STATE OF MINNESOTA
IN SUPREME COURT

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

Petitioners,

v.

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.

Supreme Court No. A20-1362

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO VOLUNTARY WITHDRAWAL OR, IN THE ALTERNATIVE, DISMISSAL WITHOUT PREJUDICE

Petitioners submit the following in reply to Respondent's opposition to Petitioners' request to voluntarily withdraw the Petition or, in the alternative, motion to dismiss without prejudice:

Dismissal without prejudice is warranted because the matter is moot.

- The relief Petitioners seek here is to require the ballots to be segregated. The *Carson* Order requires the ballots to be segregated. Petitioners' requested relief has been obtained. To avoid mootness, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence

(mootness)." *Dean v. City of Winona*, 868 N.W.2d 1, 4–5 (Minn. 2015) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The Petitioners' interest in segregation that existed at the commencement of this action no longer exists now that it has been ordered. This issue is moot.

- Additionally, the fact that the ballots are to be segregated because of law applicable only to the presidential election does not change the fact that the ballots are being segregated.
- This matter is not a situation which is "capable of repetition, yet likely to evade review." *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (exception to mootness doctrine). For such a situation to exist, there must be a reasonable expectation that a complaining party would be subjected to the same action again *and* the duration of the challenged action is too short to be fully litigated before it ceases or expires. *Kahn*, 701 N.W.2d at 821. The issue of segregation—the only relief sought here—will not arise again in the short period between now and post-election because the relief sought has already been ordered by another court of competent jurisdiction and the Secretary has issued guidance to election officials to implement that relief. Additionally, the underlying legal issues supporting segregation is not likely to evade review: If the underlying legal issues remains the same after the election, it will be litigated and decided.
- This matter is not one which is "functionally justiciable" and presents an important question of "statewide significance that should be decided immediately." *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984) (exception to mootness doctrine). In considering this exception to the mootness doctrine, the court "appl[ies] this exception narrowly." *Dean v. City of Winona*, 868 N.W.2d 1, 6 (Minn. 2015). This matter no longer presents an urgent question of statewide significance because the relief sought by Petitioners has

already been ordered and, presumably, will be implemented. Petitioners do not seek an order invalidating late-arriving mail-in ballots. Petitioners only sought the modest relief to preserve the rights of affected parties in the event the Secretary's actions were held to be unlawful.

- Moreover, this Court cannot decide the issue in a way that binds the federal court. *M'Kim v. Voorhies*, 11 U.S. 279, 281, 3 L. Ed. 342 (1812) ("A State Court has no jurisdiction to enjoin a judgment of the Circuit Court of the U. S."). The Secretary wishes to relitigate here its lose in the Eighth Circuit. To what end, it is unclear. Segregation has already been ordered.

If the Court declines to dismiss based on mootness, Petitioner Donald J. Trump for President, Inc. is properly before the Court: Petitioner has not waived its rights to contest the Consent Decree, is not in privity with the *Carson* plaintiffs, and does not come with unclean hands.

- The waiver of rights in the Stipulation is not implicated here. Donald J. Trump for President, Inc. was not a party to *LaRose v. Simon*, No. A20-1040. The intervening parties (and subsequently the appellants) were the Republican Party of Minnesota (RPM), Republican National Committee (RNC), and National Republican Congressional Committee (NRCC). Donald J. Trump for President, Inc. *was* an intervening party in *NAACP-Minnesota-Dakotas v. Simon*, No. A20-1041, along with RPM, RNC, and NRCC. *LaRose* dealt with deadline extension for mail-in ballots and *NAACP-Minnesota-Dakotas* dealt with removal of witness requirement for absentee voting. Both matters, were addressed in the Consent Decree. Each respective group of intervening parties appealed the Consent Decree to this Court, and the matters were consolidated. The parties to both actions stipulated to dismiss the consolidated appeal. The waiver of rights is

necessarily limited to the actions to which Appellants are parties. For RPM, RNC, and NRCC, this meant both appeals. For Donald J. Trump for President, Inc., this meant only the appeal to which it was a party – that is, *NAACP-Minnesota-Dakotas v. Simon*, No. A20-1041. So, Donald J. Trump for President, Inc.'s waiver of rights with respect to *NAACP-Minnesota-Dakotas v. Simon*, No. A20-1041, simply is not implicated here.

- Privity does not apply. The Secretary urges the Court to find Donald J. Trump for President, Inc. in privity with the presidential electors in *Carson* who are, we assume, in turn in privity with the intervening appellants in *LaRose*, and, because of this chain of privity, the Court should apply res judicata to bar this Petition. The Court should decline the Secretary's invitation. First, Donald J. Trump for President, Inc. did not have "control" over the *LaRose* or *Carson* litigation because it was not a party to either action and it did not have the opportunity to advance the legal theories in those matters. *Bogenholm by Bogenholm v. House*, 388 N.W.2d 402, 406 (Minn. Ct. App. 1986) (citing Restatement (Second) of Judgments § 39 comment c (1982)) ("To have control of litigation a person must have an effective choice as to the legal theories to be advanced on behalf of the party and have control over the opportunity to obtain review."). Further, Trump for President's interests may have aligned with those in *Carson*, but "coincidental interests alone are not sufficient to establish privity." *See Denzer v, Frisch*, 430 N.W.2d 471, 473 (Ct. App. Minn. 1988). Second, the Secretary's request implicates the rights of parties not before this Court (*Carson* plaintiffs) which presents serious due process concerns. Petitioners see the Secretary's request as nothing more than an attempt to leverage a ruling here to undercut the plaintiffs in *Carson*.

- Even if privity exists as to Donald J. Trump for President, Inc., the parties do not argue that the Stipulation is binding on Petitioner Beam. If need be, the Petition (which is now moot) can go forward with Petitioner Beam.
- Donald J. Trump for President, Inc. has not come with unclean hands. The Secretary, astonishingly confuses Donald J. Trump for President, Inc. for President Trump and his administration. Assuming, *arguendo*, that the Secretary's allegations concerning actions taken by the Trump Administration are true (which they are not), they have absolutely no bearing on the issues before the Court because Donald J. Trump for President, Inc. and the Trump Administration are separate and legally distinct entities. The Trump Administration is not a party to this action.

If the Court declines to dismiss based on mootness, laches would not bar consideration of the Petition.

- The Secretary argues that laches is applicable because (1) there was an unreasonable delay and (2) a post-election challenge would be ineffectual. Neither argument is persuasive.
- Unreasonable delay is only one-third of the inquiry on laches. Laches requires dismissal when "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*." *Monaghen v. Simon*, 888 N.W.2d 324, 328-29 (Minn. 2016) (emphasis added). The Secretary asserts only unreasonable delay as a basis for denial on grounds of laches. The Secretary says nothing as to prejudice to others or as to the equities in granting relief. The reason for this is obvious: there is no prejudice to others and the equities weigh

heavily in favor of preventing potential severe and irreparable harm by granting the modest, prospective (and now moot) injunctive relief requested by Petitioners.

- The Secretary is reading tea leaves when he boldly claims that "[e]ven if a court later invalidates the consent decree, votes cast based on the consent decree will be valid and counted because they will have been cast in reliance on the rule in place at the time." Simon Response at 13. This assertion is unsupported by any binding authority (because there is none), and, in any event, has no bearing on the inquiry of laches. Additionally, later success or failure on the underlying merits of the legal issues is beyond the scope of the now-moot relief requested by Petitioners.
- State-law judicial doctrine, such as laches, cannot override federal law. If the Secretary's deadline extension violates the Electors and Elections Clauses, the state-law doctrine of laches would be inapplicable for the same reason the U.S. Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000), rejected the Florida Supreme Court's attempt to fashion an "appropriate" recount remedy that contravened the state's election statutes. In other words, a state-law judicial doctrine cannot override the supremacy under federal law of the Legislature's prescription of the manner of conducting federal elections. Again, the relief sought here is not to disqualify late-received ballots, but, even so, laches can provide no protection against that result.

If the Court declines to dismiss based on mootness, the merits support granting relief.

- The Secretary argues both denial on laches and the need to "resolve" "pressing items of state law for the Court" – he cannot have it both ways. Simon Response to Withdrawal

or Dismissal at 2. Again, this Court need not reach the merits because the relief sought has already been ordered by another court of competent jurisdiction.

- The merits of the underlying issues have not been fully briefed. The Court ordered the parties to brief the narrow issue of laches. Petitioners responded to this narrow request while the Secretary (and Intervenors) went further to present arguments on the merits. For this reason, Petitioners respond briefly to the merits below:
- The Secretary's actions violate the U.S. Constitution, federal law, and state law. Subject only to Congress, the Elections and Electors Clause vest the power to determine the time and manner of federal elections exclusively to the Minnesota Legislature. U.S. Const. art. I, § 4, cl.1; U.S. Const. art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The constitution . . . leaves it to the legislature exclusively[.]"). Consequently, only Congress and the Minnesota Legislature, and not the Secretary, has plenary authority to establish the time manner of conducting the elections in Minnesota. Both Congress and the Minnesota Legislature have done so. 2 U.S.C. § 7; 3 U.S.C. § 1, Minn. Stat. § 204d.03, subd. 2. The Minnesota Legislature further provided that mail-in votes must be received by 8:00 p.m. on Election Day in order to be counted (or 3:00 p.m. if delivered in person). Minn. Stat. § 203B.08. The Secretary has no power to override the Minnesota Legislature as he did so in the Consent Decree.
- Minn. Stat. § 204B.47 does not apply. This statute allows the Secretary to "adopt alternative election procedures[,]" but only "[w]hen a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court[.]" Minn. Stat. § 204B.47. This statute does not authorize the Secretary to override the Legislature's ballot deadlines due to public health concerns. Rather, by its plain terms,

Section 204B.47 only authorizes alternate rules where an election law "cannot be implemented as a *result*" of a court order. *Id.* (emphasis added). Here, the Secretary initiated the court order in cooperation with litigants. In other words, the only thing that caused a state order to be issued was the Secretary own voluntary actions to create that court order. Additionally, the order does not declare the statute invalid and therefore does not prohibit the Secretary from following applicable state and federal law.

- The Consent Decree combined with its accompanying state court order do not cure the constitutional infirmities. The powers under the Electors and Election Clauses are "conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). These constitutional provisions establish "a limitation upon the State in respect of any attempt to circumscribe the legislative power." *McPherson*, 246 U.S. at 25; *see also Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (same). This limitation operates on the Secretary and forecloses his argument that state constitutional officers and judges may, consistent with Articles I and II, rewrite the law. *See Bush v. Gore*, 531 U.S. 98, 111–12 (2000) (Rehnquist, J., concurring). The Secretary attempts to sidestep this constitutional limitation by reliance on *Smiley v. Holm*, 285 U.S. 355 (1932) and *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015). These cases are inapposite. While true that the Minnesota Legislative cannot enact election laws in violation of the Minnesota constitution (and Articles I and II do not prohibit a state court from reviewing such laws), that has not happened here. Minnesota's mail-in ballot deadline law has never been declared unconstitutional and it remains on the books. The Secretary has no authority to

disregard validly enacted state law simply because he thinks it to be unconstitutional and believes to have a better policy.

Respectfully submitted,

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