

STATE OF MINNESOTA
IN SUPREME COURT

FILED

October 30, 2020

**OFFICE OF
APPELLATE COURTS**

DONALD J. TRUMP FOR PRESIDENT,
INC., SENATE VICTORY FUND, HOUSE
REPUBLICAN CAMPAIGN COMMITTEE,
RYAN J. BEAM,

Petitioners,

v.

Supreme Court No. A20-1362

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

Respondent,

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

Intervenors.

**PETITIONERS' SUPPLEMENTAL
INFORMAL MEMORANDUM**

Petitioners respectfully request the Court to hold this case in abeyance in light of the injunction entered by the United States District Court for the District of Minnesota in *Carson v. Simon*, No. 20-cv-2030 (Minn. order entered Oct. 30, 2020). If that injunction in *Carson* is vacated or modified, then consideration of the Petition may be ripe for review.

Petitioners submit the following memorandum in response to the Court's October 29, 2020 Order requesting briefing on laches as applied to this Petition.

INTRODUCTION

At the outset, the Petitioners request the Court to take judicial notice of the injunction entered today in *Carson v. Simon*, No. 20-cv-2030 (Minn). Hours after this Court ordered the parties to brief whether the doctrine of laches should preclude the Court from granting this Petition, the Eighth Circuit Court of Appeals in *Carson v. Simon* reversed the federal district court's denial of a preliminary injunction and remanded the case to the district court to enter an injunction requiring the Secretary and those under his direction to "identify, segregate, and otherwise maintain and preserve all absentee ballots received after the deadlines set forth in Minn. Stat. § 203B.08, subd. 3." *Carson v. Simon*, No. 20-3139, at 2 (8th Cir. Oct. 29, 2020) (hereinafter "*Carson Order*"). The district court did so today.

In reversing, the Eighth Circuit found that "the Secretary's actions in altering the deadline for mail-in ballots likely violates the Electors Clause of Article II, Section 1 of the United States Constitution" because "[b]y its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the 'Legislature' of each state" and "the Secretary has no power to override the Minnesota Legislature." *Carson Order* at 11–12. Additionally, the Court determined that the Secretary's plan disregards state law and would cause "irreparable harm" because it would allow potentially invalid ballots to be counted, violate the U.S. Constitution, and undermine the electoral process determined by the Minnesota Legislature. *See Carson Order* at 12–13. Further, the Court found that the balance of equities weighed in favor of granting injunctive relief because "the inevitable post-election challenges to the counting of invalid ballots if no injunction is granted is even more problematic since it would give voters no opportunity to adjust their mailing time or to deliver their mail-in ballots on Election Day to obviate their risk." *Carson Order* at 14. And finally, the Court found the "public interest is

likewise served by maintaining the ability to enforce the law adopted by the Minnesota Legislature and in upholding the exclusive authority vested in the Minnesota Legislature under the Electors Clause of the United States Constitution.” *Id.*

In light of the *Carson* Order, the Petitioners request that this Court hold this case in abeyance pending any vacatur or material modification of the injunction. The Petitioners attempted to enter into a joint stipulation to hold this matter in abeyance until resolution of the *Carson* litigation. The Secretary has declined. Accordingly, we submit this brief on the narrow issue of laches.

ARGUMENT

Laches is an equitable doctrine applied to “prevent 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.” *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002). With respect to laches, “[t]he practical question in each case is whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.” *Id.* at 170 (quoting *Fetsch v. Holm*, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952)).

Here, Petitioners’ delay, if any, was reasonable, the requested relief would not significantly “result[] in prejudice to others,” and the balance of equities weigh in favor of granting relief. For these reasons, the Court should not deny the petition on grounds of laches.

I. Petitioners’ delay, if any, was reasonable.

The Consent Decree which gives rise to the complained of harms was entered into state court on August 3, 2020. Admittedly, August 3, 2020 was the first date in which this Petition could have conceivably been filed. However, to suggest the Petitioners have unreasonably

delayed asserting a known right by not immediately filing this petition ignores the flurry of litigation in this state and across the country addressing the underlying controversy regarding unconstitutional extensions of the mail-in deadlines taken by non-legislative bodies. The Petitioners monitored those cases and reasonably expected that a court of competent jurisdiction would issue, at a minimum, the limited relief requested here prior to the election. Alas, that did not occur until the *Carson* decision was issued on October 29, 2020. Any delay on part of the Petitioners should be viewed in light of these fast-moving parts, and, in any case, such delay does not justify delay when compared to the limited prejudice to others and equities favoring relief being granted.

II. There is no prejudice to others because the requested relief relieves prejudice to others.

The Petitioners are requesting that Secretary segregate all late-arriving ballots. This modest relief is limited in scope and presents only minor administrative burden to the Secretary and county election officials. For these reasons, the prejudice to others is minimal and laches should not be applied.

Fundamentally, the relief sought here is aimed at preventing prejudice to Minnesota voters that might occur if late-received ballots are intermingled with other ballots and then subsequently held to have been accepted in violation of federal law and therefore subject to disqualification. In that event, Minnesota risks disenfranchisement of its entire electorate in the Presidential election and potentially other federal elections. Segregation of late-received ballots serves to prevent that result, without itself precluding the counting of any ballot. So, there is no harm to any party, only the avoidance of harm.

In addition, the relief requested involves no serious burden.

First, the scope of the requested relief is narrow. Petitioners are requesting the Secretary to segregate all mail-in ballots into three groups: (1) those mail-in ballots received before 8 p.m. on Election Day; (2) those mail-in ballots received after 8 p.m. on Election Day but before the deadline set by the Consent Decree; and (3) those mail-in ballots received after the deadline set by the Consent Decree. Petitioners are requesting the “modest relief”¹ of requiring the Secretary to further segregate the ballots into an additional third group for the limited purpose of preserving a targeted remedy in the event the extended mail-in deadline is invalidated.

Second, the relief requested here can be accomplished in the remaining days before the Election. *Compare Clark v. Pawlenty*, 755 N.W.2d 293 (Minn. 2008) (laches applied because, in part, relief—reprinting ballots, resending absentee ballots, notifying early voters, and reprogramming, retesting, and recertifying voting machines—could not be accomplished in the 26 days between filing of petition and primary date) *with De La Fuente v. Simon* 940 N.W.2d 477 (Minn. 2020) (laches not applied, in part, because relief could be accomplished as the petition was filed five weeks before ballots were to be made available for early voting). This is so because the relief here does not require massive and unduly burdensome administrative resources and does not otherwise affect the voting process that is already underway. Additionally, under existing state law (and even the consent decree), election officials are already required to segregate late-arriving ballots – a task which occurs in every election and which election officials are well-equipped to do. Minn. Stat. § 203B.08 subd. 3, *see also*

¹ *See Republican Party of Pennsylvania v. Boockvar*, 592 U.S. ___ (Oct. 28, 2020) (denying motion to expediate consideration of petition for writ of certiorari) (Alito, J., statement) (“[T]he Court’s denial of the motion to expedite is not a denial of a request for this Court to order that ballots received after election day be segregated so that if the State Supreme Court’s decision is ultimately overturned, a targeted remedy will be available. Petitioner represents that it will apply to this Court to obtain that *modest relief* . . .”) (emphasis added).

§§ 204B.45–46 (late-arriving mail-in ballots are marked as late by county elections officials and not delivered to the ballot boards).²

Further, this relief presents no prejudice to other parties – including voters and candidates. The requested relief will not result in any harms to electorate in general due to “last-minute changes” in the voting process because none exist here. *See Clark*, 755 N.W.2d at 303 (the Court “cannot ignore the potential prejudice to the electorate in general” caused by “mandating last-minutes changes” to the voting process). The requested relief would not disturb voting nor would it require the Secretary to issue new guidance to voters. Again, this is so because the Petitioners are requesting only narrow and limited prospective injunctive relief needed to preserve legitimate post-election challenges in the event the Secretary’s action are found to be unlawful. Petitioners are not requesting the Court adjudicate the merits of the underlying alleged harms³ – such election contests will necessarily occur post-election and, in all likelihood, would be brought in actions separate from this case. Additionally, all candidates for

² Notably, on October 28, 2020, the Pennsylvania’s Secretary of State voluntarily issued guidance to the county boards of election directing them to, *inter alia*, securely segregate all mail-in and civilian absentee ballots received between the statutory election day deadline and extended deadline – the exact relief requested here. If Pennsylvania can do it in short order—a state with over twice as many registered voters than Minnesota—it is hard to imagine that Minnesota would be incapable of accomplishing this same task. *See* Pennsylvania Department of State, *The Administration of Voter Registration in Pennsylvania: 2019 Report to the General Assembly*, 1 (June 30, 2020) (8,549,062 registered voters in Pennsylvania as of 2019); Office of the Minnesota Secretary of State Steve Simon, *Election Administration & Campaigns: Voter Registration Counts*, <https://www.sos.state.mn.us/election-administration-campaigns/data-maps/voter-registration-counts/> (last visited, Oct. 30, 2020) (3,537,003 registered voters in Minnesota as of 2020).

³ On the merits, Petitioners raise good-faith and legitimate concerns that the Secretary’s actions are unlawful and will cause severe and irreparable harm absent segregation. If *Carson* did not make that point clear enough, one need only turn on the nightly news to see that similar mail-in ballot deadline extensions in other states present matters of “national importance.” *Republican Party of Pennsylvania v. Boockvar*, 592 U.S. ___ (Oct. 28, 2020) (denying motion to expediate consideration of petition for writ of certiorari) (Alito, J., statement). The Court should decline to apply the equitable doctrine of laches on that basis alone.

office—regardless of party affiliation—are benefited, not prejudiced, by the requested relief because segregation would preserve candidates’ ability to contest election results in the event the Secretary’s actions are found to be unlawful.

III. The equities weigh in favor of granting relief.

At its core, what Petitioners’ request here is simple: modest prospective relief to ameliorate the severe and irreparable harms that will occur if the Secretary’s actions are found to be unconstitutional and if invalid ballots are not segregated from valid ballots.

If held unlawful, the Secretary’s actions pursuant to the Consent Decree would cause severe and irreparable harm absent segregation. In the limited instances in which this Court has applied laches and denied relief on a Minn. Stat. § 204B.44 Petition, the complained of “errors, omissions, or wrongful acts” were not of the same magnitude and severity present here. *See Clark v. Reddick*, 791 N.W.2d 292 (Minn. 2010) (county auditor erred in accepting an affidavit of candidacy without the required nominating petition); *Clark v. Pawlenty*, 755 N.W.2d 293 (Minn. 2008) (violation of Minnesota constitution with respect to a single judicial office). And indeed, severe and irreparable harm will result when invalid ballots are inseparably mixed with valid ballots and counted in the vote totals. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (granting stay) (Scalia, J., concurring) (“The counting of votes that are of questionable legality . . . threaten[s] irreparable harm”). Without segregation, Petitioners and other interested parties would be left without an effective remedy to challenge the Secretary’s actions. Even worse, there is a legitimate risk that, absent segregation, the state’s *entire count* for presidential electors could be disqualified in the event that a court of competent jurisdiction holds that changing the deadline was unlawful and Minnesota fails to satisfy Congress’s safe harbor of 3 U.S.C. § 5.

The modest and limited relief requested here would wholly eliminate these severe and irreparable harms.

Additionally, there is a strong public interest in maintaining the rule of law and giving effect to lawfully enacted Legislative mandates. The Secretary's actions flagrantly defy state law and upsets the constitutionally established roles for Congress and the Minnesota Legislature in regulating elections. If held unlawful, the Secretary's actions "not only offend the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators, they do damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures." *Moore v. Circosta*, 592 U.S. ___ (Oct. 28, 2020) (app. for inj. relief denied) (Gorsuch, J., dissenting). Accordingly, public interest weighs decidedly in favor of granting the requested relief and abstaining from applying the doctrine of laches.

CONCLUSION

The Petitioners respectfully respect the Court to hold this case in abeyance in light of the *Carson* injunction. In the event this Petition becomes ripe for review, the Court should grant the requested relief so as to avoid irreparable harm to Minnesota voters.

Respectfully submitted,

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