>2</sup> The rule “is designed to protect nonparties from having their interests adversely affected by litigation conducted without their participation.”<sup>3</sup>

**II. The Applicants Claim an Interest Relating to the Subject Matter of the Action and the Applicant is So Situated that the Applicant May Not Be Able to Adequately Protect That Interest Without Being a Party.**

The Applicants as authors and voters for the Voter Identification Constitutional Amendment claim an interest in the subject matter of this proceeding. The Applicants also claim that if they are not parties, their interests will not be protected because the Minnesota Senate and Minnesota House have chose not to intervene.

Minnesota courts have acknowledged that individual state legislators have a sufficient interest in legislative prerogatives that they may bring claims for vote

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<sup>1</sup> *Luthen v. Luthen*, 596 N.W.2d 278 (Minn. Ct. App. 1999).

<sup>2</sup> *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 28 (Minn.1981) (quoting 7A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1909, at 524 (1972) (footnote omitted)) (citation omitted).

<sup>3</sup> *Gruman*, 416 N.W.2d at 500 (citation omitted).

nullification and usurpation of legislative powers.<sup>4</sup> For legislators to have standing, they must show that their claimed injury is "personal, particularized, concrete, and otherwise judicially cognizable."<sup>5</sup> "Cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power."<sup>6</sup> But only the last two before-mentioned categories confer legislator standing.<sup>7</sup>

The U.S. Supreme Court in *Coleman v. Miller* found standing for individual legislators who claimed that their "no" votes were nullified by the legislative act being given effect anyway. There, the Court held that Kansas state legislators who had been locked in a tie vote that would have defeated the State's ratification of a proposed federal constitutional amendment, and who alleged that their votes were nullified when the Lieutenant Governor broke the tie by casting his vote for ratification, had "a plain, direct and adequate interest in maintaining the effectiveness of their votes."<sup>8</sup> The U.S. Supreme Court in *Raines v. Byrd*,<sup>9</sup> restated

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<sup>4</sup> See *Rukavina v. Pawlenty*, 684 N.W.2d 525, 532 (Minn.App. 2004), *review denied* (Oct 19, 2004); *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 149-150 (Minn.App.1999), *review denied* (Mar 14, 2000).

<sup>5</sup> *Conant*, 603 N.W.2d at 150 (citing *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

<sup>6</sup> *Silver v. Pataki*, 96 N.Y.2d 532, 539, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. Jul 10, 2001) (vote nullification).

<sup>7</sup> *Id.* at 539, *citing Coleman v. Miller*, 307 U.S. 433, (vote nullification); *Dodak v. State Admin. Bd.*, 441 Mich. 547, 495 N.W.2d 539 (usurpation of power .belonging to legislative body).

<sup>8</sup> *Id.*, at 438 (emphasis added).The U.S. Supreme Court in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 544-545, n. 7 (1986)(dicta), also recognized legislative standing based on vote nullification. The Court stated, "It might be an entirely different case if, for example, state law authorized School Board action solely by unanimous consent, in which event Mr. Youngman might claim that he was legally entitled to protect "the effectiveness of [his] vot[e]." *Coleman v. Miller*, 307 U.S. 433, 438 (1939). . . But in that

the *Coleman* holding and further explained that individual legislator standing existed when legislators' no votes were nullified by the legislative act being given effect anyway.

Likewise, the New York Court of Appeals in *Silver v. Pataki*<sup>10</sup> held that the Speaker of New York's General Assembly had capacity and standing as a legislator to bring suit seeking to vindicate his rights as a legislator. The Speaker's successful challenge was based on the Governor using the line item veto on non-appropriation bills. The Court stated that a single legislator had standing on a vote nullification claim regardless of whether or not other legislators decided to join the suit:

Nor is a controlling bloc of legislators (a number sufficient to enact or defeat legislation) a prerequisite to plaintiff's standing as a Member of the Assembly. The *Coleman* Court did not rely on the fact that all Senators casting votes against the amendment were plaintiffs in the action (*see, Kennedy v. Sampson, supra*, 511 F.2d, at 435 ["In light of the purpose of the standing requirement \* \* \* we think the better reasoned view \* \* \* is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority"]). Moreover, plaintiff's injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit.<sup>11</sup>

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event Mr. Youngman would have to allege that his vote was diluted or rendered nugatory under state law and even then he would have a mandamus or like remedy against the Secretary of the School Board . . ." 475 U.S. at 544, 545, n. 7 (citations omitted).

<sup>9</sup> *Raines v. Byrd*, 521 U.S. 811, 822 (1997).

<sup>10</sup> *Silver v. Pataki*, 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. 2001).

<sup>11</sup> *Id.* at 848-49. *See also, Dodak v. State Admin. Bd.*, 441 Mich. 547, 495 N.W.2d 539 (1993)(A single member of the state house appropriations committee had standing to bring an action alleging that the state administrative board's transfer of appropriated funds from one program to another within a department of state government was unauthorized.)

According to these precedents, the Applicants have legislator standing and sufficient interests in this case under two categories: vote nullification and legislative usurpation.

The Applicants claim that granting the petition would be a violation of the separation of powers since the power to propose constitutional amendments is granted to the legislative department – not the judicial department. The Constitution, Article IX, Section 1 states:

Section 1. Amendments; ratification. A majority of the members elected to each house of the legislature may propose amendments to this constitution. Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval or rejection at a general election. If a majority of all the electors voting at the election vote to ratify an amendment, it becomes a part of this constitution. If two or more amendments are submitted at the same time, voters shall vote for or against each separately.

The Constitution, Article III, Section 1, is, in part, an instruction to the executive and judicial branch not to encroach legislative prerogatives:

Section 1. 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.

Thus, the state legislators want to argue to the Court that it needs to take heed of the separation of powers, defer to the legislature on its wording of the constitutional amendment and allow the Voter Identification Constitutional Amendment to be voted on in November 2012.

So, vote nullification exists under *Coleman* and its progeny because the Applicants through their authoring the bills, their “yes” votes and other legislative action did pass the Voter Identification Constitutional Amendment. The Voter Identification Constitutional Amendment is scheduled to be on the November 2012 general election ballot. If the Court grants the Petition, the Applicants’ “yes” votes will be nullified in violation of the legislative prerogative to determine the text of the constitutional amendments presented to the people. The Court granting the Petition would be a judicial usurpation of legislative power.

The point is that only the state legislature is entitled and would make arguments protecting legislative prerogatives. In the absence of the state legislature intervening as a party, individual state legislators should be granted intervenor-party status to defend legislative prerogatives.

Additionally, the Petitioners also allege injury because the Supreme Court proceedings – absent the presence of individual legislators – would unconstitutionally tip the balance of powers in favor of the executive and judiciary branch at the expense of the legislative branch – on a critical issue of constitutional amendment. The legislature’s power to pass constitutional amendments – without executive or judicial approval -- is one of its paramount powers. When the executive or judiciary branches usurp the power of the legislature, the legislature unjustly loses power – and the people lose democratic representation.

Further, with the absence of the Minnesota Senate and House as original respondents or intervenor-respondents, the Applicants' interests as legislators authoring and voting for the Voter Identification Constitutional Amendment will not be represented. In short, no parties are present to argue on behalf of Applicants that the Court granting the petition would be vote nullification and usurpation of legislative power.

**III. Alternatively, the Applicants Move for Permissive Intervention.**

Rule 24.02 of the Minnesota Rules of Civil Procedure allow permissive intervention. If the Applicants are denied intervention as a matter of right, the Applicants make the alternative motion that they be permitted to intervene as a permissive intervention.

**CONCLUSION**

For these reasons, the Applicants' motion for intervention should be granted.

Dated: June 7, 2012

  
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