A20-1486

STATE OF MINNESOTA
IN SUPREME COURT

Tyler Kistner, Gene Rechtzigel, Rich Draheim, Steve Drazkowski, Jeremy Munson, Tim Miller, Calvin Bahr, Erik Mortensen, Dan Hall, Jose W. Jimenez, Sandra A. Jimenez, Tomas Settell, Megan Olson, Leilani Holmstadt, Pam Myhra, Roz Peterson, Lucia Vogel, Jennifer Zielinski, Diane Napper, Alexander Deputie, Charlotte Smith, Fern Smith, Mariah Delapaz, Cynthia Londquist, Lisa Pohlman, Nora L. Felton, Deborah Coxe, Jane L. Volz, Paul Staut, Kathleen Hagen, Janine Kusnierek, Greg Buck, Don Bumgarner, Amy Bruno, and Kathleen Nydegger,

Petitioners,

v.

Steve Simon, only in his official capacity as the Minnesota Secretary of State and member of the State Canvassing Board, Margaret H. Chutich, only in her official capacity as a member of the State Canvasing Board, Gordon L. Moore, III, only in his official capacity as a member of the State Canvasing Board, Regina Chu, only in her official capacity as a member of the State Canvasing Board, and Christian Sande, only in his official capacity as a member of the State Canvasing Board,

Respondents,

and

Minnesota Democratic-Farmer-Labor Party, by Ken Martin, its Chair,

Intervenor-Respondent.

INTERVENOR-RESPONDENT'S INFORMAL MEMORANDUM

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INTRODUCTION

Petitioners filed this action—seeking to challenge the results of Minnesota's November 3 general election and delay the certification of results by the State Canvassing Board—12 hours before that process was to be completed. Their causes of action are premised on a consent decree entered into by Respondent Steve Simon, the Minnesota Secretary of State (the "Secretary"), nearly *four months ago*, and a postelection review process that was underway for two weeks prior to the filing of their petition. Petitioners' inexcusably, inexplicably delayed action, one that prejudices both Respondents and Intervenor-Respondent Minnesota Democratic-Farmer-Labor Party (the "DFL Party"), is barred by the equitable doctrines of laches and finality. And because the only relief they seek is delaying the State Canvassing Board's certification, the case is moot because certification is complete.

The people of Minnesota have spoken. Their votes have been cast, counted, and certified. The results are in, and it is now time for this campaign—and Petitioners' untimely action—to end.

STATEMENT OF FACTS

On May 13, 2020, a group of Minnesota voters and the Minnesota Alliance for Retired Americans Educational Fund (collectively, the "Alliance") filed an action in state court against the Secretary, arguing that Minnesota's Election Day receipt deadline and witness-signature requirement for mail ballots violate the U.S. and Minnesota Constitutions. *See LaRose v. Simon*, No. 62-CV-20-3149 (Ramsey Cty. Dist. Ct.);

Declaration of Charles N. Nauen ("Nauen Decl.") Ex. 1.[1] On July 17, the Alliance and the Secretary filed a proposed consent decree, in which the Secretary agreed not to enforce the challenged election laws during the November election. *See* Nauen Decl. Ex. 2. Although this consent decree was vigorously opposed by the Republican Party of Minnesota, Republican National Committee, and National Republican Congressional Committee (the "Republican Committees"), all of whom had intervened in *LaRose*, *see id.* Ex. 3, Ramsey County District Judge Sara Grewing issued an order entering the consent decree on August 3, *see id.* Ex. 4.

The Republican Committees sought and were granted an expedited appeal in this Court but ultimately chose not to pursue it. Instead, on August 18, the *LaRose* parties, joined by the parties in a related appeal, *see NAACP Minn.-Dakotas Area State Conf. v. Simon*, No. A20-1041 (Minn.), signed a stipulation to dismiss their appeals. *See* Nauen Decl. Ex. 5. In the stipulation, both the Republican Committees *and* Donald J. Trump for President, Inc. (the "Trump Campaign") "waive[d] the right to challenge in any other judicial forum the August 3, 2020 Orders and the August 3, 2020 Stipulations and Partial Consent Decrees that formed the basis for the above-captioned consolidated appeals"; in other words, the consent decree and Judge Grewing's related orders. *Id.* Ex. 5, at 2–3. This Court dismissed the appeal pursuant to the stipulation. *See id.* Ex. 6.

[1] Exhibit cites refer to the exhibits attached to the Declaration of Charles N. Nauen, filed concurrently with this informal memorandum.

Petitioners initiated this action on November 24, nearly three weeks after Election Day and on the day of the scheduled meeting of the State Canvassing Board. *See* Pet. to Correct Errors & Omissions Under Minnesota Statute § 204B.44 ("Pet."). They assert three causes of action: violations of the First and Fourteenth Amendments to the U.S. Constitution, as well as Article I of the Minnesota Constitution, *see id.* ¶¶ 70–92; violations of the separation of powers under the Minnesota Constitution, *see id.* ¶¶ 93–108; and due process violations under the U.S. and Minnesota Constitutions, *see id.* ¶¶ 109–20. Although premised on a confusing hodgepodge of legal theories and factual predicates, all three of Petitioners' claims generally challenge both the consent decree entered into by the Secretary and the postelection review process undertaken by state and county officials.

Later that day, this Court ordered Petitioners to complete service on all Respondents and "all candidates for the office in the case of an election," and file proof of that service by 4:30 p.m. that day. Order 2 (quoting Minn. Stat. § 204B.44(b)). It also invited "Petitioners, any respondent, and any other person served with the petition [to] file an informal memorandum to address the issues of laches, mootness, and the doctrine of finality." *Id*. Petitioners subsequently filed proof of service on Respondents, but not on candidates for office or anyone else.

Soon after the Court issued its order, the State Canvassing Board met and certified the results of the election. *See* Exs. 7–8.

ARGUMENT

I. Petitioners' action is moot.

"As a constitutional prerequisite to the exercise of jurisdiction," this Court "must consider the mootness question." *Matter of Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989). This doctrine ensures that courts "consider only live controversies, and an appeal will be dismissed as moot when intervening events render a decision on the merits unnecessary or an award of effective relief impossible." *Wayzata Nissan, LLC v. Nissan N. Am., Inc.*, 875 N.W.2d 279, 283 (Minn. 2016).

Here, Petitioners' action is moot precisely because an intervening event—specifically, the State Canvassing Board's certification of results—has made Petitioners' requested relief impossible. The *only* relief requested in the petition, framed in bolded text, is "**an immediate temporary restraining order (TRO) enjoining the 2020 State Canvassing Board from certifying the November 3, 2020 election**." Pet. 6, 48. But Petitioners cannot delay what has already happened; the State Canvassing Board has met and certified the results of the election. Consequently, "this 'court is unable to grant effectual relief,' [and] the issue must be dismissed as moot." *Farm Bureau Mut. Ins. Co. v. Schwan*, 687 N.W.2d 388, 391 (Minn. Ct. App. 2004) (quoting *Schmidt*, 443 N.W.2d at 826).[2]

[2] Petitioners also seek other, ancillary relief from this Court; most notably, an injunction requiring "every county [to] complete[] a [postelection review] in full compliance with MN Stat. § 206.89." Pet. 6, 48. But this relief is also moot, since the review process is already complete—as it *must* be, since the process necessarily precedes certification. *See* Minn. Stat. § 206.89, subd. 6 ("The secretary of state shall report the results of the postelection

Established exceptions to the mootness doctrine do not salvage Petitioners' claims. First, although some election "cases may be exceptions to the mootness doctrine because they are 'capable of repetition, yet evading review,'" *Kahn v. Griffin*, 701 N.W.2d 815, 822 (Minn. 2005) (quoting *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974)), this exception does not apply here. Instead, it "is 'limited to the situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* at 821 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Here, as discussed in Part II *infra*, Petitioners had ample time both before and after Election Day to raise their challenges without resorting to this eleventh-hour effort to prevent certification. Moreover, Minnesota courts—including this Court—have demonstrated their ability to quickly adjudicate timely election disputes prior to certification by the State Canvassing Board. *See, e.g.*, *Coleman v. Ritchie*, 758 N.W.2d 306, 307–08 (Minn. 2008). And the set of circumstances challenged in the petition—use of a consent decree that by its terms expired after "certification of ballots for the November General Election," *see* Nauen Decl. Ex. 2,

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review at the meeting of the State Canvassing Board to canvass the state general election."). And to the extent Petitioners seek extraordinary remedies like "a new statewide election," Pet. ¶ 91, such relief is beyond the limited scope of section 204B.44. *See, e.g.*, *Begin v. Ritchie*, 836 N.W.2d 545, 548 (Minn. 2013) ("[O]ur precedent recognizes that section 204B.44 'provides a remedial process only for correction of the ballot and directly related election procedures.'" (quoting *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008))).

at 14, and the postelection reviews undertaken by particular counties—are not the sort of election issues that are capable of repetition.[3]

Nor is this "a case that is technically moot [but] is 'functionally justiciable' and presents an important question of 'statewide significance that should be decided immediately.'" *Dean v. City of Winona*, 868 N.W.2d 1, 6 (Minn. 2015) (quoting *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984)). This Court "appl[ies] this exception narrowly," *id.*, and need not do so even if both criteria are satisfied. *See In re Guardianship of Tschumy*, 853 N.W.2d 728, 739 (Minn. 2014). Here, both criteria are *not* satisfied. For claims to be functionally justiciable, "the record [must] contain[] the raw material . . . traditionally associated with effective judicial decision-making." *Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011) (third alteration in original) (quoting *Rud*, 359 N.W.2d at 576). By contrast, the petition here was originally filed in this Court, and is replete with wild speculation and little evidence—hardly a robust record with sufficient material to inform this Court's deliberations. And while elections themselves might be important matters of statewide significance, the same cannot be said for the actual claims raised in

[3] Instead, the types of election cases that are capable of repetition concern *statutes* that would necessarily be applied in all successive elections—not, as here, limited plans for only a single election. *See, e.g.*, *Kahn*, 701 N.W.2d at 821–23 (concluding that challenge to widely used apportionment scheme satisfied exception); *Storer*, 415 U.S. at 737 n.8 ("[T]his case is not moot, since the issues properly presented . . . will persist as *the California statutes* are applied in future elections." (emphasis added)); *Lawrence v. Blackwell*, 430 F.3d 368, 369–72 (6th Cir. 2005) (considering mootness challenge to Ohio election statute); *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983) ("If such cases were rendered moot by the occurrence of an election, many constitutionally suspect *election laws*—including the one under consideration here—could never reach appellate review." (emphasis added)).

this petition. Petitioners challenge a now-expired consent decree that neither the Republican Committees nor the Trump Campaign chose to fully litigate in this Court, and that Petitioners themselves waited nearly four months before finally addressing. And the postelection review efforts of isolated *counties* do not rise to the level of an issue of *statewide* significance.

In short, because certification has passed and no exceptions apply, this matter is now moot.

II. Petitioners' requested relief is barred by laches.

Even if the Court had jurisdiction to hear this case, the relief Petitioners seek—in an action filed months after entry of the challenged consent decree and on the eve of the State Canvassing Board's certification—is barred by laches.

When there has been "such an unreasonable delay in asserting a known right" that it "result[s] in prejudice to others," the doctrine of laches prohibits granting the relief requested. *Piepho v. Bruns*, 652 N.W.2d 40, 43 (Minn. 2002) (per curiam) (quoting *Fetsch v. Holm*, 52 N.W.2d 113, 115 (Minn. 1952)); *see also Kelly v. Commonwealth*, No. 68 MAP 2020, slip op. at 2 (Pa. Nov. 28, 2020) (dismissing postelection challenge to certification under "doctrine of laches given [petitioners'] complete failure to act with due diligence") (per curiam) (attached as Ex. 9). Here, the consent decree that Petitioners challenge was entered by Judge Grewing on August 3. The Republican Committees and the Trump Campaign subsequently dismissed their appeals before this Court—and then Petitioners did precisely nothing. They waited, as August, September, and October passed. During these intervening months, the Secretary, state and local officials, voter education

groups, and the media publicized the consent decree's provisions, and on September 18, election officials began distributing mail ballots with instructions that (1) "**[a] a witness is not required for registered absentee voters for the 2020 Minnesota State General**," and (2) ballots must be "**post marked on or before Election Day, November 3**." Nauen Decl. Ex. 10, at 3–8. Petitioners should have known of this critical date, since it was emphasized in both Judge Grewing's order, *see id.* Ex. 4, at 18, and the consent decree itself, *see id.* Ex. 2, at 3, 6. And yet still Petitioners waited, as Election Day came and went and Minnesotans' ballots were tallied and canvassed by county officials, including in Ramsey, Hennepin, and Dakota Counties, the only three against whom specific claims are alleged in the petition. Petitioners did not file their petition until the early morning hours of November 24—a mere 12 hours before the State Canvassing Board's meeting, and well after the general election was conducted pursuant to the challenged consent decree, including the receipt and processing of *1.9 million* mail ballots. *See* Pet. ¶ 37.

The delay in this case is as apparent as it is inexcusable. Petitioners could have challenged the Secretary's consent decree months ago, well before mail ballots were distributed, voted, and tabulated. And the allegedly insufficient county postelection review processes challenged in the petition occurred days before its filing. *See id.* ¶ 61(A) (Ramsey County conducted postelection review on November 16); Affidavit of Jane L. Volz ("Volz Aff.") ¶ 5 (Hennepin County conducted postelection review on November 20); Volz Aff. ¶ 6 (Dakota County conducted postelection review on November 16). But Petitioners waited to challenge these rules and processes only after the results were clear—and, for many of them, only after they learned that they had not prevailed in their respective

elections. *See* Pet. ¶ 1–2, 9–25; *cf. Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (en banc) ("[T]he failure to require prompt pre-election action . . . as a prerequisite to post-election relief may permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action." (quoting *Toney v. White*, 476 F.2d 203, 209 (5th Cir. 1973))).

The risk of prejudice is apparent as well. Election laws and rules engender significant reliance interests on the parts of both voters and officials. *See, e.g.*, *Bognet v. Sec'y of Commonwealth*, No. 20-3214, 2020 WL 6686120, at *17 (3d Cir. Nov. 13, 2020) (concluding that "[u]nique and important equitable considerations, including voters' reliance on the rules in place when they made their plans to vote and chose how to cast their ballots," counseled against late-hour change to election law); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made."). This is especially true of postelection challenges like this, which threaten disenfranchisement of voters who cast their ballots in reliance on previously settled election rules—precisely the risk that Petitioners have created with this untimely petition. Accordingly, "[e]xtreme diligence and promptness are required in election-related matters." *In re Contested Election of Nov. 2, 1993*, 650 N.E.2d 859, 862 (Ohio 1995) (per curiam). "Courts will consider granting post-election relief only where the plaintiffs were not aware of a major problem prior to the election or where by the nature of the case they had no opportunity to seek pre-election relief," *Hart v. King*, 470 F. Supp. 1195, 1198 (D.

Haw. 1979), even where parties allege far more egregious misconduct than Contestants claim here. *See, e.g.*, *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss. 1985) (refusing to void election even where defendants conceded that districts were malapportioned because "to grant the extraordinary relief of setting aside an election, when no circumstances barred timely suit by the plaintiffs, would be to embrace the hedging posture" that courts have discouraged (citations omitted)).

Here, any delay or disruption in certification of the State's returns at this late hour risks nullification of the votes of all Minnesotans who followed applicable rules and guidelines and cast their ballots accordingly—a result not only prejudicial, but potentially unconstitutional as well. *See United States v. Saylor*, 322 U.S. 385, 387–88 (1944) ("[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place."); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595, 597–98 (6th Cir. 2012) (concluding that rejection of ballots invalidly cast due to poll worker error likely violates due process); *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020) ("Plaintiffs ask this Court to disenfranchise almost seven million voters. This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated."). This case ultimately illustrates why the doctrine of laches carries such force in the election context: the risk of prejudice to voters, officials, and parties like the DFL Party is unconscionably high, especially where Petitioners could have and should have brought

their challenges at an earlier, less disruptive point. The doctrine therefore bars Petitioners' requested relief.

III. Petitioners' claims are barred by the doctrine of finality

Petitioners' action is also barred by the doctrine of finality, which in this case implicates two dynamics: preclusion and deference. *See, e.g.*, *Clay v. Clay*, 397 N.W.2d 571, 579 (Minn. 1986) (noting that "the long established doctrine of finality of judgments [] is embodied in the concepts of res judicata, collateral estoppel, and" adherence to statutes that advance important public policies).

First, Petitioners are bound by the Republican Committees' stipulation that "waiv[ed] the right to challenge in any other judicial form" the consent decree that forms the primary basis for the petition's claims. Nauen Decl. Ex. 5, at 2–3. Absent fraud, a valid judgment entered by agreement or consent has the same preclusive effect "as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties *and those in privity with them*." *Hentschel v. Smith*, 153 N.W.2d 199, 203 (Minn. 1967) (emphasis added) (quoting *Pangalos v. Halpern*, 76 N.W.2d 702, 706 (Minn. 1956)). This Court "has directed that 'privity must be determined by the facts of each case.'" *Benson v. Hackbarth*, 481 N.W.2d 375, 377 (Minn. Ct. App. 1992) (quoting *Johnson v. Hunter*, 447 N.W.2d 871, 874 (Minn. 1989)); *see also Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. Ct. App. 1998) ("Privity does not follow one specific definition, but rather expresses the idea that a judgment should also determine the interests of certain non-parties closely connected with the litigation.").

Here, the facts show that Petitioners are in privity with the Republican Committees. The Republican Committees intervened in *LaRose* "[o]n behalf of their supported candidates[and] voters," citing their interest in "helping Republican candidates and voters" by "support[ing] Republican candidates for office." Nauen Decl. Ex 3, at 8, 12. Accordingly, as Republican voters and candidates, Petitioners were and are *expressly represented* by the Republican Committees in that ongoing action. Although Petitioners are "not parties to" the state court action, they are nonetheless "connected with it in their interests . . . as if they were parties" because their "interests are represented" by the Republican Committees. *Rucker v. Schmidt*, 768 N.W.2d 408, 413 (Minn. Ct. App. 2009) (quoting *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 200 N.W.2d 45, 47–48 (Minn. 1972)). Put differently, Petitioners—candidates and voters of the very political party that intervened in *LaRose*—"are so connected with" that litigation that the stipulation "should determine their interests as well as those of the actual parties." *Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. Ct. App. 2000). Therefore, Petitioners are bound by the stipulation and cannot challenge the state consent decree in any other forum—including this one.

Second, the conclusions and certification of the State Canvassing Board are entitled to deference. Minnesota Statutes section 204.C33, subdivision 3 grants the State Canvassing Board the authority "to canvass the certified copies of the county canvassing board reports received from the county auditors[,] prepare a report," and "certify its correctness." Because of the fact-intensive nature of election certification, the considered judgment of the State Canvassing Board should not be disturbed. *See Coleman v. Minn.*

State Canvassing Bd., 759 N.W.2d 44, 46 (Minn. 2008) (denying section 204B.44 petition seeking relief from decision of State Canvassing Board); *cf. Ritchie*, 758 N.W.2d at 308 (granting in part section 204B.44 petition where "the State Canvassing Board *ha[d] not yet* certified the final results of the recount" (emphasis added)); *Monaghen v. Simon*, 888 N.W.2d 324, 334–35 (Minn. 2016) (per curiam) (similar).[4]

CONCLUSION

Neither the law nor the facts support Petitioners' untimely suit, which threatens to upend the lawful certification of Minnesota's election returns. The doctrines of laches, mootness, and finality all militate against consideration of Petitioners' prejudicially delayed claims given that the State Canvassing Board has now certified the results. "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). Minnesotans cast their votes pursuant to clearly stated rules, officials counted those votes, and the State Canvassing Board certified them. Petitioners might not like these results, but they must accept them.

For these reasons, the DFL Party respectfully requests that this Court deny Petitioners' requested relief.

[4] Although this Court's order authorizing this informal memorandum did not invite discussion of the merits or other issues outside laches, mootness, and finality, the DFL Party stands ready to brief additional points as needed—including, for example, the Secretary's authority to enter into the challenged consent decree pursuant to Minnesota Statutes section 204B.47.

Dated: November 30, 2020

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CERTIFICATION PURSUANT TO MINN. R. APP. P. 132

This brief was prepared using Microsoft Word 2016 in 13-point Times New Roman font. The brief complies with the type face limitations set forth in Minn. R. App. P. 132.01, subd. 3, and contains 3,367 words.

s/Charles N. Nauen
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