

FILED

November 30, 2020

**OFFICE OF
APPELLATE COURTS**

**STATE OF MINNESOTA
IN SUPREME COURT**

Court File No. A20-1486

Tyler Kistner, et al.,

Petitioners

vs.

Steve Simon, et al.,

Respondents

PETITIONER'S INFORMAL
MEMORANDUM ON LACHES,
MOOTNESS AND
DOCTRINE OF FINALITY

INTRODUCTION

The Petitioners recognize the challenges faced by the Court in addressing the Petition to Correct Errors and Omissions under Minnesota Statute § 204B.44. The certification of the general election results is a serious matter with far-reaching implications. There are clear Constitutional deadlines to be met and a segment of the public clamoring to wrap up the elections and move on.

On the other hand, there is an equally large segment of the population thoroughly convinced that the election has been corrupted by technological interference (including but not limited to the use of internet communications to alter the counts in various races, scanners able to compile statistical data and email

that information in real time to outside parties for the 14 days leading up to the actual election day and the use of machines that can print on ballots) and human error (including but not limited to the failure to maintain chain of custody of ballots, the failure to separate ballots, the failure to properly apply the law to absentee ballots, the failure to ensure voters were legal voters before allowing them to vote, the failure to keep and maintain all election materials...) This group of people will not accept the results of this election unless there is actual proof that a full audit of the election is completed.

Never-before have there been more issues about the administration of elections in Minnesota and nationwide than in this election year.

Never-before has there been the level of fear of and distrust in and corruption related to our election officials as there has been this year.

Never-before have Minnesota voters and candidates needed the Judiciary to defend election laws and the Minnesota Constitution as much as is needed now.

I. FACTS / HISTORY

Minn. Stat. § 206.89 governs the postelection review (PER) process. This statute clearly sets the timing for the dates the County Canvassing Boards and State Canvassing Board must meet. Per statute, the County Canvassing Boards met to complete the PER between the dates of Friday, November 13, 2020 and Friday,

November 20, 2020. The State Canvassing Board meets the third Tuesday following a state general election.

As noted in the *Petition* filed with the Court, there were countless irregularities observed by independent observers who attended the PERs around the state. Many of these issues were documented in affidavits. These irregularities were clear violations of state law and called into question the legitimacy of the vote counts being certified by the County Canvassing Boards.

Over the next three days, Petitioners worked with counsel to draft and file the *Petition*.

On November 24, 2020 Petitioners filed the *Petition to Correct Omissions and Errors* Minn. Stat. § 204B.44 at the Minnesota Supreme Court seeking an immediate temporary restraining order enjoining the Minnesota State Canvassing Board from certifying the November 3, 2020 election.

Multiple phone calls were made to determine how to serve the members of the State Canvassing Board as the Secretary of State's Office was closed to the public due to COVID-19 and access to the judicial members of the State Canvassing Board is also restricted for the same reason. After repeated calls to the Attorney General's Office, an email was provided to Petitioner's counsel that could be used for service.

All Respondents were served with the Petition between 1:30 pm and 3:21 pm on November 24, 2020 via the email provided to Petitioners' counsel by staff at the Attorney General's Office on April 24, 2020.

The Minnesota State Canvassing Board met at 2:00 pm on November 24th via a telephone call-in number. Members of the public could dial-in to listen to the meeting, as the public's microphones were muted. There was no video feed made available. The Chair of the Canvassing Board indicated that the members of the State Canvassing Board were not on site due to COVID-19 concerns.

The Canvassing Board voted to certify the November 3rd, 2020 elections without noting any discrepancies and allowing for contingent and expected recounts. The Canvassing Board is recessed pending any recounts filed within the statutory timeframe allowed.

The Court has allowed the submission of an informal memo addressing issues of laches, mootness and the doctrine of finality by 9:00 am on November 30, 2020.

ISSUES

I. Laches

“Laches” is an equitable doctrine. Laches is used to prevent a plaintiff or petitioner who has not been diligent in asserting a known right from recovering at

the expense of a defendant / respondent who has been prejudiced by a delay in seeking redress.

The issue that must be ascertained is not simply whether the Petitioner could have brought this matter to the Court sooner but rather has the Petitioner behaved unreasonably, in these circumstances, by filing this petition? Has the filing of this petition caused prejudice to others, as would make it inequitable to grant the relief prayed for?¹

Minnesota's 87 County Canvassing Boards were each scheduled to meet between the dates of November 13- November 20, 2020. The State Canvassing Board was scheduled to meet on Tuesday, November 24, 2020. It was not possible to know the County Canvassing Boards would be derelict in their duties until they were, in fact, derelict in their duties. Numerous observers, each attempting to meaningfully participate in the PER process under Minn. Stat. § 206.89, were obstructed by the very county officials that were mandated to follow the laws that guarantee the public's right to observe.

Following the many observers' realizations of this dereliction during numerous PERs throughout the state, it was necessary to share and gather data, draft a Petition to correct Errors and Omissions and file the Petition with the Court. This occurred in a matter of days after the last PER was performed on November

¹ *Clayton v. Kiffmeyer*, 2004, 688 N.W.2d 117 (2004).

20th, hardly an unreasonable timeframe. In fact, there is an argument to be made the statute fails to allow adequate time for challenges to be made when the process is corrupt.

Laches did not bar consideration of a petition even when a candidate was late in filing for a judicial seat and that delay adversely impacted the candidate field and process because the need for certainty in the judicial election process was more important.² There is an equally important need for certainty in all of our elections.

The Petitioners did not slumber on their rights - they, with great sadness, filed a petition detailing the facts that showed Minnesota's election system has deteriorated into an inconsistent, unaccountable system that allows partisanship to block access to the areas where ballots are counted.

There is a growing distrust of our election process, not only in Minnesota but nationwide. Our election officials must be able to tell the voters the election process was not corrupted. The failure of the Secretary of State to ensure a consistent enforcement of Minnesota Election Law is a travesty for the state.

Laches relates to disputes in equity. In disputes tied to elections, justice can only be found by uncovering the truth. The Supreme Court's history of addressing

² *Winters v. Kiffmeyer*, 2002, 650 N.W.2d 167 (2002).

ballot challenges on a case-by case basis serves to ensure clarity and certainty prevail in the election process.³

Laches does not prohibit this case from proceeding.

II. Mootness

On November 24, 2020 the Minnesota State Canvassing Board voted to recess, pending notification of election contests. The Board may, by choice or by order, decertify the statewide general election results pending an audit as sought by the *Petition to Correct Errors and Omissions* filed on November 24, 2020.

Voters and candidates have standing for each claim, satisfying the (i) injury-in-fact, (ii) traceability, and (iii) redressability elements.⁴ Voters and candidates have standing for (a) Claim I, violation the First Amendment and Equal Protection clause; (b) Claim II, violation of the separation of powers; and (c) Claim III, violation of due process. Given a cognizable legal theory, claims need only provide enough facts to make the claims plausible.⁵

³ *Clark v. Pawlenty*, 2008, 755 N.W.2d 293, certiorari denied 129 S.Ct. 2056, 556 U.S. 1208, 173 L.Ed.2d 1134

⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁵ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The Court has jurisdiction to issue a declaratory judgment if there is a justiciable controversy.⁶ Justiciability will be determined by the existence of definite and concrete assertions of right.⁷

Generally, the petitioners' interest at the beginning of the litigation must persist throughout the proceedings.⁸ However, as to matters related to elections, “the passage of an election before a court renders its decision will not necessarily render an election-related case moot; such cases may be exceptions to the mootness doctrine because they are ‘capable of repetition, yet evading review.’”⁹ No matter the type of case, the Court will dismiss a case as moot if it cannot grant effectual relief.¹⁰

The Petitioners each had and have the right to assert the claims made consistent with the Minnesota and United States Constitutions. The requirements to safeguard the election process and the duties of elected officials to protect the rights of the Petitioners are clearly defined in Minn. Stat. §§ 206.89, 204B.19, 204B.44 and 13D.01.

⁶ *Minnesota Ass'n of Public Schools v. Hanson*, 287 Minn. 415, 419–20, 178 N.W.2d 846, 850 (1970).

⁷ *Id.* at 420, 178 N.W.2d at 850.

⁸ *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

⁹ *Kahn v. Griffin*, 701 N.W.2d 815, 822 (Minn. 2005).

¹⁰ *Matter of Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989).

The Court can grant relief to the Petitioners through an order to de-certify the election pending a full audit that complies with all applicable Minnesota law.

A critical distinction exists specific to cases likely to occur again if the matter is not addressed. The Supreme Court has determined that in the absence of a class action, the “capable of repetition, yet evading review” doctrine 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.”¹¹

A similar doctrine exists in Minnesota, where the Court will not deem a case moot if it implicates issues that are capable of repetition, yet likely to evade review.¹²

This doctrine is on point with election law violations and the likelihood that subsequent cases will arise related to the PER process. The timeline between the last County Canvassing Board meeting and the State Canvassing Board meeting is three days. This timeline prevents potential claimants from raising violations because there is literally not time to gather the information and draft the petition. The issues raised in this Petition have likely been occurring for years without a

¹¹ *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).

¹² *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn.1980).

check for that very reason. As elections are becoming more controversial, races tighter, and the conflict between the parties increases, the challenge to our very communities must be considered. If there are no consequences for those who choose to ignore the law, they will persist and likely continue to escalate the misconduct.

More importantly, the Court will retain jurisdiction and not deem a “functionally justiciable” case moot if it raises “an important public issue “of statewide significance that should be decided immediately.”¹³

The integrity of the election process is an incredibly important public issue and has serious statewide significance. The failure to address both the blatant abuses of power by election officials in Minnesota and the failure to administer the most basic election laws properly will send a tragic and dangerous message to Minnesota voters. The best hope to unify voters around election results is to prove, through an open and honest process, that the elections were fair, lawful and free of interference from partisan gamesmanship. There were failures across Minnesota in the administration of the PER process, as documented by the affidavits attached to the Petition. Those failures can be cured by ordering the relief requested by Petitioners.

¹³ *Kahn* at 821-822, citing *State v. Brooks*, 604 N.W.2d 345, 347–48 (Minn.2000).

Petitioners claims have not been addressed and are not moot. Essentially, all of Petitioners claims involve their fundamental right to vote. The stipulated agreement between the Secretary of State and the DFL Party and its representatives, changed the way absentee ballots were processed. This drastic shift in election law occurred without legislative approval and made material changes to Minnesota Election Law. Polling place voters were treated differently than absentee voters. Mail-in ballots could have been submitted by anyone, from anywhere. All checks were removed from the verification system used for years to protect the integrity of the vote.

Now, Petitioners simply seek to enforce Minnesota Election Law.

This case is not moot.

III. Doctrine of Finality

Res judicata is a doctrine of finality, and it applies to all claims that could have been litigated in an earlier action.¹⁴

“Law of the case” is also a doctrine of finality but does not apply to matters that have not yet been litigated or decided at trial or on appeal.¹⁵

¹⁴ *Ward v. El Rancho Manana, Inc.*, 945 N.W.2d 439, 446 (Minn. Ct. App. 2020), review denied (Oct. 1, 2020).

¹⁵ *Matter of Welfare of M.D.O.*, 462 N.W.2d 370, 376 (Minn. 1990).

The matter before the Court relates to the State Canvassing Board and its responsibility to oversee the County Canvassing Boards and to certify as correct those County Canvassing Boards certifications of each of their specific PERs.

Those PERs should have all been completed using consistent processes and standards, in an open forum, as dictated by Minnesota statutes and rules, between the dates of November 13, 2020 and November 20, 2020. The State Canvassing Board met on November 24, 2020 to review the results of the PER, issues that were reported and possible contested elections.

There was no way to know prior to November 13, 2020 if any of the County Canvassing Boards would violate the laws when completing the PER. As observers began to attend the PERs in the counties, issues became obvious.

The Petition before the Court was properly filed as soon as possible following the completion of the last PER.

A Doctrine of Finality does not apply to this case.

CONCLUSION

Minnesota election law provides clear guidance to potential and registered voters and to election volunteers and officials, from the voter registration process to casting a ballot to contesting an election. The election law system works if the people who are responsible for implementing those laws do their jobs.

This election year, too many people seem to have failed to do their jobs. Those election officials, judges and workers who did not do their jobs, or who knew of other people who did not do their jobs, and then refused to let the public engage in the legally required process to verify the votes were properly counted, also failed their communities, their state and their country.

The certification of an election is not a trivial matter. The certification of an elections is one of the most important duties a person can accept and the oath taken, by each and every person who certifies elections, to follow the law matters.

Neither the County Canvassing Boards nor the State Canvassing Board exist to simply rubber stamp reported results. Did members of those boards spend time observing the ballot boards or the canvass? Did they research the training that was being done at the local levels to ensure there would be consistency in the execution of the law? Members of the public tried to observe and were denied meaningful access. These Minnesota voters showed up around the state hoping to learn all was well with our election system. Instead they observed an election system in disarray in many areas of the state.

These problems should not be minimized by a system hoping the issues, or the truth-tellers, go-away. The Petitioners will not simply retreat. This system must engage in an actual PER, run like a recount as is required by statute. The review should be statewide and of every precinct. Those running it should be aided by

volunteers from all major parties, not simply the government employees who have overseen the failures. The people of Minnesota have the right to have access to the process to ensure accountability.

Petitioners ask the Court to provide the relief requested in the Petition to Correct Errors and Omissions under Minnesota Statute §204B.44.

Respectfully Submitted,

Dated: November 30, 2020

_____/s/ Susan Shogren Smith _____
Susan Shogren Smith (Atty # 0340467)
Shogren Smith Law
600 62nd Avenue North
Brooklyn Center, MN 55430
612-812-8160
Email:
shogrensmithlaw@protonmail.com
Attorney for Petitioners