UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JAMES CARSON & ERIC LUCERO,

Plaintiffs,

v.

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

Defendant,

and

ROBERT LAROSE, TERESA MAPLES, MARY SANSOM, GARY SEVERSON, & MINNESOTA ALLIANCE FOR RETIRED AMERICANS EDUCATIONAL FUND,

Intervenor-Defendants.

Case No. 0:20-cv-02030-NEB-TNL

MEMORANDUM IN OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION TO CERTIFY QUESTION TO MINNESOTA SUPREME COURT

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INTRODUCTION

Intervenors' certification motion should be denied. The question they propose be certified to the Minnesota Supreme Court is predominantly a factual question on a matter over which no motion is even pending. The mandatory elements of Minnesota Statutes § 480.065, subd. 3, are not met: there is ample Minnesota authority articulating principles of *res judicata* and privity, and a ruling on Plaintiffs' privity in their capacity as electors will not be determinative of the claims in this case, because Plaintiffs also appear in their capacity as voters. All of this suggests why the Secretary declined to join Intervenors' *res judicata* argument at the injunction stage and not one judge of the Eighth Circuit, including the dissenting judge, considered it necessary to address the argument at all.

The Eighth Circuit has already recognized that this is a case of significant public importance and that Plaintiffs are likely to prevail. Intervenors' motion seeks to undermine that ruling, and numerous factors cut against the application of any discretion this Court may have to certify the proposed question. First and foremost is that certification and an indefinite stay would substantially delay final resolution of issues that may require prompt hearing and determination by this Court and reviewing courts on appeal. Intervenors' contrary arguments are unpersuasive, and their motion should be denied.

LEGAL STANDARD

The Minnesota Supreme Court is permitted to entertain a question certified by a federal court only "if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state." Minn. Stat. § 480.065, subd. 3. Even if those

elements are met, the "question of certification is committed to the sound discretion of the district court." *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 881 (8th Cir. 1996) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). "The Eighth Circuit has indicated that the power to certify a question should be utilized sparingly." *Friedlander v. Edwards Lifesciences, LLC*, 2016 WL 7007489, at *1 (D. Minn. Nov. 29, 2016).

ARGUMENT

I. Certification Is Not Available Under Minnesota Law or Eighth Circuit Precedent

Certification is impermissible in this case. Certification requires "a 'close' question of state law," *Johnson v. John Deere Co.*, 935 F.2d 151, 154 (8th Cir. 1991), that "may be determinative of an issue in pending litigation in the certifying court," *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162, 164 (Minn. 2017) (quotation marks omitted). The question Intervenors propose for certification is not a close one, is not a question *of law* at all, and could not be determinative of any claim in this case.

A. The Question Is Not Close, Let Alone Untethered from Existing State-Law Sources

"The most important consideration guiding the exercise of this discretion is whether the reviewing court finds itself genuinely uncertain about a question of state law." *Johnson*, 935 F.2d at 153 (cleaned up). This requires "a 'close' question *and* lack of state sources enabling a nonconjectural determination." *Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, Minn.*, 771 F.2d 1153, 1157 n.2 (8th Cir. 1985) (emphasis added); *see also Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 210 (8th Cir. 1987) (declining certification because "the issue in this case is not an extremely close one"). There is no cause for uncertainty here, and there are ample state-law sources to resolve the privity issue Intervenors raise.

1. Intervenors propose that the Court certify the question whether "presidential electors nominated and certified pursuant to Minnesota Statutes section 208.03 [are] in privity with their corresponding presidential candidate and political party." Mem. ISO Mot. 1. But Intervenors presented that question to the Eighth Circuit during Plaintiffs' recent preliminary-injunction-stage appeal, Int's CA8 Merits Brief 17–21 (filed October 26, 2020), and that court found that it did not even merit discussion. *See Carson v. Simon*, No. 20-3139, 2020 WL 6335967, at *1–9 (8th Cir. Oct. 29, 2020). Notably, the dissent of Judge Kelly sided with Intervenors and the Minnesota Secretary of State on multiple issues, but that opinion also did not so much as mention Intervenors' *res judicata* argument. *Id.* at *9–12 (Kelly, J., dissenting). There is no basis to infer uncertainty on a question that all judges, of differing views, equally deemed irrelevant to resolution of Plaintiffs' preliminary-injunction motion.

Intervenors' position is rejected by numerous Minnesota precedents that consistently frame the privity question as whether the relationship alleged to establish privity exists *at the time* of the judgment with the alleged preclusive impact. *See, e.g.*, *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984) ("Thus, for either *res judicata* or collateral estoppel to act as a bar to these firefighters' claims, we must determine whether the firefighters were in privity with the City of St. Paul *at the time* of its action against NSP." (emphasis added))[1]; *Robb v. Jesson*, 2012 WL 987324, at *5 (Minn. Ct. App. Mar. 26, 2012) ("Schroeder was a unit director at the MSOP *at that time* and, therefore, a person acting under the MSOP program director." (emphasis added)); *Deli v. Hasselmo*, 542 N.W.2d 649, 658 (Minn. Ct. App. 1996) ("Although not a party to her husband's action, *at all times material*, Deli was in privity with her husband as joint

[1] *Abrogated on other grounds* by *Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54 (Minn. 1993).

owner of the gymnastics facility." (emphasis added)); *Friends of Chester Park v. Humes*, 2001 WL 290419, at *7 n.2 (Minn. Ct. App. Mar. 27, 2001) (finding no privity because the party allegedly bound "was living in Alaska, not Duluth" "[a]t the time of the earlier decision" and the relevant relationship did not exist). It is undisputed that, at the time of the stipulation of dismissal that Intervenors claim precludes this action, Plaintiffs were not certified elector nominees. The question is not a close one. *See Nichols v. Knox Cty., Tenn.*, 718 F. App'x 338, 344–45 (6th Cir. 2017) ("Because the County's res judicata argument clearly fails, we also deny the motion to certify questions to the Tennessee Supreme Court.").

2. For the same reason, and then some, there is no "lack of state sources enabling a nonconjectural determination." *Shakopee Mdewakanton Sioux Cmty.*, 771 F.2d at 1157 n.2. Minnesota's law of privity and *res judicata* is well developed across numerous decisions of the Minnesota Supreme Court and Minnesota Court of Appeals. *See, e.g.*, *Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967); *Johnson v. Hunter*, 447 N.W.2d 871, 874 (Minn. 1989); *Rucker v. Schmidt*, 794 N.W.2d 114, 121 (Minn. 2011). In its precedents of these issues, "the [Minnesota] Supreme Court has enumerated various principles which, in conjunction with precedent in other jurisdictions and considerations of public policy, allow the Court to determine the issue before it without obtaining an opinion from another court." *H.B. Fuller Co. v. U.S. Fire Ins. Co.*, 2011 WL 2884711, at *9 (D. Minn. July 18, 2011). This is not some undeveloped or fast-moving area of law where basic principles are uncertain.

It would be impossible to deny that there are numerous "relevant sources of state law available to…provide a discernible path for the court to follow." *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) (quoted favorably in *Johnson*, 935 F.2d

at 153). Literally dozens of Minnesota Supreme Court and Court of Appeals decisions outline the parameters of preclusion and privity doctrine. These include the cases cited above, which establish that the relationship allegedly conferring privity status must exist *at the time* of the allegedly preclusive judgment. Further, Minnesota follows generally applicable principles of *res judicata* and privity, such as those articulated in the Restatement (Second) of Judgments, *see, e.g.*, *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 200 N.W.2d 45, 47 (Minn. 1972); *Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 534 (Minn. 2003); *State v. Lemmer*, 736 N.W.2d 650, 661 (Minn. 2007), which provide further sources of law to guide the Court's inquiry. *Cf. Hankinson v. King*, 117 F. Supp. 3d 1068, 1077 n.3 (D. Minn. 2015) ("The Court finds that the state law question in this case may be answered by carefully comparing the transferee liability provisions in the Minnesota Nonprofit Corporations Act to its analogues in the Business Corporations and Limited Liability Companies Acts.").[2]

Against all this, Intervenors insist otherwise (at 7) on the basis that "[t]he Minnesota Supreme Court has never considered" the *precise* question of whether privity exists between certified elector nominees and political parties and candidates. But it is hardly unusual, or any ground for certification, that a case calls for the application of well-established law to a novel factual circumstance. That is why certification is

[2] Standard preclusion principles require that privity exist at the time of the judgment alleged to have *res judicata* effect. *See, e.g.*, *Hann v. Carson*, 462 F. Supp. 854, 860 (M.D. Fla. 1978) ("The term 'in privity' has come to mean through decisional law a representative relationship between a party in the first case and a party in the second case, at the time the same claim was litigated and decided in the first case."); *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 184 (2d Cir. 2003) ("[T]he district court's application of collateral estoppel is correct only if Saybolt North America was in privity with Mead at the relevant time, i.e., during Mead's trial."); *cf. United States v. Perchitti*, 955 F.2d 674, 677 (11th Cir. 1992) ("That the same individual wore two hats, but at different times, is not by itself a sufficient demonstration of privity.").

inappropriate when state law provides "enough guidance so that the decision in this case is not merely conjectural," *Perkins*, 823 F.2d a 210, as it does here.

That standard is illustrated by the Eighth Circuit's decision in *Perkins*, which found a single state supreme court decision interpreting the state statute at issue sufficient to deny certification. *Id.*; *see also Shakopee Mdewakanton Sioux Cmty.* 771 F.2d at 1157 n.2 (finding a single precedent interpreting the statute in question to provide "sufficient guidance" to decide the case); *Kelley v. Kanios*, 383 F. Supp. 3d 852, 882 (D. Minn. 2019)[3] ("[T]he fact that a recent Minnesota Supreme Court decision even speaks to the relevant legal issues in and of itself distinguishes this case from other instances where this Court has been confronted by a truly 'novel' or 'unsettled' question of state law."). It is not sufficient for certification purposes that "the [Minnesota] Supreme Court has not spoken on the issue in this case directly." *H.B. Fuller*, 2011 WL 2884711, at *9; *U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, 2015 WL 6549595, at *2 (D. Minn. Oct. 27, 2015) ("[A]lthough the Minnesota Supreme Court has not spoken on these issues directly, given the prior Minnesota Supreme Court cases, as well as the recent Eighth Circuit decision interpreting those cases in a nearly identical context, this Court does not find itself genuinely uncertain about a question of state law or without a discernible path to follow."); *In re Medill*, 119 B.R. 685, 688 (Bankr. D. Minn. 1990) ("To be sure, the Minnesota Supreme Court has never ruled on the constitutionality of subd. 22," yet "the Minnesota Supreme Court has announced and refined an analysis which provides ample guidance to this Court.").

[3] *Rev'd and remanded on other grounds sub nom. Kelley as Tr. for PCI Liquidating Tr. v. Boosalis*, 974 F.3d 884 (8th Cir. 2020).

If Intervenors choose to assert their privity argument in a motion, the Court will have at its disposal ample authority to reach a decision. For that reason, certification would be improper.

B. The Question Is Not One of Law

Under governing precedent, only "a question of state law," not of fact, can merit certification. *Johnson*, 935 F.2d at 153 (cleaned up); *see also Lickteig v. Kolar*, 782 N.W.2d 810, 818 n.6 (Minn. 2010) (confining review on certification to "a question of law" and declining to reach "a question of fact"). But "[p]rivity is usually a question of fact requiring a case-by-case determination." *Miller v. Nw. Nat. Ins. Co.*, 354 N.W.2d 58, 62 (Minn. Ct. App. 1984); *Denzer v. Frisch*, 430 N.W.2d 471, 473 (Minn. Ct. App. 1988) (same); *Houlihan v. Fimon*, 454 N.W.2d 633, 636 (Minn. Ct. App. 1990) (same). "Because the circumstances in which privity will be found cannot be precisely defined, determining whether parties are in privity requires a careful examination of the circumstances of each case." *Gowan v. Estate of Pape*, 2016 WL 208331, at *4 (Minn. Ct. App. Jan. 19, 2016) (citing *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 200 N.W.2d 45, 47 (Minn. 1972)). The predominantly factual question Intervenors pose does not merit certification as a question *of law* to the Minnesota Supreme Court. *See Diginet, Inc. v. W. Union ATS, Inc.*, 958 F.2d 1388, 1395 (7th Cir. 1992) ("Both the question of res judicata and the question whether ATS is a telephone company are fact-laden and particularistic. They may never recur, and (as will become apparent) they lack broad, general significance. Such questions are not suitable for certification to a state's highest court.").

That is especially so given that there is no currently operative factual record. There is no pending dispositive motion or motion for injunctive relief. Plaintiffs'

motion for a preliminary injunction was resolved in the Eighth Circuit, the Secretary and Intervenors have not moved to dismiss the case—but instead answered the complaint—and no summary-judgment motions have been filed. Because the parameters underpinning what facts courts may and must assume to be true changes depending on the nature of the motion before the Court, *see, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (motion to dismiss)*; Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (same); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (summary judgment), the Minnesota Supreme Court would, at a minimum, need to know what facts will be legally operative for purposes of issuing a ruling on a certified question. *See In re McNeilus Mfg. Explosion Coordinated Litig.*, 381 F. Supp. 3d 1075, 1080 (D. Minn. 2019) (denying certification motion because, *inter alia*, "dispositive motions have yet to be filed"). And Plaintiffs have had no opportunity to establish a factual record to address whatever precisely it is that Intervenors intend to argue regarding their affirmative defense of *res judicata*—which is presumably something more than the scant argumentation accompanying the instant motion.[4]

C. The Question Is Not Determinative

Intervenors' proposed question also would not be "determinative of an issue in pending litigation." Minn. Stat. § 480.065, subd. 3. Here, the question of Plaintiffs' privity as electors would not be determinative of their right to bring this action because they have also asserted their rights as voters. A party found in privity in some capacities may not be deemed in privity in other capacities. *See, e.g.*, *Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987) (distinguishing individual and official capacities of litigants

[4] Intervenors' argument (at 8) that "[t]he Minnesota Supreme Court… has first-hand knowledge of the relevant facts" is perplexing. Appellate tribunals do not decide questions based on their own first-hand knowledge, but on the record developed in trial courts.

for privity purposes); *State v. Lemmer*, 736 N.W.2d 650, 661 (Minn. 2007) (similar holding); Restatement (Second) of Judgments § 36(2) (1982) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity."). Accordingly, even an affirmative answer to the question Intervenors propose for certification would not be dispositive of the federal issues presented in this case.

Despite that Plaintiffs raised this same point in their previous responsive filings, Intervenors do not address or even acknowledge it. Instead, they assert only that "the Eighth Circuit held only that Plaintiffs have standing because Electors have standing as candidates." Mem. ISO Mot. 7 n.1 (quotation marks omitted). But the Eighth Circuit did not reach the question of Plaintiffs' standing as voters and therefore did not rule one way or the other. *Carson*, 2020 WL 6335967, at *5 n.2 ("Having concluded the Electors have standing as candidates, we need not decide whether they also have standing under their other theories."). Plaintiffs' assertion of standing as voters therefore continues to underpin their claims, separate and apart from any issue of privity that might apply to their capacity as candidates. *Compare Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 n.7 (2018) ("[T]the State has not offered sufficient reason to believe that certification would obviate the need to address the constitutional question.").

As a result, the privity question regarding Plaintiffs' status as electors is not "determinative" of anything; even if the Minnesota Supreme Court were to find Plaintiffs in privity with intervenors in the *LaRose* case in their capacity as candidates, the case

would have to proceed in this Court based on Plaintiffs' status as voters. This statutory element, too, is unmet.

II. Numerous Discretionary Considerations Militate Against Certification

Certification would not be an exercise of "sound discretion." *Allstate Ins.*, 74 F.3d at 881. A series of factors cut against certification; none support it.

First, Intervenors were, for weeks, content to press their privity defense in federal court, filing at least four briefs urging this Court and the Eighth Circuit to adopt their position. Only after the Eighth Circuit ruled against them did they decide to seek a new forum. *See Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 209–10 (8th Cir. 1987) (finding it highly relevant that the parties seeking certification "did not move the district court to certify the question until after the motion for summary judgment had been decided against them"). "Once a question is submitted for decision in the district court, the parties should be bound by the outcome unless other grounds for reversal are present." *Id.*; *see also Minnesota Voters*, 138 S. Ct. at 1891 n.7 (2018) ("Minnesota's request for certification comes very late in the day."). Intervenors' motion smacks of forum shopping. *In re Midpoint Dev., L.L.C.*, 466 F.3d 1201, 1207 (10th Cir. 2006) ("We generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court." (quotation marks omitted)).

Second, and most significant here, "[c]ertification would almost surely result in substantial delay." *Leiberkneckt v. Bridgestone/Firestone, Inc.*, 980 F. Supp. 300, 311 (N.D. Iowa 1997). Intervenors request an indefinite stay of this matter, as votes are being counted, for resolution of only one of the issues in this case in the Minnesota Supreme Court—one that cannot be dispositive of Plaintiffs claim no matter how it is

decided. The result would be to table for an unknown quantity of time the question on which the Eighth Circuit found Plaintiffs "are likely to succeed on the merits." *Carson*, 2020 WL 6335967, at *6. That is a highly inefficient and inequitable way to resolve a case of profound public importance concerning the validity of votes in a presidential election. Intervenors provide no estimate of how long a Minnesota Supreme Court proceeding will take, nor could they. And they do not show much respect to that court when they move to drop the proposed question in its lap and demand a near-instant answer. *See Leiberkneckt*, 980 F. Supp. at 310 (citing "the time demands on…the docket of the state supreme court" as a relevant consideration). "[T]he cost of delay would likely outweigh any potential benefit in this case." *U.S. Bank Nat'l*, 2015 WL 6549595, at *2.

Third, the federal nature of the issues in this case predominates over and, indeed, overwhelms any questions of state law. The Eighth Circuit has already concluded that the questions presented merit expedited review and an order mandating a preliminary injunction. *See Carson*, 2020 WL 6335967, at *8. The court concluded that "the Electors have strongly shown likely success on the merits since the Secretary's actions are likely to be declared invalid under the Electors Clause of Article II of the United States Constitution." *Id.* at *7. Given that holding, and the Eighth Circuit's unanimous indifference to Intervenors' privity argument, this is not an appropriate case for resolution in the state system.

Fourth, the Secretary has not (at least to date) joined Intervenors' privity argument and has not moved for certification. A question truly "novel under Minnesota law," Mem ISO Mot. 2, would likely have been identified as such long ago by the Secretary of State and its Attorney General, whose office is providing representation.

Fifth, Minnesota is not "a distant state" from this Court or the Eighth Circuit. *Contrast Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). This Court and the Court of Appeals are not "'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Id.*

Finally, Intervenors have not made a substantial showing to justify their request in these exceptional circumstances. Their motion is entirely perfunctory, limiting legal analysis on the question of certification to barely more than a page of text. Mem. ISO Mot. 7–8. They provide very little on the "various factors" courts weigh in analyzing the question of certification, *Pella Corp. v. Liberty Mut. Ins. Co.*, 2016 WL 7437153, at *2 (S.D. Iowa Sept. 2, 2016), apparently on the view that the label "novel" establishes a basis of certification. As explained, the label is inapt and the assumption incorrect.

CONCLUSION

The motion should be denied.

Date: November 4, 2020

Respectfully submitted,

/s/ Danyll W. Foix

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