

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.  
Judge Denise Reilly

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Julie Quist, Thain Dikkers, Lisa Kaiser,

Petitioners/Contestants,

v.

Case No. 62-CV-20-5598

Steve Simon, in his official capacity as  
Minnesota Secretary of State, and  
Tina Smith, Senate candidate

Respondents/Contestees.

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**CONTESTANTS MEMORANDUM OPPOSING CONTESTEES**

**MOTION TO DISMISS**

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The voter is entitled to have his vote counted fairly and honestly along with the votes of others. If his confidence in this procedure is undermined, there will necessarily be a loss of respect for the democratic system which is wholly dependent upon fair and honest election procedures.

*In re Contest of Election of Vetsch*, 71 N.W.2d 652 (Minn. 1954)

## INTRODUCTION

Contestants submit this response memorandum opposing Contestees' Tina Smith and Minnesota Secretary of State Steve Simon motions to dismiss.

All arguments raised by Contestees fail to address the facts, but seek instead to convince the court to avoid allowing the voters the access to the election materials necessary to prove their claims in total. The Contestees claim the Notice of Election Contest Under Minnesota Statutes chapter 209 ("Notice") "rest entirely on speculation, rumor, and conclusory assertions of bad faith."<sup>1</sup> The Notice served on each Contestee is quite the opposite. Contestants, and their volunteer attorney, working *pro bono*, seek to ensure integrity in the Minnesota elections because across Minnesota, and the United States, millions of Americans believe that there has been an assault upon our election system. This is not a belief for Contestees Smith and Simon to make light of but rather a fact we ask the Courts to acknowledge and remedy by ensuring these election results are allowed to be examined thoroughly. If there are no oddities in the election process or results, there are no risks to verifying the results and correcting the unlawful processes that have occurred. The way to unify the country is through openness.

Never before have Minnesota voters been confronted with the abuse of process, the disregard of both state and federal Constitutions, the flagrant violations of Minnesota law and the

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<sup>1</sup> Contestee Smith's Memorandum, p. 1.

careless and reckless disregard of public trust as has been demonstrated this past year in the usurping of our longstanding election system.

**There is, to be sure, significant public interest in ensuring the fairness and integrity of Minnesota's elections. *Wichelmann v. City of Glencoe*, 200 Minn. 62, 65, 273 N.W. 638, 639 (1937)** (“In order to secure a full and complete expression of the popular will, it is necessary not only that all voters who are qualified be permitted to vote, but also that only those who are entitled to vote be permitted to do so....”)

There have been many election challenges over the past several decades, at times initiated by losing candidates but more often triggered automatically by very close races that triggered automatic recounts.

This election challenge is different. This contest is brought by voters who seek the protection of their Constitutional rights and are demanding the properly passed laws of Minnesota be upheld and enforced. These voters also demand the elected officials involved be reminded of both their constitutional and statutory powers and limitations.

Voting in elections is a constitutional right, and state election officials bear the solemn responsibility and duty to enforce the constitutional and legislative requirements for the exercise of that right.<sup>2</sup> M.S.A. § 204C.12.

When a candidate or voter brings a challenge to an election case, the district court has original jurisdiction in most connected matters.<sup>3</sup> The district court is the one great court of general

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<sup>2</sup> Minnesota Constitution, Art. M.S.A. Const. Art. 7, § 1

<sup>3</sup> Minnesota Voters All. v. Simon, 885 N.W.2d 660 (Minn. 2016)

jurisdiction to which all may apply to have justice judicially administered, in every case where the Constitution itself does not direct application to be made elsewhere.<sup>4</sup>

The district court is able to address general election and ballot issues could be addressed in which would allow for litigation of factual disputes, and district court proceedings, followed by any needed appellate review, would provide adequate remedy and protect important public interest in ensuring fairness in state elections.<sup>5</sup> M.S.A. Const. Art. 7, § 1; M.S.A. §§

The federal elections in Minnesota have much in common with races in swing states across the country: Unauthorized consent decrees that led to dramatic increases in absentee ballots because nearly all protections of those ballots, related to witness signatures, were removed from the acceptance process and deadlines for receipt those ballots was extended for days or, in Minnesota, a week after election day. Minnesota announced its highest number of absentee / mail in ballots in history: 1,912,686 ballots. In 2016, the Minnesota State Canvassing Board reported 674,566 absentee ballots. Each and every one of those ballots was properly witnessed to verify the integrity of that ballot. In 2020, every one of the 1,912,686 absentee ballots were not witnessed. The witness requirement functioned like an election judge, offering at least some protection for a ballot that had left the chain of custody of the state. In fact, 3 weeks after the election, only approximately 1.2Million absentee ballots were connected to a voter record in the statewide voter database, even though those ballots are REQUIRED to be connected immediately upon acceptance. These ballots are all tracked. This means that, according to the Secretary of State's own report of 1.9Million absentee ballots collected, there were approximately 700,000 excess absentee ballots being reported three weeks after the election. There is not a way to know how

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<sup>4</sup> Minnesota Voters All. v. Simon, 885 N.W.2d 660 (Minn. 2016)

<sup>5</sup> Minnesota Voters All. v. Simon, 885 N.W.2d 660 (Minn. 2016)

many excess ballots there were on November 4, 2020. If the courts want voters to trust the system, the system must allow light to shine on the mistakes made.

The opportunity to flood the system with non-rejectable ballots originated with unconstitutional, unlawful consent decrees between Secretary of State Steve Simon and Democrat activists that mirrored other agreements in other states. This alteration of election law was initiated outside of the Constitutional process and led to a dilution of the vote of legal voters. This dilution of the vote disenfranchises legal voters in the same manner as does denying a legal voter their vote.

Contestants believe the November 3, 2020 election is tainted by fraud and corruption. If the election was as obviously pristine as Contestees claim, why have seven attorneys descended from all corners of the country, working for the large international law firm Perkins Coie, to defend Contestee Smith? Because these attorneys are involved in all of the similar cases across the country that are raising the nearly identical issues. This cannot be a coincidence. These Contestees, these attorneys and the people in Minnesota who are paying attention know that these elections were not routine. Some people did something in Minnesota. The Contestants are going to figure it out.

Contestees argue the court lacks jurisdiction because (1) the Legislative Contestants did not timely serve Contestees; (2) Contestants' allegations are facially inadequate to support their contest; (3) Laches apply; (4) Smith's margin of victory is too large and (5) Secretary of State Simon must be dismissed because he is not a Contestee.

All Contestees' arguments lack merit and the court clearly has jurisdiction over this contest. Finally, for various reasons that also lack merit, Contestees argue Contestants contest should be dismissed because they fail to state a claim for relief under Rule 12.02(e) of the Minnesota Rules of Civil Procedure. Contestants' claims demonstrate multiple violations of Minnesota Election Law and the numerous irregularities that may point to potential fraud. The Court must accept every

assertion made by Contestants as factual. Contestants have made a sufficient showing to survive these motions to dismiss.

### **RELEVANT FACTS**

Numerous material violations of election law and the irregularities are set forth in Contestants' Notice, affidavits, and the response memorandum opposing Secretary Simon's and Contestees motions to dismiss. Contestants incorporate by reference all prior pleadings, including affidavits, in this joint response memorandum. Additional facts shed light on the irregularities and deliberate, serious and material violations of Minnesota Election Law.

#### **Petition to Correct Errors and Omissions**

A petition to Correct Errors and Omissions was filed at the Minnesota Supreme Court on November 24, 2020 seeking an injunction of the certification of Minnesota's elections by the Minnesota State Canvassing Board. That Petition was dismissed by the Supreme Court. The Petition is currently being prepared for an appeal.

That Petition provided clear facts that Minnesota's election laws were not followed by many of the county canvassing boards. The State Canvassing Board has a clearly defined responsibility:

“The returns of every election for officeholders elected statewide shall be made to the secretary of state who shall call to his assistance two or more of the judges of the supreme court and two disinterested judges of the district courts. They shall constitute a board of canvassers to canvass the returns and declare the result within three days after the canvass.”<sup>6</sup>

The Canvassing Board is not an entity that exists merely to rubber stamp whatever information is passed in front of it. This Board should evaluate all the documents presented to it by the county ballot boards and Secretary of State Simon. This is typical due diligence expected

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<sup>6</sup> Minnesota Constitution, Art. VII, Sec. 8

of any board member on any board. The Canvassing Board is vested with oversight of our elections- the elections that determine our President, our Senators and our Congressional Representatives.

The PER report submitted to the State Canvassing Board by Dakota County clearly demonstrates that in precinct West St. Paul W-2 P-2 there were no absentee ballots counted.<sup>7</sup> This precinct failed the PER, yet the County Auditor indicated it passed. This is grossly incorrect and every member of the State Canvassing Board should have noticed this. When any of the precincts selected to be canvassed in the PER has a discrepancy, the county is required to perform a PER on 3 additional precincts in that jurisdiction.<sup>8</sup>

The Dakota County PER was never completed. Additionally, on 11/29/2020 the state of Minnesota updated the Statewide Voter Database System. Dakota County reported a total of 160,688 absentee / mail in ballots received in the 11/03/2020 general election. Every absentee ballot is to be immediately connected to a voter record in the statewide voter database as soon as the voter's ballot is accepted.<sup>9</sup> In this update, a query showed that Dakota County had only connected 5529 ballots to a voter record.<sup>10</sup> This means that Dakota County reported 160,688 excess ballots to the State Canvassing Board. This data is not the entry of registration data that can be withheld for 42 days.<sup>11</sup> This data is to be reported immediately upon the acceptance of a ballot. The flagrant and irresponsible treatment of the election process by the officials charged with overseeing and administering it is tragic and the people of Minnesota have a right to see exactly how these transgressions occurred.

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<sup>7</sup> Dakota County PER Report, printed 11/17/2020 by Andy Lokken, Ex.1.

<sup>8</sup> Minn. Stat. § 206.89 Subd 5.

<sup>9</sup> Minn. Stat. §203B.24 Subd 2.

<sup>10</sup> Affidavit, Rick Weible, Ex. 2.

<sup>11</sup> Minn. Stat. § 201.121 Subd. 1.

## **Dakota County Canvassing Board**

According to Andy Lokken's December 8, 2020, Sworn Declaration, the Dakota County canvas was completed on November 12, 2020.<sup>12</sup> Dakota County never completed its postelection review (PER) that occurred on November 16, 2020 and therefore any certification of the canvas is illegal. Also, Dakota County's canvassing board met twice after November 12, 2020, both for emergency meetings with the last one just 2.5 hours before the State Canvassing Board meeting on November 24, 2020 illustrating more irregularities in this election.

## **Dominion Voting Machine Freight Receipt**

According to the Dominion Voting Systems FedEx receipt found at the November 16, 2020 PER, the Dominion Voting machine was set up on November 12, 2020, the same day Mr. Lokken claims the canvas was complete.<sup>13</sup> Lokken claims the 520-pound freight bill was for two large Dominion Voting printers that were delivered on the morning of the PER.<sup>14</sup> The freight bill states they are computers and components.<sup>15</sup> Dominion Voting printers can print ballots.<sup>16</sup> Why would Dakota County need two large Dominion Voting printers delivered via FedEx Freight Priority more than a week *after* the election? They could have been shipped regular freight because there would ordinarily be no need for ballot printers after an election. Dakota County would like Contestants to believe that the more than 150,000 excess absentee ballots reported to the state were actually cast.<sup>17</sup> Unfortunately, because Dakota County only had 5,725 ballots connected to voter records three weeks after the election, it raises the possibility that more than 150,000 ballots were

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<sup>12</sup> Sworn Declaration of Andy Lokken, p. 1.

<sup>13</sup> See First Volz Aff., (Ex. A). Ex. 3

<sup>14</sup> Lokken Declaration

<sup>15</sup> First Volz Aff., (Ex. A.) Ex. 3.

<sup>16</sup> Seventh Volz Aff., (Ex. A) Ex. 4.

<sup>17</sup>



illegally entered into the election count, using those brand new Dominion printers. Had things been done properly, there would be no questions.

### **Postelection Review**<sup>18</sup>

Lokken claimed there were no election judges at the PER, only city and county staff. Christina Gevara identified herself as an election judge and she was counting the ballots for West St. Paul precinct.<sup>19</sup> Ms. Gevara signed page 15 of the PER worksheet as a judge after it was completed.<sup>20</sup> Andy Lokken stated he “recycled” the worksheets after he promised he would email them to Ms. Volz the following morning.<sup>21</sup>

The final PER results show approximately 870 ballot (see table of ballot-votes below) missing in the West St. Paul precinct.<sup>22</sup> There were 863 missing ballots for the U.S. Senate race. Most of these missing ballots were allegedly votes for Tina Smith. There were 851 missing ballots for the U.S. Representative race for District 2. Contestant Tyler Kistner ran for this CD2 seat. Most of the missing ballots were apparently votes for Contestee Craig. There were 870 missing ballots for the presidential race which were largely alleged votes for Joe Biden.

<b>Race</b>	<b>Missing Votes</b>
U.S. Senate Race	863
U.S. Representative District 2 Race	851
Presidential Race	870
<b>Total</b>	<b>870</b> <sup>23</sup>

At the Dakota County PER, many ballots were not in sealed transfer cases and

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<sup>18</sup> County Auditors must perform a “postelection review” (PER) pursuant to Minn. Stat. § 206.89 of the state general election.

<sup>19</sup> Seventh Volz Aff., ¶ 5. Ex. 4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, Ex. C & D.

<sup>23</sup> *Id.*, Ex. C & D.

signed by election judges as required by Part 8230.4385 of the Minnesota Administrative Rules.<sup>24</sup> Many cardboard boxes were labeled as if they had ballots from several different precincts.<sup>25</sup> While observing the PER, the Eagan precinct had ballots from other precincts mixed in and they had to be separated.<sup>26</sup>

### **Dakota County's Election Data**

As of November 29, 2020, the Secretary's website showed 286,188 registered voters.<sup>27</sup> Only 6,798 have data sets indicating they voted on November 3, 2020.<sup>28</sup> There were 7,277 voter registrations after November 2, 2020.<sup>29</sup> Of those, 6,590 voted on November 3, 2020.<sup>30</sup> Thirty-one of those voted have registration dates after November 3, 2020.<sup>31</sup>

The Secretary's website has 263,422 "Estimated Voters" for Dakota County.<sup>32</sup> 155,622 absentee ballots were accepted.<sup>33</sup> Only 6,798 total ballots (between 2.3 to 4.3 percent) of the ballots in Dakota County have been assigned to a voter in the Secretary's database.<sup>34</sup> The extreme variations and the lack of data in the Secretary's database indicate serious problems involving absentee ballots rendering the election certifications illegal. Dakota County Canvassing Board and the State Canvassing Board should not have certified the election on November 24<sup>th</sup> (five days before the November 29<sup>th</sup> data was available from the Secretary's website), because there had been

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<sup>24</sup>See Exhibit E, Seventh Volz Aff., showing a picture of a sealed transfer case signed by two election judges at the Scott County PER.

<sup>25</sup> Seventh Volz Aff. ¶ 4 Ex. 4.

<sup>26</sup> Seventh Volz Aff. ¶ 11. Ex. 4.

<sup>27</sup> Affidavit of Rick Weible, p. 6. Ex. 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

no proper oversight.

### **Contestants' Observations of November 3, 2020 Election**

After the polls closed on November 3, 2020, at 8:00 p.m., Dakota County's election results started being reported. The contestant-candidates were winning in Dakota County.<sup>35</sup> Something unexplainable happened after midnight even though 100 percent of the precincts in Dakota County had reported.<sup>36</sup> At 2:30 a.m. the voting tallies were restated reflecting the supposed processing of 19,000 absentee ballots.<sup>37</sup> For Contestant Jose W. Jimenez, his opponent received 14,000 votes and only 5,000 for him. The same peculiarities happened for Contestant Pamela J. Myhra, Tomas Settell, and Fern A. Smith.<sup>38</sup>

Contestant Sandra J. Jimenez was the clear winner at midnight on November 4, 2020 and she had won the election for the House District 57B seat.<sup>39</sup> At 12:33 a.m. on November 4, 2020, she got a transcribed voicemail from her opponent, Contestee John Huot, stating "there is a problem with the absentee ballots."<sup>40</sup> Then, at 2:30 a.m. on November 4, 2020, as she watched the voting tallies for Dakota County, the counting was restarted reflecting the processing of 19,000 absentee ballots with her opponent receiving the majority of those votes.<sup>41</sup> Further, on November 2, 2020, the night before the election, Contestant Sandra J. Jimenez's opponent John Huot told Minnesota Representative Steven Drazkowski that he had already "banked" 10,000 votes and only needed 2,500 to win the election.<sup>42</sup>

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<sup>35</sup> See Affidavits of Jose W. Jimenez, Tomas Settell, Fern A. Smith Aff. 1, Aff. 2, Aff. 3.

<sup>36</sup> Affidavit of Jose W. Jimenez, p. 2. Aff. 1

<sup>37</sup> *Id.*

<sup>38</sup> See Affidavits of Pamela J. Myhra, Tomas Settell, and Fern A. Smith. Aff. 4, Aff. 2, Aff. 3.

<sup>39</sup> Affidavit of Sandra A. Jimenez, p. 2. Aff. 5.

<sup>40</sup> *Id.*, p. 2, Exhibit A.

<sup>41</sup> *Id.*, p. 2, ¶ 4.

<sup>42</sup> Affidavit of Steven Drazkowski. Aff. 6.

## ARGUMENT

### I. THE RAMSEY COUNTY COURT HAS JURISDICTION OVER BOTH TINA SMITH AND SECRETARY SIMON

**The Canons of Construction require a plain language interpretation of the law, following grammatical rules and common usage.<sup>43</sup>**

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.<sup>44</sup>

Every law shall be construed, if possible, to give effect to all its provisions.<sup>45</sup>

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters, the mischief to be remedied, the object to be attained, and the consequences of a particular interpretation.<sup>46</sup>

#### **Minn. Stat. 209.02, Subd. 1, is exceptionally clear:**

Any eligible voter, including a candidate, may contest in the manner provided in this chapter: (1) the nomination or election of any person for whom the voter had the right to vote if that person is declared nominated or elected to the senate or the house of representatives of the United States, or to a statewide, county, legislative, municipal, school, or district court office; or (2) the declared result of a constitutional amendment or other question voted upon at an election. The contest may be brought over an irregularity in the conduct of an election or canvass of votes, over the question of who received the largest number of votes legally cast, over the number of votes legally cast in favor of or against a question, or on the grounds of deliberate, serious, and material violations of the Minnesota Election Law.

The following are plain language interpretations of the words used in 209.02, subd 1:

Any eligible voter: any eligible voter

May contest: is not required to contest, but may contest

Election of any person: election of any person

Declared elected: election certified

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<sup>43</sup> Minn. Stat. § 645.08.

<sup>44</sup> Minn. Stat. § 645.16.

<sup>45</sup> Id.

<sup>46</sup> Chapman v. Davis, 233 Minn. 62, 66, 45 N.W.2d 822, 825 (1951) and Minn. Stat. § 645.16 (3, 4, 6)

Senate or house of representatives of the United States: Senate or house of representatives of the United States

May be brought: is not required to be brought, but may be brought

Irregularity in the conduct: defect, mistake, departure from rule, regulation or law

Election: election

Canvass of votes: local or state canvass of votes

Or: allows for a contest to be brought for any one of the reasons listed

Finally, a contest may be brought by a voter “on the grounds of deliberate, serious, and material violations of the Minnesota Election Law’, thereby violating those voters federal and state Constitutional rights and causing real harm to them and to all the voters of Minnesota.”<sup>47</sup>

The candidates in an election have limited, if any, involvement in the implementation of Minnesota’s election laws. There are many individuals, government entities and private businesses who could be included in a civil action related to deliberate, serious and material violations of Minnesota’s election law.

Because the legislature included a provision allowing for a contest to be brought on the grounds of deliberate, serious and material violations of Minnesota’s election law, the court must give that provision effect.

This language clearly allows the voter to name as a party, in a civil matter, any of those individuals who are believed to have engaged in deliberate, serious, and material violations of the Minnesota Election Law. Denying the Voter or Contestant the ability to name as a party any person who or entity or agency that engaged in the deliberate, serious and material violations of Minnesota’s election law would negate the provision altogether.

**When the contradictions in the language of a statute create confusion,  
the court has a duty to interpret the statute using plain language.**

**Inconsistencies in Minn. Stat. 209.021 creates unresolvable conflicts for contestants.**

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<sup>47</sup> Minn.Stat. §209.021, subd 1.

“Service of a notice of contest must be made in the same manner as the service of summons in civil actions.”<sup>48</sup>

This language is clear: There is NO ambiguity.

The purpose of personal service is to inform the parties to the contest of the grounds upon which there is an action occurring in the courts related to the election.<sup>49</sup> Personal service upon the parties is required within 7 days after the canvass.<sup>50</sup> Subdivision 1 does not limit the parties to the matter.

Minn. R. Civ. P. 4.03 governs the service of civil summons within the state.

Because the statute specifically states service must be made in the same manner as the service of summons in civil actions, said service upon an individual shall be as follows:

**(a) Upon an Individual.** Upon an individual by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein.<sup>51</sup>

It is necessary to determine the plain meaning of “place of abode” to further interpret the requirements of Minn. Stat. 209.021.

The Court has a long-established interpretation of ‘abode’ meaning one's fixed place of residence for the time being.<sup>52</sup> In such connection ‘abode’ and ‘residence’ may be synonymous, however the term ‘usual place of abode’ is a much more restricted term than ‘residence.’<sup>53</sup> Abode refers to the place where the defendant is actually living at the time when service is made.<sup>54</sup>

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<sup>48</sup> Minn. Stat. §209.021.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Minn. R. Civ. P. 4.03.

<sup>52</sup> Holtberg v. Bommersbach, 236 Minn. 335, 337, 52 N.W.2d 766, 768 (1952).

<sup>53</sup> Holtberg v. Bommersbach, 236 Minn. 335, 337, 52 N.W.2d 766, 768 (1952).

<sup>54</sup> Holtberg v. Bommersbach, 236 Minn. 335, 337, 52 N.W.2d 766, 768 (1952).

A person's legal address is often not a location at which that person resides but is rather an address the person plans to return to in the future. Proof of this common fiction, particularly related to election contests: college students registering to vote using the address of a temporary college dorm hall. These students do not intend to live in the dorm hall for years because they cannot remain in those halls for years. These young people often plan to return to their parents' home. Car insurance is often registered at their parents' address. Their W-2s will use the parental address. Minnesota allows these students to register to vote at their "place of abode".

In the case of persons serving in the United States Congress, it is common for those individuals to make their "place of abode" in Washington, DC or the surrounding area. A person's place of abode is determinative as to personal service. A Contestee's ownership interest in a property does not necessarily create the opportunity or legal ability for a contestant to achieve personal service of the Contestee at that residence.

Minnesota does not require candidates for office to list their place of abode on filings or to make that information available to the public. There is no statute citation available that requires an address of a candidate be listed publicly.

Service of the summons upon an individual cannot be made at the campaign office because Rule 4 cannot be satisfied by service on defendant's place of work or business.<sup>55</sup>

In civil actions requiring service, there is a relationship between the parties and a home or business where an incident occurred. There must be to justify a civil suit.

In an election contest, there is not necessarily a direct relationship between the Voter or Candidate filing a contest and the Contestee. The Contestee's campaign is identifiable, but

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<sup>55</sup> Thiele v. Stich, 425 N.W.2d 580, 584 (Minn. 1988)

excluded from service. A Contestee is an interested party who likely had nothing to do with any alleged wrongdoing and is not able to correct any wrongs or participate in any administrative process related to the challenge. The Contestee has no control over election materials.

The case law related to Minn. Stat. § 209.021 has turned an administrative process into a civil action when a recount is requested by a voter or candidate. All simple recounts are administrative, no matter who requests them.

When there is a challenge to an election based upon allegations of constitutional or statutory violations by an individual, business or government entity, those challenges should be governed by civil procedure and the alleged wrongdoer(s) must be allowed to be joined as parties.

There is no other civil action in statute requiring personal service with a timeline as short as the 7 days required in Minn. Stat. § 209.021.

The Contestee's interpretation of the applicable statutes and case law create an illogical and impossible contest process for Contestant /Voters.

Clearly, Senator Smith has not been harmed by any lack of service she bemoans as she has more than a half dozen attorneys from across the country representing her interests in this matter.

**Inconsistencies in Minn. Stat. 209.021 regarding notice served on parties create unresolvable conflicts for contestants.**

When a statute is ambiguous, the court must attempt to ascertain the intent of the Legislature by considering the statute's purpose.<sup>56</sup> *In Marks v. Comm'r of Revenue*, the court considered “among other matters: the purpose of the law, the circumstances of its enactment, and the mischief the law was meant to remedy.”<sup>57</sup>

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<sup>56</sup> *Marks v. Comm'r of Revenue*, 875 N.W.2d 321, 328 (Minn. 2016)

<sup>57</sup> *In Marks v. Comm'r of Revenue* 875 N.W.2d 321, 328 (Minn. 2016) citing *BCBSM, Inc.*, 663 N.W.2d at 533.



The Minnesota Legislature is required to draft legislation that does not conflict with other statutes, can be read and understood by Minnesotans and serves a singular purpose. Establishing the rules for notice in an election contest related to a United States Senate race should have been neither difficult nor complicated. The legislature made it both and the resulting court cases have made the issue even more cumbersome for those voters and contestants who believe an election should be contested.

Minn. Stat. §209.021, Subd. 3 provides rules regarding the notice as it served on parties. This subdivision should provide Contestants and Voters with clear guidance about how to serve the appropriate parties. The Legislature has not only failed miserably to draft a statute that guides contestees through the process, it failed to address even the most obvious challenges Contestants would face in that process. This is either a serious oversight or an intentional effort to undermine efforts to challenge elections.

The statute states: “In all contests relating to the nomination or election of a candidate, the notice of contest must be served on the candidate who is the contestee”<sup>58</sup> but then later in the paragraph allows, “If personal or substituted service on the contestee cannot be made, an affidavit of the attempt by the person attempting to make service and the affidavit of the person who sent a copy of the notice to the contestee by certified mail is sufficient to confer jurisdiction upon the court to decide the contest.”<sup>59</sup>

The statute does not indicate the affidavit of service regarding the attempt to make service must be filed by the end of the seventh day.

The statute does not require the copy of the notice be sent certified by the seventh day.

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<sup>58</sup> Minn. Stat. §209.021 Subd 3.

<sup>59</sup> Id.

In fact, the language “If personal or substituted service on the contestee cannot be made...”<sup>60</sup> must be read to mean that AFTER the 7<sup>th</sup> day, when personal service has NOT been possible, an affidavit must be filed describing why the person could not be served. The statute does not limit reasons allowable for lack of service.

The statute is clear that the filing of both the affidavit of attempt to serve and the affidavit of notice sent by certified mail is sufficient to confer jurisdiction upon the court to decide the contest.

An affidavit was filed with the court that clearly stated Tina Smith could not be served by December 1, 2020 because contestants were unable to find her and could not verify an address for her. That affidavit also stated that a certified letter was mailed to the only address found.

The Secretary of State was served the notice of the contest and the contest was filed in Ramsey County District Court.

For all of these reasons, Tina Smith’s motions to dismiss should be denied.

**Indispensable parties must be joined to a civil action.<sup>61</sup>**

As noted above, Minn. Stat. §209.02 governs election contests in which there are allegations of deliberate, serious, and material violations of the Minnesota Election Law.

Minn. Stat. §209.021, Subd. 1 turns the election contest into a civil action.

The Minnesota rules of Civil Procedure require the filing parties to include a person who is subject to service of process in their notice of complaint, or in this instance, contest. A person

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<sup>60</sup> Id.

<sup>61</sup> Minn. R. Civ. P. 19.01

shall be joined as a party in the action if in the person's absence complete relief cannot be accorded among those already parties.<sup>62</sup>

The Secretary is subject to service in this matter because the Secretary committed many of the acts described in the contest.

Additionally, the legislature has chosen to combine the administrative process of an election contest with the civil suit processes. As a result of the legislature's action, Secretary Simon must be a party to this election contest.

The Secretary of State is indispensable to election contests. He is the chief election official in the state.<sup>63</sup> In case law dating back to 1972, the Court has identified the SOS as indispensable and joined him in proceedings.<sup>64</sup>

The Secretary of State is involved in every aspect of Minnesota's election law system.<sup>65</sup>

In this matter, the Secretary of State has specifically committed acts that have contributed to the deliberate, serious, and material violations of the Minnesota election law. Secretary Simon must be joined in this action because he is accused of violating the law and the constitutional rights of the voters. The court must not ignore the allegations of the Secretary's direct involvement in the complaint itself.

The case law cited by the Secretary is not applicable to this contest because this contest is brought about by voters alleging deliberate, serious, and material violations of the Minnesota election law by the Secretary, himself. He is indispensable to this contest because he is the bad actor responsible for the issues at the heart of the matter.

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<sup>62</sup> Minn. R. Civ. P. 19.01

<sup>63</sup> Clark v. Pawlenty, 755 N.W.2d 293, 299 (Minn. 2008)

<sup>64</sup> Parsons v. Hickey, 294 Minn. 543, 201 N.W.2d 739 (1972)

<sup>65</sup> Minn. Stat. §§ 201.221, 204B.146, 204B.21, 204B.27, 204B.47, 5.38 and more

Additionally, the Secretary is responsible for overseeing the process of a statewide election contest. He is necessary to the action for the reasons stated previously in this memorandum. The Secretary will need to be compelled to produce election materials.

Secretary of State Simon was properly served. The court has jurisdiction over him.

For all the reasons included in this memorandum, Secretary Simon's motions for dismissal must be denied.

## **II. . THE CUMULATIVE EFFECT OF MATERIAL AND SERIOUS VIOLATIONS OF MINNESOTA ELECTION LAW JUSTIFIES THIS CONTEST.**

Furthermore, Contestants assert the State Canvassing Board has wrongly certified the Minnesota Elections. The Minnesota Supreme Court and the State Canvassing Board were notified there were serious concerns about the canvass. A Petition to Correct Errors and Omissions was filed. The State Canvassing Board both failed to provide oversight and chose to ignore the issues presented to it. This amounts to a dereliction of duty, especially in an election that the entire world is watching.

After the Canvassing Board certified the election, the Contestants became aware of additional information demonstrating Dakota County did not complete its PER. Because the Dakota County PER was never completed in accordance with the law. Minn. Stat. § 206.89, subd 10, provides:

### **Time for filing election contest.**

The appropriate canvass is not completed and the time for notice of a contest of election does not begin to run until all reviews under this section have been completed.

*Id.* (emphasis added). The PER was *purportedly* completed on November 17, 2020 when Andy Lokken provided his results to the Secretary of State. The PER, however, did not result in

acceptable performance and therefore has not been completed. Minn. Stat. § 206.89, subd. 4, provides: **Standard of acceptable performance by voting system.**

A comparison of the results compiled by the voting system with the postelection review described in this section must show that the results of the electronic voting system differed by no more than one-half of one percent from the manual count of the offices reviewed. Valid votes that have been marked by the voter outside the vote targets or using a manual marking device that cannot be read by the voting system must not be included in making the determination whether the voting system has met the standard of acceptable performance for any precinct.

*Id.* (emphasis added). In the West St. Paul precinct, 870 ballots are missing and there are 2,584 missing ballot-votes. This greatly exceeds the one-half of one percent from the manual count. There were 1,327 voters and 870 missing ballots in this precinct. Over 65 percent of the ballots are missing. There is no valid explanation for these missing ballots other than they do not exist. Additional review is *required* under Minn. Stat. 206.89, subd. 5, which provides in part:

**Additional review.**

(a) If the postelection review in one of the reviewed precincts reveals a difference greater than one-half of one percent . . . the postelection reviews official must, within two days, conduct an additional review of the races indicated in subdivision 3 in at least three precincts in the same jurisdiction where the discrepancy was discovered[.]<sup>66</sup>

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<sup>66</sup> Minn. Stat. § 206.89, subd. 5(b) goes on to state:

If the results from the countywide reviews from one or more counties comprising in the aggregate more than ten percent of the total number of persons voting in the election clearly indicate that an error in vote counting has occurred, the secretary of state must notify the postelection review official of each county in the district that they must conduct manual recounts of all the ballots in the district for the affected office using the procedure outlined in section 204C.35. The recount must be completed and the results reported to the appropriate canvassing board within two weeks after the postelection review official received notice from the secretary of state.

In just one precinct in Dakota County, 870 ballots are missing. Numerous violations of Minnesota Election Law have occurred. In *In re Contest of Election of Vetsch*, 71 N.W.2d 652, an election was set aside because of widespread violations of the election laws, including the disappearance of 59 ballots. The *Vetsch* court held:

We realize full well that the disenfranchisement of a voter is a serious matter, but there is also an obligation to see that the will of the voters in other precincts whose ballots have, without a doubt, been honestly cast and counted is vindicated. A decision of this nature does not rest upon a single incident occurring during the election but upon the cumulative effect of the numerous serious violations which occurred. The purpose of the election laws is to assure honest elections. Such a wholesale flouting of the law cannot be tolerated when the result is to cast doubt and suspicion upon the election and impeach the integrity of the vote.

*Id.* at 660. Here, like in *Vetsch*, widespread violations election laws occurred. None of the legislative races were counted in the PER to determine if those missing ballots affected their races. Contestants undoubtedly provide ample grounds to state a claim upon relief can be granted. Contestants are entitled to an inspection of the ballots to find *Id.* (emphasis added). Dakota County was required to perform additional review because of the 870 missing ballots. Therefore, the PER is not complete and the tolling for service of election contests has not begun.

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*Id.* at 660. Here, like in *Vetsch*, widespread violations election laws occurred. None of the legislative races were counted in the PER to determine if those missing ballots affected their races. Contestants undoubtedly provide ample grounds to state a claim upon relief can be granted. Contestants are entitled to an inspection of the ballots to find out the truth of this election and the court can determine if this election should be set aside.

Dakota County's PER has not actually been completed, the time for bringing a contest has not even begun to toll. Hence, the Dakota County canvas, as well as the Statewide canvass, certifications are illegal and based upon fraudulent data.

Contestants believe the elections should be decertified and the state should undergo a complete audit. This is the only way that all voters in Minnesota will accept the results of the election. If the election is decertified, the concerns about service are moot. The Petition to Correct Errors and Omissions is being prepared for appeal.

There is no question that the election cycle of 2020 has raised serious concerns about the conduct of election officials in Minnesota and the Notice of Contest provided extensive explanations of those concerns. The Notice of Contest raises issues related to the absentee ballots, including potential fraud, missing ballots, voter database issues, Consent Decrees and others mentioned previously. Additionally, the jurisdiction of all issues beyond the scope specifically prescribed to the District Court in Minn. Stat. 209.12 must be preserved for the appropriate legislative branch in Congress.

### **III. LACHES AND THE DOCTRINE OF FINALITY DOES NOT BAR THE VOTERS' ELECTION CONTEST.**

Contestees argue the laches and the doctrine of finality bar Contestants election contest. These doctrines do not bar the voters' contest. Laches is equitable in nature and "applie[s] 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." *Monaghan v. Simon*, 888 N.W.2d 324, 328 (Minn. 2016) (quotation omitted). The application of the doctrine of laches depends on the facts of the case. *Aronovitch v. Levy*, 238 Minn. 237, 242, 56 N.W.2d 570, 574 (1953). In deciding whether to

apply laches, a court must determine "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." *Carlson v. Ritchie*, 830 N.W.2d 887, 891 (Minn. 2013) (quotation omitted).

The Supreme Court has held that when an action is governed by a statute of limitations, laches does not apply. *M.A.D. v. P.R.*, 277 N.W.2d 27, 29 (Minn. 1979). "An exception exists in equitable actions when a party can show that delay would result in substantial injury to innocent parties." *In re: Appeal from Final Order of the Bd. of Managers*, 889 N.W.2d 575, 580 (Minn. Ct. App. 2016), *review denied* (Minn. Mar. 28, 2017).

Here, voters can only bring a contest after the election. Election contests are strictly governed by statutes of limitation as to when a contest can be brought. For this case, it is seven days after an election is certified. Laches does not apply. Voters had no standing to intervene in the consent decree actions. Absentee voters had different and more lax rules in voting including no witness verification. In person voters did not have that option. In person voters had to fully comply with all the provisions of Minnesota Election Law to vote. In person voters had no option to attempt to void the consent decrees prior to the election. Therefore, laches and the doctrine of finality do not apply to the voter contestants. Voters now have standing to challenge the potential illegality of the consent decrees.

Furthermore, in federal contests, the issue of the consent decree is beyond the scope of the governing statute. All evidence related to this and any other issues outside the Court's jurisdiction, including the number of outer envelopes held by each county, for example, must be preserved to be forwarded to the appropriate legislative body.

#### **IV. NEITHER VOTERS NOR TINA SMITH NOR THE SECRETARY OF STATE KNOW THE TRUE RESULTS OF THE 2020 ELECTIONS IN MN**



The Minnesota Secretary of State has the duty to ensure the local election officials are properly trained. If he fails to do his job, questions will be asked.

The database provided to the public on November 29, 2020 provided a great deal of information that raises serious questions about the election results reported to Minnesota and the nation. These numbers have nothing to do with the glitch Minnesota experienced in the darkness of night on November 3<sup>rd</sup> -4<sup>th</sup>, 2020. These numbers are the 700,000 ballots that were reported that did not exist in the voter database records.

Across Minnesota, there are election abnormalities reported from the beginning of the cycle through the PERs which were not performed properly, to the State Canvass which failed to review the data provided that obviously failed the standards.

Contestants are certain Contestees do not want this election examined closely because they likely know the truth behind the curtain. The Voters did speak on election day and the message they sent is not the message being reported.

**V. SECRETARY OF STATE SIMON IS INDISPENSIBLE TO THESE PROCEEDINGS AND MUST NOT BE DISMISSED FROM THE MATTER BECAUSE ALL ELECTION MATERIALS MUST BE TAKEN AND PRESERVED FOR CONTEST AT THE UNITED STATES SENATE UNDER MINN. STAT. §209.12.**

As noted earlier, Secretary Simon should not be dismissed from this contest and this court has jurisdiction over him.

**Under Minn. Stat. § 209.12 this court must take and preserve the evidence related to all issues raised in this contest that go beyond the number of votes legally cast in the election. This is not discretionary. The court is required to either take and preserve the evidence related to all claims raised or appoint another person to complete the task.**

Unfortunately, nearly all the issues raised in this contest relate directly to the responsibilities and the conduct of the MN Secretary of State. The implementation of the entire body of election

law, including all provisions related to enforcement of election law, fall within the scope of duty of the holder of the constitutional office. The Office of the Secretary of State, and therefore Secretary Simon, will be required to oversee the security of all election materials, any gathering of evidence necessary in these proceedings, coordinating all recounting of ballots or other items with local officials, etc. Based on these facts, the Secretary is an indispensable party to this proceeding.<sup>67</sup>

In each of the four actions before the Court, the Contestee is a party by mere circumstance, only. The Contestee did not take any illegal action to affect the ballots or counting of the ballots. The Secretary of State took those actions. The Contestee did not fail to properly train local election officials to comply with election law- the Secretary failed. The Contestee will not be responsible to ensure the many procedures during the contest are properly followed. The Secretary must be compelled to follow those procedures. The Secretary will be required to provide the plaintiffs with data and documentation that must be compelled, if necessary. The Contestee were not responsible to ensure the County Ballot Boards retained outer envelopes of all absentee ballots- the Secretary was responsible. The Contestee were not responsible to verify that the election judges promptly connected every absentee ballot to a voter record in the voter database system- the Secretary was responsible. There can be no election contest without the participation and compliance of the MN Secretary of State. There is no other person or entity who can fulfill the responsibilities of the Secretary of State. He is necessary to each of the contests. The Secretary should remain a party to this matter because complete relief will be denied the Plaintiffs if he is dismissed from the matter.<sup>68</sup>

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<sup>67</sup> *Parsons v. Hickey*, 294 Minn. 543, 201 N.W.2d 739 (1972).

<sup>68</sup> Minn. R. Civ. P. 19.01.

If the Secretary does not remain a party under Rule 19.01, Plaintiffs ask the Court to determine whether in equity and good conscience the matter can proceed without the Secretary's involvement.<sup>69</sup> To determine this, the Court applies four factors to this situation. The first factor requires an assessment of adverse impact upon the person.<sup>70</sup> The Secretary would not be adversely affected by remaining a party to this action. In fact, because the Secretary must participate in the action and will be required to perform actions related to it, his remaining a party is expedient for both him and the Court. As to the second factor, there is no prejudice to lessen on the Secretary as he has no personal liability.<sup>71</sup> The third factor requires the secretary remain a party as no adequate judgement can be rendered in the absence of his participation.<sup>72</sup> Again the Secretary will be involved in all aspects of the matter whether he is dismissed or not dismissed because it is his statutory duty. If he is dismissed, the Court will likely need to compel his cooperation. It will be much more difficult, if not impossible for the Court to secure full cooperation, if this Court does not retain jurisdiction over him. Finally, the fourth factor requires an evaluation of the practicality of dismissal.<sup>73</sup> This matter cannot be heard in another jurisdiction so there is no practical reason to exclude the Secretary.

The Secretary of State is supposed to represent the interests of all Minnesotans and he is supposed to ensure our elections are constitutional, lawful, and nonpartisan in implementation. Because of the recent public statements made by Secretary Simon regarding election challenges, the Plaintiff's believe the Secretary will need to be compelled to cooperate with these actions.

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<sup>69</sup> Minn. R. Civ. P. 19.02.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

Not only has the Secretary noted his disagreement with those who question the integrity of the recent elections, he has taken the extreme, outrageous and wholly irresponsible position of suggesting those challenges will lead to the murder of election officials.

The concern that there was tampering in the 2020 elections is a belief held by approximately half of the country, despite the facts of voter fraud being censored by social media and ignored by the mainstream media. Imagine the percentages if the whistleblowers were shown on any of the prime-time media outlets. The Secretary has chosen to make this matter not about election security and integrity but about the integrity of the voters who demand an open, honest and legally compliant election process. Proof of the Secretary's misplaced priorities and efforts to exacerbate the tensions between the people can be seen in the words he chose carefully while speaking in a Minnesota Senate hearing on December 8, 2020 to discuss those election issues:

We are in the midst of “a tidal wave of disinformation, politically inspired lies, designed to mislead and manipulate people. So, I will not, at this hearing amplify or dignify conspiracy theories. We have seen a lot of them this past month at the federal and the state level and they are not just wrong, they are dangerous and they have to stop. They are dangerous in the short term because I think someone might get killed. I think someone in this country, maybe in this state, is going to get killed. We have amped up people out there who believe wild and unsubstantiated theories about our democracy that risk inspiring violence and even murder...”<sup>74</sup>

Ironically, Secretary Simon then suggested both that the people who espouse beliefs that run counter to his are causing damage to our country but then stated that “In a democracy we always welcome strong differences of opinion as we do at this committee and at the legislature, but we also need a basic shared reality and millions of people are being told big lies repeatedly, not just about a particular election contest but about our entire election system and those lies are tearing us

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<sup>74</sup> MN SENATE ELECTIONS COMMITTEE (2020), [http://mnsenate.granicus.com/player/clip/5567?view\\_id=&meta\\_id=27457&redirect=true](http://mnsenate.granicus.com/player/clip/5567?view_id=&meta_id=27457&redirect=true) (last visited Dec 13, 2020).

apart. they are doing the bidding of our foreign adversaries, and they are poisoning our democracy.”<sup>75</sup>

Apparently, the nearly half of the country not of the same political bent as the Secretary is to be vilified if it does not crawl into a corner and hide. Everything stated by the Secretary about the conservatives he does not trust could be said by those conservatives about the Secretary. For the Secretary, it ends with his un-American attempts to intimidate people into silence. The people will not be silenced. A growing group of Constitutionally-aware citizens is lawfully demanding, and will continue to demand, a full audit of the election. This is not simply a request for a simple recount of the ballots, which may have been tampered with since the election as there has been no documented or monitored chain of custody in many areas of the state. This is a request for a true investigation into the entire election system: the laws, the rules, the equipment, the data, the election materials and the people.

This comprehensive analysis of the election system is not necessary because conservatives engaged in election fraud: there have not been reports of conservative’s election tampering. This audit of the system is necessary because, as of 11/25/2020, there were 700,000 absentee / mail- in ballots in MN NOT connected to a voter ID record in the Minnesota statewide voter registration system, as required in statute.<sup>76</sup>

There are only two possible ways this clear violation of Minnesota election law happened on a scale so large that 20-25% of the state’s ballots are potentially excludable, and neither of those reasons relate to unconstitutional Consent Decrees or Alleged Dominion Voting Systems breaches.

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<sup>75</sup> *Id.*

<sup>76</sup> Minn. Stat. Ann. § 203B.24 (West).

These votes must be challenged because of the possibility that highly organized Minnesotans engaged in some old-fashioned, yet very nefarious, ballot box stuffing. The other possibility is total incompetence in leadership that led to a failure to train local officials in the law and the process required to connect those votes to the voter record. The applicable statute is not complicated: The election judges shall compare the voter's name with the names recorded under section 203B.19 in the statewide registration system. For each returned ballot, the election judges must indicate on the record in the statewide registration system whether the absentee ballot was accepted or rejected.<sup>77</sup>

Contestants have raised the issue in the notice of the contest, and so many voters do believe, the Minnesota Secretary of State intentionally engaged in illegal and unconstitutional activities to usurp the power of Minnesota's legislature, erase the state's election law and collude with other states and advocacy groups to alter the results of the elections. These are grounds of deliberate, serious, and material violations of Minnesota's Election Law and all evidence on these issues must be taken and preserved by the judge trying the contest, or by some person appointed by the judge for that purpose; but the judge shall make no findings or conclusion on those points.<sup>78</sup>

As evidence of these serious and material violations, the Secretary of State intentionally violated the United States and Minnesota Constitutions and multiple Minnesota statutes when he agreed to overly broad stipulated settlements with Democrat advocacy groups.<sup>79</sup> Because the Secretary's proposed legislation to the Minnesota House on April 8 seeking the authority to issue sweeping consent decrees in response to a health concern, was rejected by the legislature, he was

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<sup>77</sup> *Id.*

<sup>78</sup> Minn. Stat. Ann. § 209.12 (West)

<sup>79</sup> *LaRose v. Simon*, 62-CV-20-3149, MN Dist. Ct

clearly aware that he did not have the authority to do so in May.<sup>80</sup> The agreements entered into by the Secretary, with his constituents, were not to protect those individual voters. If that were the issue, the Secretary could have, and should have, crafted a narrowly tailored agreement with those plaintiffs to address their specific concerns.

There are voters who believe Secretary Simon perpetrated a fraud, not only upon the Court but more importantly, upon the voters. Secretary Simon hoodwinked the voters of Minnesota, who were unaware of the facts of the agreements into which he entered, of the political histories and relationships between the parties to those agreements and of the potential collusion that had occurred between the Secretary and his cohorts in swing states around the country.

There are a growing number of people who believe that perhaps he and others in his position in other states agreed to change the election rules in nearly the same way so they could manipulate the results of the 2020 elections.

The only way to answer these questions is to audit the system. The data we need to have preserved until it can be thoroughly analyzed is under the control of the Secretary. The issues at hand call into question both Secretary Simon's competence and his ethics. Simon has violated the Federal and State Constitutions, his Oath of Office, and Minnesota's election law. He has disrespected the voters. He should not be dismissed from this action.

## **CONCLUSION**

The Court has jurisdiction over this election contest and Contestants provide ample allegations, including evidence, indicating widespread violations of Minnesota Election Law. Accordingly, Contestants respectfully request that the Court deny Contestees' motions to dismiss.

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<sup>80</sup> Simon Proposed legislation, Ex. 5.

The undersigned hereby acknowledges that sanctions may be awarded pursuant to Minnesota Statutes § 549.211.

DATED: December 22, 2020.

SHOGREN SMITH LAW

By: /s/ Susan Shogren Smith

Susan Shogren Smith (MN #0340467)

600 62<sup>nd</sup> Avenue North

Brooklyn Center, MN 55430

[shogrensmithlaw@protonmail.com](mailto:shogrensmithlaw@protonmail.com)

Phone: (612) 812-8160

ATTORNEY FOR CONTESTANTS