STATE OF MINNESOTA
IN SUPREME COURT

Court File No. A09-345

Harold Shad; Joy Andis; Kristi Moler; Cynthia Racine; Kelsey Smith; Jordan Traub; Phyllis Ebert; Donald Gleason; Raymond Kocisko; Mary Nelson; Patricia Panagos; Neal Rootes ;Jeanette Stenson; John Sullivan-Fedock; Clarice Brederson; Henry Abel; Muriel Elaine Anderson; Maura Coonan; George Fairbanks; Gloria Fairbanks; Gerald Gauster; Lorraine Gauster; Richard Myslajek; Christine Paulu; Molly Vinyard-Williamson; Sarah Wilensky; Jessica Fark; Guilford Lewis; Barbara Miller; and Kathleen Wetterstrom,

Petitioners,

vs.

Mark Ritchie, Minnesota Secretary of State; Cass County; Dakota County; Hennepin County; Pope County; Ramsey County; Sherburne County; Saint Louis County; and Wabasha County,

Respondents.

PETITIONERS' MEMORANDUM OF LAW REGARDING TIMELINESS OF PETITION BY CERTAIN MINNESOTA VOTERS TO HAVE THEIR VOTES COUNTED PURSUANT TO MINN. STAT. § 204B.44

INTRODUCTION

Petitioners' February 20, 2009, petition seeking to have their improperly rejected absentee ballots counted is timely because effective relief protecting Petitioners' fundamental rights to vote is still available via the pending election contest, to which the

Court referred a virtually identical petition. Both petitions can and should be tried in the same forum at the same time, eliminating any possible prejudice to any party.

In the interest of judicial economy and to remove uncertainty from the election process, Petitioners urge the Court to promptly refer the instant petition for consideration and determination as part of the pending election contest.

BACKGROUND

On January 5, 2009, the State Canvassing Board completed the canvass of the November 4 election, declaring that Al Franken had received the highest number of votes for the office of United States Senator. On January 6, 2009, Norm Coleman filed a notice of contest in district court, pursuant to Minn. Stat. § 209.021, challenging the State Canvassing Board's declaration.

On January 13, 2009, 64 Minnesota voters filed a petition in the Minnesota Supreme Court, pursuant to Minn. Stat. § 204B.44, to request that their improperly rejected absentee ballots be counted. On January 16, 2009, this Court referred the petition for consideration and decision as part of the pending election contest in district court.

On February 6, 2009, seven other Minnesota voters who sought to have their rejected absentee ballots counted filed a notice of intervention and moved to intervene in the § 209 election contest. The three-judge district court panel denied the motion to intervene in the election contest, but noted that a petition under § 204B.44 remained a viable vehicle to pursue such claims:

> The Court notes that other provisions of Minnesota Election law provide a procedure for the seven voters to protect their right to suffrage. Specifically, the Court notes that these voters could file a petition for correcting errors and omissions in the conduct of the election pursuant to Minnesota Statute § 204B.44 . . . . The Court notes that the procedure under § 204B.44 remains open and available to the seven voters who seek to intervene in this election contest.

Order (February 6, 2009) at 3-4.

During the course of the election contest trial, which began on January 26, 2009, the district court panel has issued and continues to issue a series of orders interpreting Minnesota election law and applying the law to the particular circumstances of certain absentee voters and their ballots and to categories of absentee ballots. *See, e.g.*, Order (February 10, 2009) (granting in part and denying in part January 13 Petitioners' motion for summary judgment); Order (February 13, 2009) (defining 10 categories of absentee ballots that are *not* legally cast under the relevant law); Order (February 23, 2009) (granting in part and denying in part Contestee's conditional motions for partial summary judgment); Order (March 2, 2009) (granting in part and denying in part Contestants' motion to vacate the February 10 Order and judgment). In addition, the district court panel has under advisement the January 13 Petitioners' renewed motion for summary judgment, which was heard on February 27, 2009.

Taking heed of the district court panel's ruling on the motion to intervene and other orders applying Minnesota election law to rejected absentee ballots, 30 other Minnesota voters filed the instant petition, dated February 20, 2009, pursuant to Minn. Stat. § 204B.44, and requested that their rejected absentee ballots be accepted, opened, and counted. The February 20 Petitioners presumed their petition, like the January 13

petition, would be referred to the district court panel for consideration and decision as part of the pending election contest. Affidavit of Charles N. Nauen ("Nauen Aff.") at ¶ 3.

Trial in the election contest continues at this time. Contestee began presenting his case today, March 3. The January 13 Petitioners expect to begin trying their case when Contestee rests, in approximately two to three weeks from now, and anticipate that the trial will conclude shortly thereafter. *Id.* at ¶ 4. The February 20 Petitioners presumed they would try their case to the three-judge panel in conjunction with or immediately following the other petitioners, adding less than a day to the trial. *Id.* at ¶ 5.[1]

On February 26, 2009, this Court ordered the February 20 Petitioners to serve and file a memorandum addressing why their petition "should not be dismissed as untimely in light of the seven-day deadline for filing a notice of contest after a recount under Minn. Stat. §§ 209.021, subd. 1, and 204C.35, subd. 1(d) (2008)." Order (February 26, 2009) at 1-2.

ARGUMENT

I. THE DEADLINE FOR FILING A § 209 NOTICE OF CONTEST DOES NOT APPLY TO THIS § 204B PETITION.

Minn. Stat. §§ 209 and 204B provide separate and distinct vehicles for voters to challenge the improper rejection of their absentee ballots. *See Coleman v. Ritchie*, 758

[1] Petitioners may bring a motion for summary judgment which would eliminate or limit claims for trial. Nauen Aff. at ¶ 5.

N.W.2d 306, 310 (Minn. 2008) (Page, J., dissenting).[2] Actions under §§ 209 and 204B are subject to different rules and procedures. Section 209 election contests must be filed in district court and, if the contest involves a special or general election, must be commenced within seven days after the canvass is completed. Minn. Stat. § 209, subd. 2 and subd. 1. In contrast, § 204B petitions must be filed with a judge of the supreme court. Minn. Stat. § 204B.44. Unlike a § 209 election contest, there is no hard deadline for a § 204B petition. The timeliness of a § 204B petition is judged based on principles of laches. *See Winters v. Kiffmeyer*, 650 N.W.2d 167, 169-70 (Minn. 2002).

Because actions under § 209 and § 204B are governed by different rules and procedures, this § 204B petition should not be dismissed as untimely based on the seven-day deadline for filing a § 209 notice of contest.

II. THIS § 204B PETITION IS NOT BARRED BY LACHES.

In considering laches in the context of an election, the "practical question in each case is whether there has been an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." *Winters*, 650 N.W.2d at 170 (internal citation and quotation marks omitted). None of these factors weighs in favor of applying laches to frustrate Petitioners' efforts to ensure that their votes are counted.

[2] Chapters 209 and 204B serve somewhat different purposes. "[C]hapter 209 is primarily concerned with which party received the highest number of votes, not the protection of

A. Petitioners Did Not Unreasonably Delay In Asserting Known Rights.

Whether a petitioner unreasonably delayed in asserting a known right is a "practical question" that can only be determined by examining the particular circumstances of each case. *See, e.g., id.*; *cf. Clayton v. Kiffmeyer*, 688 N.W.2d 117, 122-23 (Minn. 2004) (ruling on laches would require determination of disputed facts). As a practical matter given the circumstances, Petitioners acted with reasonable promptness in asserting their claims.

One of the key subplots in the pending election contest is the dispute between Contestants and Contestee regarding the correct interpretation of Minnesota election law as it applies to absentee ballots. In a nutshell, the dispute concerns whether the law requires strict compliance or substantial compliance with the standards and requirements for voting by absentee ballot. The parties have skirmished over this issue in several motions, resulting in a series of orders interpreting the law and applying it to the particular circumstances of certain absentee voters and their ballots and to categories of absentee ballots. *See, e.g.*, Orders dated February 10, 2009, and February 13, 2009.

These orders clarify whether certain rejected absentee ballots present valid claims. The February 10 Order, for example, held that to assert valid claims petitioners must demonstrate not only that the reasons given by election officials for rejecting the ballots were wrong but also must affirmatively demonstrate that "their absentee ballots complied with all of the requirements imposed by Minnesota law or that failure to comply with the law was not due to fault on the part of the voter but due to official error." Order

---

the fundamental right to vote." *Coleman*, 758 N.W.2d at 310 (Page, J., dissenting).

(February 10, 2009) at 10. The February 13 Order provided additional direction, rejecting as "not legally cast" 10 categories of absentee ballots. For example, the district court categorically rejected absentee ballots witnessed by persons who identified themselves as notaries but did not affix notarial seals or stamps. Order (February 13, 2009) at ¶ 1.2. In the absence of these r ulings, potential petitioners whose ballots exhibited certain characteristics could only speculate as to whether their ballots were improperly rejected.

The instant petition is dated 10 days after the district court panel's February 10 Order and only seven days after the February 13 Order rejecting as a matter of law entire categories of absentee ballots. Although Petitioners might have been able to assert their claims in good faith at an earlier date, these orders clarified Petitioners' rights and informed Petiti oners as to the validity of their claims. Because petition ers did not prematurely file claims that the district court panel's subsequent orders would call into question, the adjudication of Petitioners' claims will proceed more efficiently which, in turn, will accelerate the day on which Minnesota's empty seat in the United States Senate is filled.

Further, whether a petitioner has proceeded with sufficient dispatch must be judged "in view of the inherent limitations upon adequate judicial consideration." *Moe v. Alsop*, 180 N.W.2d 255, 260 (Minn. 1970) (construing Minn. Stat. § 203.38). Generally, a petitioner must act with sufficient promptness to procure effective relief. *See id.* (application to prevent placement of candidate's name on ballot ordinarily must be made in time for hearing and order to issue in advance of deadline to print ballots).

The Court recently applied these principles in *Clark v. Pawlenty*, 755 N.W.2d 293 (Minn. 2008), *petition for cert. filed*, (U.S. Jan. 28, 2009) (No. 08-1076). In *Clark*, the petitioners sought to strike from primary and general election ballots the name and incumbent designation of an appointed associate justice. The Court held that the petition was untimely with respect to the primary election ballot but not with respect to the general election ballot. The Court reasoned, "The deadlines, legal and practical, that give rise to prejudice regarding the primary election are not yet upon us for the general election." *Id.* at 303.

Similarly in this case, there is sufficient time to procure effective relief without prejudicing other parties. The February 20 petition was filed after trial had commenced but before Contestant had rested and before Contestee had begun to present his case. More importantly, the petition was filed well before the other petitioners had begun to present their case. The January 13 Petitioners, with whom the February 20 Petitioners share common interests and issues, will not begin to try their case until Contestee rests, in approximately two to three weeks from now. Nauen Aff. at ¶ 4.

If the February 20 petition is promptly referred to the district court panel, there is still time for Petitioners' claims to be considered. This fact mitigates any concern that the petition might have been filed sooner. *See Moe*, 180 N.W.2d at 260, n.12 (the availability on short notice of a referee to conduct a hearing mitigates the fact that the application "might have been more timely made"). The claims of all petitioners, all of whom are represented by the undersigned counsel, can be efficiently presented in the election contest in approximately one day. Nauen Aff. at ¶ 6.

Under these circumstances, Petitioners acted with sufficient dispatch in filing their petition.

B. No Prejudice Would Result To Others.

Even if a petitioner unreasonably delays, the Court may address the merits when there would be no prejudice to others. *See Melendez v. O'Connor*, 654 N.W.2d 114, 117 (Minn. 2002). Here, there is no prejudice.

The claims asserted by the February 20 Petitioners are virtually identical to the claims asserted by the January 13 Petitioners: all allege that election officials erred in rejecting their absentee ballots. The presentation of all petitioners' claims at trial will be seamless, and will raise only issues that have already been raised in other contexts or that would be addressed at trial regardless. Adjudicating the additional claims will add mere hours, not days, to the trial. Under these circumstances, referring the February 20 Petition to the district court panel would not result in prejudice to any party.

C. The Equities Weigh Heavily In Favor Of Accepting The Petition.

Even if a petitioner is dilatory and others are prejudiced by the petitioner's delay, the gravity of the matter may compel the Court to address the merits of the claims. *See Winters*, 650 N.W.2d at 170. The importance of providing "clarity and certainty in the election process" weighs heavily in favor of addressing the merits. *Clark*, 755 N.W.2d at 303. *See also Winters*, 650 N.W.2d at 170 ("the need for certainty in the judicial election process compels us to address the merits"); *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992) (although Court was not persuaded petitioner "acted with dispatch[,]" challenge to judicial election process warranted addressing merits), *cert. denied*, 507 U.S.

1033 (1993); *cf. Breza v. Kiffmeyer*, 723 N.W.2d 633, 635 (Minn. 2006) (while not condoning delay in filing petition, Court exercised discretion to address merits of challenge to ballot question on proposed constitutional amendment).

As recently stated in related proceedings, "[n]o right is more precious" than the right to vote. *Coleman*, 758 N.W.2d at 312 (Anderson, Paul H., J., concurring in part and dissenting in part) (internal citation and quotation marks omitted). This Court is "the defender of the fundamental right to vote." *Id.* at 310 (Page, J., dissenting).

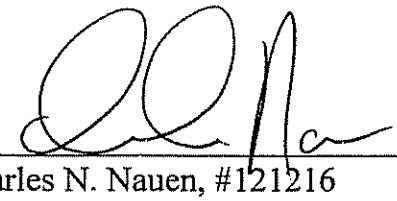
The right to vote and to have a voice in the election of a United States Senator from the State of Minnesota is at the heart of Petitioners' claims. Petitioners complied with all of the laws, standards, and requirements to have their absentee ballots counted; nevertheless, their ballots were rejected. If ever there were a time for the Court to assume its role as defender of the right to vote, it is now. If ever there were a matter of sufficient gravity to be addressed on the merits, it is this one. The importance of providing clarity and certainty in the election process compels the Court to allow Petitioners' claims to be addressed on the merits.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Court find that their petition was timely filed, and urge the Court to address Petitioners' claims on the merits by promptly referring it for consideration as part of the pending election contest.

Dated: March 3, 2009

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

By: 

Charles N. Nauen, #121216
William A. Gengler, #210626
David J. Zoll, #0330681
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Telephone: 612-339-6900
Facsimile: 612-339-0981

ATTORNEYS FOR PETITIONERS