STATE OF MINNESOTA

IN SUPREME COURT

File No. A20-1486

Tyler Kistner, et al.,

Petitioners,

vs.

Steve Simon, Margaret Chutich, Gordon L. Moore, III, Regina Chu, Christian Sande,

Respondents.

RESPONDENTS' RESPONSE TO MINN. STAT. § 204B.44 PETITION

In the fall of 2020, 3,292,997 Minnesotans cast ballots in this state's general election. The results of the election have now been canvassed and approved by the Respondent members of the State Canvassing Board. Despite the date of the Board's meeting being established by state law, mere hours before the Board met, Petitioners filed the instant petition, contending for the first time that court decisions issued months earlier—regarding the procedures by which Minnesotans could cast ballots—should be disregarded and nearly two million votes cast in reliance on those decisions should be invalidated. Petitioners also challenge acts of county election officials performed as part of a statutory post-election process over which the Respondents have no legal authority.

The Court requested briefing on mootness, laches, and finality.[1] The petition should be dismissed for three reasons. First, it is moot, because the State Canvassing Board has already certified the results of the 2020 general election, which is the action Petitioners sought to stop. Second, Petitioners' claims are barred by laches, because they sat on their rights for more than three months before making their current claims. Third, the petition violates the doctrine of finality, because Petitioners attempt to resurrect disputes that were resolved months ago by this and other Minnesota state courts regarding the rights of Minnesota voters. Well over three million voters have cast ballots in reliance on state-court decisions in the cases Petitioners now seek to reopen. The relief Petitioners seek would inflict outrageous injustice on millions of Minnesotans, and as a result the Court should dismiss the petition.

FACTS

I. MINNESOTA'S ABSENTEE VOTING SYSTEM AND CERTIFICATION OF RESULTS

Early and absentee voting begins 46 days before election day in Minnesota. Minn. Stat. § 203B.081, subd. 1 (2020). In the 2020 general election, this meant that early and absentee voting began on September 18. *See id.* Ballot boards appointed by county and municipal governments determine whether absentee ballots have been properly cast. *Id.* § 203B.121. After the polls close on election day, the boards tally the accepted ballots, which are added to votes cast in person at polling places. *Id.*, subd. 5. The totals are reported to a county canvassing board. *Id.* §§ 204C.19, 204C.31, subd. 3. Each county

[1] The petition also has no merit, but Respondents will reserve briefing those issues until requested by the Court.

canvassing board meets to certify county results between three and ten days after the election. *Id.* § 204C.33, subd. 1. On the third Tuesday following election day, the State Canvassing Board meets to certify the official statewide results and declare the winners. *Id.*, subd. 3. In 2020, the State Canvassing Board met for this purpose on November 24. *See id.*

The Secretary of State is a constitutional officer and Minnesota's chief elections official. Minn. Const. art. VII, § 8; *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008). He has the authority to adopt rules for the receipt of absentee ballots in addition to those set by the legislature. Minn. Stat. § 203B.08, subd. 4 (2020). When provisions of Minnesota's election laws cannot be implemented "as a result of an order of a state or federal court," state law provides that the Secretary "shall adopt alternative election procedures to permit the administration of any election affected by the order." *Id*. § 204B.47.

II. PROCEDURAL HISTORY

A. *LaRose v. Simon*

In May, a group of plaintiffs sued Secretary Simon in state court seeking to enjoin enforcement of two Minnesota election laws: Minnesota's election day receipt rule and the requirement that a witness certify an absentee ballot. *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Ramsey Cty. Dist. Ct.). The plaintiffs challenged these laws generally and as applied during the COVID-19 pandemic.

After arms-length negotiations, the plaintiffs and the Secretary entered into a consent decree for the purpose of the August 11 statewide primary. *LaRose v. Simon*,

No. 62-CV-20-3149, Consent Decree (Minn. Ramsey Cty. Dist. Ct. June 17, 2020). The decree provided, among other things, that the witness requirement is unenforceable. *Id.* The district court adopted the consent decree on June 17. *Id.* Local election officials implemented the required changes, and the primary election was held with no significant problems despite record-level turnout. *See* Tim Harlow, *More than 100,000 voters cast ballots in primary in Minneapolis*, Star Trib. (Aug. 12, 2020).

After the *LaRose* plaintiffs sought an injunction pertaining to the November 3 general election, the parties again negotiated a consent decree. *LaRose*, No. 62-CV-20-3149, Stipulation and Partial Consent Decree (Minn. Ramsey Cty. Dist. Ct. July 17, 2020). Like the one pertaining to the primary election, the August consent decree provided, among other things, that the witness requirement was suspended for the general election. *Id.* at 9. The consent decree contains undisputed stipulated facts justifying these changes. *Id.* at 1-7 (finding, among other things, that "Minnesota is anticipated to be required to maintain social distancing and abide by CDC Guidelines until the [pandemic] crisis subsides" and that "available public data regarding transmission of COVID-19 supports Plaintiffs' concerns for their safety if they are required to interact with others to cast their ballot in the November General Election").

Before the district court ruled on the consent decree, the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee moved to intervene in the lawsuit. *LaRose v. Simon*, No. 62-CV-20-3149, Order at 7 (Minn. Ramsey Cty. Dist. Ct. Aug. 3, 2020). The district court heard argument on the consent decree from the parties and the proposed Republican

intervenors in late July and then signed the consent decree on August 3. *Id.* The court issued an order and memorandum explaining the decision and the reasons the plaintiffs were likely to succeed on the merits. *Id*. at 1-25. The court held that the decree would carry out the requirements of the Minnesota Constitution. *Id*. at 24-25. The court also granted the Republican intervenors' motion for permissive intervention. *Id*. at 1, 15-16.

On August 10, the intervenors appealed directly to this Court, which granted their petition for accelerated review. *LaRose v. Simon*, No. A20-1040 (Minn. Aug. 12, 2020). A few days later, however, the intervenors voluntarily consented to dismissal of the appeal and waived their rights to challenge it in any other forum. *Id.*, Stip. (Minn. Aug. 18, 2020). This Court dismissed the appeal. *Id.*, Order (Minn. Aug. 18, 2020).

On August 28, the Secretary's office, pursuant to the consent decree, sent absentee ballot instructions to local election officials. These instructions informed voters, in large print, that "[b]ecause you are a registered voter in the State of Minnesota when this ballot packet was sent to you, you are NOT required to have a witness for the 2020 Minnesota State General Election." *See* https://www.sos.state.mn.us/media/4256/2020-general-absentee-mail-ballot-insert-for-registered-voters.pdf. Voters began receiving ballots with these instructions on September 18, when absentee and early voting began in Minnesota.

Election officials accepted and counted more than 1,900,000 absentee and mail ballots from Minnesota voters in the 2020 general election. *See* https://www.sos.state.mn.us/elections-voting/election-results/2020/2020-general-election-results/outstanding-absentee-and-mail-ballots-in-2020-general-election/.

B. *Kistner v. Simon*

Petitioners filed the instant petition in this Court on the morning of November 24, the day that the State Canvassing Board met to canvass the results of the general election. Petitioners baldly asserted that the *LaRose* consent decree that applied to the general election was engineered by "Democrat advocacy groups" and peddled conspiracy theories, dismissing the district court judge that adopted the consent decree as "the state political director for [a] Democrat Senator" and "a well-connected political staffer who became a district court judge." (Pet. at 6, 19, ¶ 5.)[2] They contend that the consent decree issued by the district court and appealed to this Court in August should be disregarded because it constituted a "usurpation of legislative power" by the Secretary. (*Id.* ¶¶ 64-69, 79-81, 83-85, 98-106.) They therefore demand a temporary restraining order enjoining the State Canvassing Board from certifying the results of the election. (Pet. at 52-53.) In the alternative, they ask the Court to order a statewide recount of the ballots cast in the 2020 general election that applies the witness requirement and thus invalidates all absentee ballots that lack a witness signature. (*Id.* ¶¶ 88-90, 107-08.) As a final alternative, Petitioners brazenly ask the Court to order "a new statewide election." (*Id.* ¶ 91.)

[2] The petition lacks page numbers. As a result, page citations to the petition refer to the page numbers provided by a software application that reads the PDF version of the petition that is available on the Court's online document access system.

Petitioners filed the petition at 1:44 a.m. and served it on the Secretary at 1:30 p.m. on November 24, thirty minutes before the meeting of the State Canvassing Board that began at 2:00 p.m.

During its meeting, the State Canvassing Board certified the results of the 2020 Minnesota statewide general election. *See* https://www.sos.state.mn.us/media/4364/mn-2020-state-general-canvassing-report-post-per.pdf.

The Court permitted the parties to file memoranda addressing laches, mootness, and the doctrine of finality.

ARGUMENT

The petition is a facially meritless attempt to invalidate a statewide election and disenfranchise millions of Minnesotans. It fails for a number of reasons, three of which are relevant to the issues on which the Court requested briefing. First, the petition is moot because the Canvassing Board has already certified the results of the election. Second, the petition is void on the basis of laches, because Petitioners sat on their rights for more than three months before challenging the consent decree. Third, any ruling overturning the consent decree at this late date would work an unspeakable injustice on nearly two million Minnesota voters who relied on decisions from the district court and this Court that they reasonably believed were final determinations of the voters' rights to submit absentee ballots without witness signatures.[3]

[3] As explained below, Petitioners' claims regarding the witness requirement fail on the grounds of mootness, laches and finality. Petitioners also complain at length about the post-election review (PER) of voting systems that various county election officials (Footnote Continued on Next Page)

I. THE PETITION IS MOOT.

First, the petition should be denied on the grounds of mootness. This Court only hears "live controversies"—that is, cases in which the Court can grant effectual relief. *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989); *In re Inspection of Minn. Auto. Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984). Once an election has been conducted and the results certified, challenges to the procedures under which the election was conducted are generally moot, because "no effective relief can [then] be provided to the candidates or voters." *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *see also Sanda v. Growe*, 463 N.W.2d 285, 285 (Minn. 1990) (denying petition under section 204B.44 as moot).

Courts, however, sometimes hear challenges to election laws after results have been certified under an exception to the mootness doctrine that permits adjudication

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conducted pursuant to Minn. Stat. § 206.89. To the extent these claims are not moot as well, the Secretary is the wrong respondent for them. Minnesota Statutes section 204B.44(a) authorizes this Court to review claims of errors and omissions of an "individual charged with any duty concerning an election." Here, any errors or omissions pertaining to the PER were committed by entirely *different* individuals from the ones Petitioners have named as respondents to this petition. Neither the Secretary nor the other members of the State Canvassing Board have any supervisory authority over the conduct of county governments' PER. *See* Minn. Stat. § 206.89 (2020). Nor do the named respondents have any firsthand factual knowledge about the manner in which the county review was carried out. As a result, if Petitioners wish to state claims pertaining to counties' PER, they must file a petition against the county officials who conducted it, not against unconnected state officials. *Cf. Republican Party of Minn. v. Narabrook*, No. A20-1353 (Minn. Oct. 30, 2020) (section 204B.44 petition against City of Minneapolis and Hennepin County election officials alleging errors in processing of absentee ballots); *Republican Party of Minn. v. Triplett*, No. A20-1361 (Minn. Nov. 2, 2020) (section 204B.44 petition against Ramsey County election official alleging errors with regard to appointment of election judges).

"where the controversy is capable of repetition, yet evading review." *Storer*, 415 U.S. at 737 n.8 (applying exception to post-election lawsuit challenging state election statutes because "the issues properly presented, and their effects on [particular] candidacies, will persist as the [challenged] statutes are applied in future elections"); *Schiff v. Griffin*, 639 N.W.2d 56, 63 (Minn. Ct. App. 2002) (holding that post-election petition under Minn. Stat. § 204B.44 fell within exception to mootness doctrine because issue presented "will likely arise in connection with future elections").

The claims before the Court are moot. Minnesotans have finished voting in the 2020 general election, and the State Canvassing Board has canvassed the returns and certified the results of the election. The relief that Petitioners request—an injunction preventing the Board from certifying the results—is therefore impossible. As a result, the petition is moot.

Petitioners may contend that their claims are not moot because they are capable of repetition yet evading review. Any such argument would fail, however, because this case is neither capable of repetition nor evading review. A claim is capable of repetition only when the complaining party can show a reasonable expectation that the same party will be subjected to the same action again. *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015). The complainant cannot meet this requirement merely by citing "speculative contingencies." *Bishop v. Comm. On Prof'l Ethics and Conduct of Iowa State Bar Ass'n*, 686 F.2d 1278, 1284 n.13 (8th Cir. 1982). "[A] mere physical or theoretical possibility" that the situation will recur is insufficient. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547 (8th Cir. 1995).

Next, a claim fits the "evading review" prong of the mootness exception only when the duration of the challenged action is "too short to be fully litigated before it ceases or expires." *Dean*, 868 N.W.2d at 5. This exception does not apply to a claim that could have been fully litigated if the complainant had timely sought relief and, if necessary, expedited procedures in court. *South Dakota v. Hazen*, 914 F.2d 147, 150-51 (8th Cir. 1990) (holding claim did not evade review where time pressure on litigation "was created by [plaintiffs'] failure to file their lawsuit sooner" and "[t]here is no apparent reason why similar future action by the [defendant] could not be fully litigated before its cessation or expiration").

The current controversy is not capable of repetition, because the consent decree that Petitioners challenge explicitly applies solely to the 2020 general election. *LaRose v. Simon*, No. 62-CV-20-3149, Consent Decree (Minn. Ramsey Cty. Dist. Ct. Aug. 3, 2020). Petitioners do not allege, nor do they have any basis to allege, that this or a similar consent order will have the same effect on the conduct of future elections. The current case is therefore not capable of repetition. *See In re McCaskill*, 603 N.W.2d 326, 328 (Minn. 1999) (holding issue not capable of repetition because "[t]he narrow issue raised by appellant . . . —the sufficiency of the evidence in this particular commitment—will not arise again").

Moreover, Petitioners' claims do not evade review, because Petitioners had the power to litigate them to completion long before the November 3 election—or even the September 18 opening of absentee balloting. As the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee

demonstrated by intervening in the *LaRose* litigation that led to the August consent decree, Petitioners had every opportunity to participate in that action and to present their arguments regarding the alleged illegality of the consent decree. Indeed, intervention in *LaRose* would have permitted Petitioners to make their current arguments in *this* Court when the lawsuit was appealed here in August. *See LaRose v. Simon*, A20-1040 (Minn. Aug. 12, 2020). As a result, Petitioners have run out of time, not because of any inherent fact about the challenged decree that makes its "live controversy" period too brief to fully litigate it, but rather because Petitioners unaccountably waited for more than three months to file their challenge in court.

The petition therefore does not meet the "capable of repetition, but evading review" exception to the mootness doctrine. It should be denied as moot.

II. THE PETITION IS BARRED BY LACHES.

For substantially the same reasons, the petition should be denied based on laches. By sitting on their rights for months, Petitioners forfeited their ability to challenge the consent decree.

The equitable doctrine of laches "prevent[s] one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Monaghen v. Simon*, 888 N.W.2d 324, 328–29 (Minn. 2016). The Court has repeatedly denied election challenges due to laches. *See Clark v. Reddick*, 791 N.W.2d 292, 294–96 (Minn. 2010); *Pawlenty*, 755 N.W.2d at 303; *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952). Laches is a critical doctrine in the election context because the "very nature of matters implicating election laws and proceedings routinely

requires expeditious consideration and disposition by courts facing considerable time constraints imposed by the ballot preparation and distribution process." *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992).

A petition filed under Minn. Stat. § 204B.44 is barred by laches when (1) the petitioner unreasonably delays in filing his or her petition and (2) the relief the petitioner requests would prejudice election officials, other candidates, and the Minnesota electorate in general. *Pawlenty*, 755 N.W.2d at 299-303. Both elements are met in this case.

Here, Petitioners sat on their rights for more than three months before challenging the consent decree. If they had sued or intervened in August, the issues they now press could have been resolved before millions of Minnesotans cast ballots and the State Canvassing Board certified the results. Petitioners offer no excuse for their delay.

Moreover, granting Petitioners' requested relief would inflict overwhelming prejudice on Minnesota voters and election officials. Petitioners ask the Court to order a statewide recount that reinstates the absentee-ballot witness requirement—a process that, if it is even feasible, would disenfranchise the vast majority of the 1.9 million Minnesota voters who voted absentee. Petitioners' alternative suggestion, a comprehensive do-over of the statewide general election, would impose enormous hardships on voters—*all* Minnesota voters—and election officials alike. Few election petitions that have ever been filed in this Court have sought to inflict such drastic harms on the Minnesota electorate as outright invalidating somewhere between 1.9 million and 3.3 million votes.

For these reasons, the petition should be denied on the basis of laches.

III. THE RELIEF PETITIONERS SEEK WOULD PENALIZE MINNESOTA VOTERS FOR RELYING ON THE FINALITY OF COURT DECISIONS.

Even if there were circumstances under which this Court could justifiably invalidate the votes of approximately 1.9 million Minnesotans, such relief cannot be appropriate under the facts of this case, because the Minnesotans who cast absentee ballots in 2020 relied on a court order explicitly declaring that those ballots were not required to contain witness signatures. Invalidating those votes would do severe damage to the presumption that judicial orders—even after they have survived appeals, as the August consent decree did—are final and worthy of reliance by Minnesotans.

A recent U.S. Supreme Court order on a similar change to South Carolina election rules illustrates the point. In September 2020, a federal district court enjoined enforcement of the South Carolina requirement that a witness certify an absentee ballot, due to concerns about COVID-19. *Middleton v. Andino*, No. 20-CV-1730, 2020 WL 5591590 (D. S.C. Sept. 18, 2020). Weeks later, the Supreme Court reversed the injunction. *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). However, the Court provided that all ballots cast without a witness during the period when the district court order was in place were valid and would be counted. *Id*. The reason is straightforward: a change in rules after the ballots were cast should not disenfranchise voters who relied on a judicial decision stating rules that were in place when they voted.

The same logic applies in this case. In fact, Minnesota voters had even stronger grounds to rely on the *LaRose* consent decree than South Carolinians had to rely on the

Andino order: whereas *Andino* was immediately appealed and the district court injunction was eventually stayed by the Supreme Court, in *LaRose* the Republican intervenors' appeal was dismissed by this Court a month before voting began. *LaRose*, Order (Minn. Aug. 18, 2020). As a result, Minnesota voters had every reason to believe that the issues presented in that case had been fully litigated and that the resolution of the legal question would not be further disturbed. An order from this Court disenfranchising the nearly two million voters who relied on the *LaRose* decree and the ballot instructions that resulted from it would therefore do substantial damage to any expectation that Minnesotans can rely on the final decisions of the state judiciary when exercising their constitutional rights.

Finally, Petitioners' claims implicate res judicata, the "finality doctrine that mandates that there be an end to litigation." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). The doctrine provides that a judgment on the merits in a previous lawsuit "constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated therein." *Id.* (quoting *Youngstown Mines Corp. v. Prout*, 124 N.W.2d 328, 340 (Minn. 1963)).

In this case, Petitioners' contentions regarding the witness requirement were litigated to a final judgment, including an appeal to this Court, in *LaRose*. The intervenors in *LaRose*—the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee—are closely related to all Petitioners. Upon information and belief, Petitioners Kistner and Rechtzigel were

directly supported by the National Republican Congressional Committee, and all twenty-five of the Petitioners who ran for office in 2020 were endorsed by the Republican Party of Minnesota. Permitting a political faction to bring the same legal claims pertaining to the same election over and over again, merely by choosing a slightly different plaintiff each time, would render res judicata meaningless and leave Minnesotans' interest in the finality of litigation unprotected. The Court should therefore dismiss Petitioners' claims under res judicata.

CONCLUSION

For these reasons, the petition suffers from fundamental and fatal legal flaws. The Court should deny the petition on the grounds of mootness and laches and because the relief Plaintiffs seek would penalize Minnesota voters' justified reliance on a final judicial decision by denying them their fundamental constitutional right to vote.

Dated: November 30, 2020

Respectfully submitted,

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