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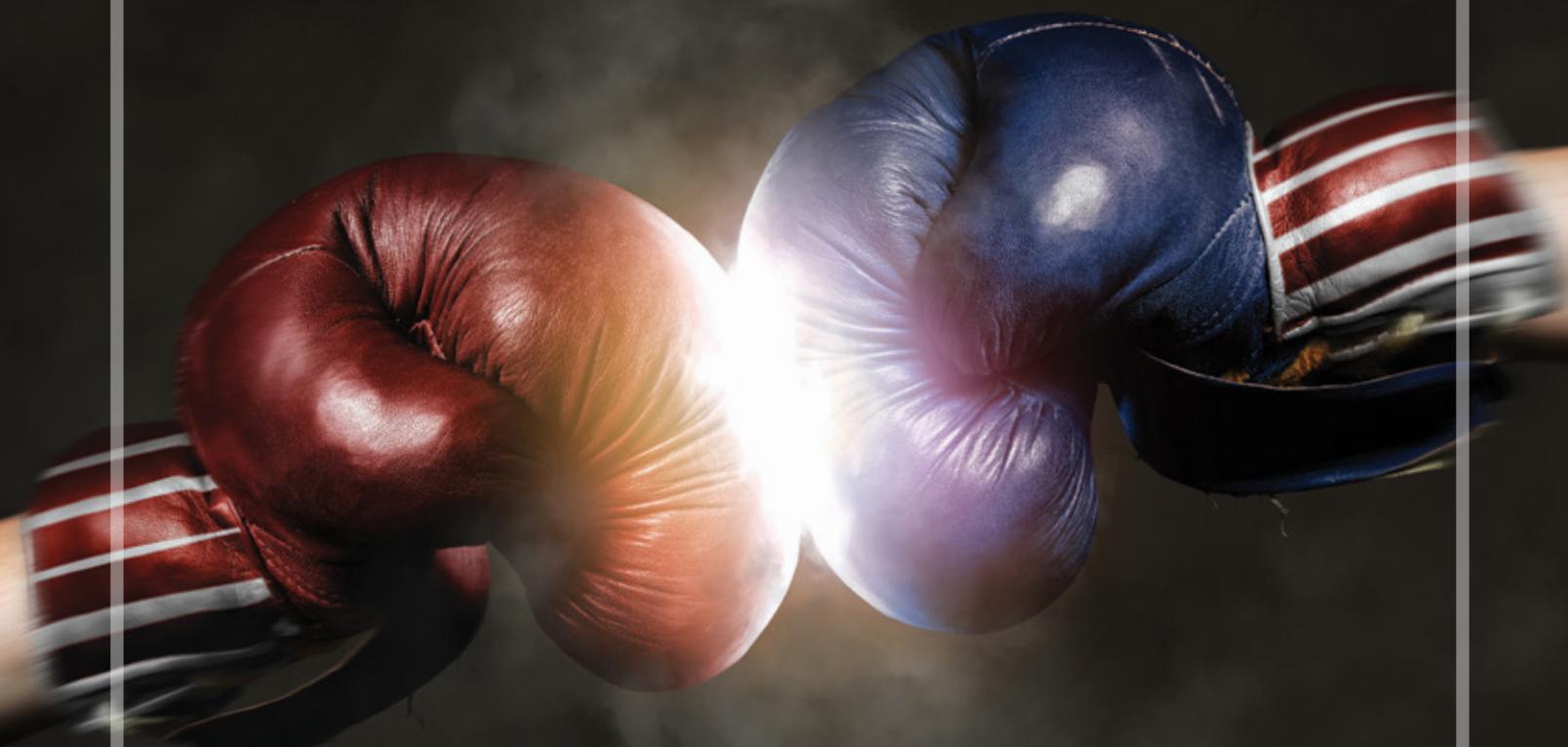
OF MINNESOTA



DEMOCRACY GOES TO COURT

*Litigating voting
rights and election
administration*

*Examining high-profile
complaints against
election attorneys*



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Litigating voting rights and election administration in Minnesota in 2020

BY GEORGE W. SOULE & ANNA VEIT-CARTER

The 2020 elections were hard-fought, high-stakes affairs that drew intense scrutiny. The covid-19 pandemic greatly influenced campaign methods, voting, and election administration, and the government's response to the pandemic created major political issues. It is no surprise that in this electoral tinder box, parties resorted to courts to press their concerns over voting and election issues. While the candidates' positions and personalities dominated campaign news, reports of election litigation made plenty of headlines as well. Parties litigated voting and election procedures heavily in the presidential swing states, but most states experienced significant election litigation.

Minnesota was no exception. Minnesota political parties, voter organizations, voters, and election officials fought in court over many aspects of voting and elections. The lawsuits continued after the election, contesting the results of several Minnesota races. This article will review the key Minnesota legal battles over voting and elections in 2020.

BALLOT ACCESS AND ORDER

Presidential primary ballot access

The first ballot case arose from Minnesota's 2020 presidential primary election—the state's first since 1992. The results of the primary (rather than the state's caucus and convention system) would bind the Republican and DFL's election of delegates to their national conventions. Minn. Stat. §207A.13, which was signed into law in 2016, provides that “[e]ach party must determine

which candidates are to be placed on the presidential nomination primary ballot for that party.” The Republican Party of Minnesota submitted only one name for the March 3 Republican ballot: Donald Trump. (Minnesota's DFL Party designated 15 candidates for its primary ballot.) The Republicans also elected to place a write-in option on their ballot, as authorized by the statute. Roque De La Fuente, who claimed he was a Republican candidate for president, petitioned the Minnesota Supreme Court to get his name on the ballot, arguing that excluding him per the statute violated the Minnesota Constitution's special-privileges clause, the U.S. Constitution's presidential eligibility clause, and the First Amendment's right to freedom of association. In *De La Fuente v. Simon*, 940 N.W.2d 477 (Minn. 2020), the Supreme Court found that the statute's burden on De La Fuente's associational rights were “de minimis” and the political parties' associational interests were “legitimate,” and concluded that the Secretary of State's acceptance of the Republican Party candidate list (of one) did not violate constitutional provisions.

Ballot order of candidates

The second ballot case focused on the order of the major party candidates on general election ballots. Minn. Stat. §204D.13, subd. 2, requires that such candidates be listed on the ballot in reverse order of the parties' average number of votes received in the last general election. Democratic Committees and voters sued to strike down the statute, contending that the law disadvantages their candidates—who would appear last on 2020 general election ballots—and “places an

undue burden on the right to vote as well as the right to political association in violation of the First and Fourteenth Amendments to the United States Constitution.” *Pavek v. Simon*, No. 19-cv-3000 (SRN/DTS), 2020 U.S. Dist. LEXIS 103989 (D. Minn. 6/15/2020). On plaintiffs' motion for preliminary injunction, U.S. District Judge Susan Richard Nelson found that a “primacy effect” that advantaged the first candidate listed on a ballot burdened the plaintiffs' constitutional rights and that interests asserted by the state in support of the statute—“(1) encouraging political diversity; (2) countering the ‘incumbent’ effect; and (3) discouraging sustained single-party rule”—were not legitimate. The court granted a preliminary injunction “barring enforcement of the statute, and [requiring] the implementation of a nondiscriminatory ballot ordering system under which the State does not discriminate on the basis of party affiliation,” a procedure in which parties' positions on a ballot are assigned by lot.

The Secretary of State did not appeal the preliminary injunction but intervenor Republican Committees appealed and requested a stay of the injunction pending appeal. In *Pavek v. Simon*, 967 F.3d 905 (8th Cir. 2020), the 8th Circuit granted the motion to stay. The court noted that the statute “does not in any way restrict voting or ballot access,” but did promote political diversity and counter the “incumbent effect” and predominant party rule. The court found no constitutional violation; rather, the statute “articulates one of the few ways Minnesota can organize its ballots without either favoring predominant parties or abandoning the task of ballot-organizing to random choice.”

VOTING RIGHTS FOR PERSONS CONVICTED OF FELONIES

In October 2019, a group of plaintiffs sued Minnesota's Secretary of State to challenge Minnesota's restrictions on voting rights for persons convicted of felonies. *Schroeder v. Minn. Secy. of State*, No. 62-CV-19-7440, 2020 Minn. Dist. LEXIS 269 (Ramsey Cnty. 8/11/2020). Pursuant to Article VII, §1 of the Minnesota Constitution, persons who have been convicted of felonies are not "entitled or permitted to vote at any election in this state... unless restored to civil rights." Minn. Stat. §609.165 restores civil rights and the right to vote to persons convicted of felonies when their conviction is discharged "(1) by order of the court following stay of sentence or stay of execution of sentence; or (2) upon expiration of the sentence."

The plaintiffs in *Schroeder* had been convicted of felonies, served their term of incarceration, and were on probation, parole, or supervised release; therefore their sentences had not expired. They argued that Section 609.165 violated the equal protection and due process clauses of the Minnesota Constitution because their voting rights should be restored "when they return to live in their communities... rather than at the end of their felony sentence."

While noting that "[i]n Minnesota voting is a fundamental right," Ramsey County Judge Laura Nelson found that this "right is explicitly limited by the text of the Minnesota Constitution" and therefore "a person who has been convicted of a felony does not have a fundamental right to vote in Minnesota until restored to civil rights." The court thus applied a rational basis review to plaintiffs' constitutional claims, and concluded that the Minnesota Legislature "demonstrated a clearly legitimate policy goal" for Section 609.165: "to promote the rehabilitation of the defendant and his return to his community as an effective participating citizen by automatically restoring civil rights to persons convicted of felonies after their sentence has ended." Judge Nelson found that Section 609.165 was a rational means to achieve this goal, and therefore did not violate equal protection or due process. The court granted the defendant's summary judgment motion and dismissed plaintiffs' claims.

In its conclusion, the court stated it was "aware of, and troubled by, the fact that the criminal justice system disproportionately impacts Black Americans and other communities of color in Minnesota, and the subsequent effect this impact has on those communities' ability to vote.

Ultimately, however, this is an issue to be addressed by the legislature." Plaintiffs appealed the court's order.

CHALLENGES TO ABSENTEE (OR MAIL) BALLOT REQUIREMENTS

In a year in which the pandemic placed in-person voters at risk, many voter advocates went to courts nationwide to expand voting opportunities, especially for absentee (including mail) ballots. Minnesota organizations challenged enforcement in the 2020 elections of several statutory provisions: those requiring that a registered voter or notary public verify that the absentee voter marked the ballot in the witness's presence (witness requirement); mandating that election

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officials receive absentee ballots by Election Day to be counted (ballot receipt deadline); prohibiting an individual from assisting more than three voters in either marking or returning their ballots; and providing that absentee ballots be mailed only to voters who had requested them.

Witness requirement

On May 13, the Minnesota Alliance for Retired Americans Educational Fund and others sued Secretary of State Steve Simon in Ramsey County District Court. Plaintiffs alleged that many voters may be deterred by the pandemic from voting in person or safely finding a voter to wit-

ness their absentee ballot, and thereby be disenfranchised. The complaint asked the court to enjoin enforcement of the witness requirement (Minn. Stat. §203B.07, subd. 3) on the ground that it would burden the right to vote in violation of the Minnesota and United States Constitutions. On June 16, the parties joined in a consent decree, which was promptly approved by the court, in which the secretary agreed not to enforce the witness requirement in the August 11 primary election. *LaRose v. Simon*, No. 62-CV-20-3149 (Ramsey Cnty.). The parties entered a second consent decree on July 17, providing the same relief in the general election.

The Republican Party of Minnesota moved to intervene to oppose the consent decree. The party argued that Minnesota had "implemented a host of safeguards to protect voters who vote in-person or by absentee ballot during the COVID-19 pandemic" and plaintiffs had not demonstrated that suspending the witness requirement for all voters was needed. The party also argued that Minnesota's "legitimate interests in deterring fraud, in maintaining public confidence in the integrity of its elections, and in ensuring the orderly administration of its elections" supported the statutory witness requirement, and thus its enforcement did not violate constitutional rights.

The parties in a similar case assigned to Judge Grewing also entered a consent decree enjoining enforcement of the witness requirement. *Nat'l Assoc. for the Advancement of Colored People Minnesota-Dakotas Area State Conference v. Minnesota Sec'y of State*, 62-C-20-3625, order dated 8/3/2020 (Ramsey Cnty.).

While the Ramsey County cases were pending, parties also litigated the witness requirement in federal court. *League of Women Voters of Minnesota Education Fund v. Simon*, Case 0:20-cv-01205 (ECT-TNL) (D. Minn.). The League alleged that enforcement of the witness requirement during the pandemic would unduly burden the right to vote in violation of the First and Fourteenth Amendments to the U. S. Constitution. As in *LaRose*, the secretary joined in a consent decree not to enforce the witness requirement in the August primary election. State and national Republican organizations and the Trump campaign intervened and opposed the consent decree. In a fairness hearing on June 23, Judge Eric Tostrud considered whether the "proposed decree is fair, reasonable, and faithful to the objectives of the governing law." He ruled from the bench, declining to enforce the consent decree because it "goes well beyond remediying the harm Plaintiffs allege

to suffer in support of their as-applied challenge...." "The harms established by Plaintiffs here are risk of exposure to COVID-19 owing to health conditions and personal circumstances that give one a reasonable fear that complying with the witness requirement will risk one's health and safety. That's not everyone.... Plaintiffs have not with their as-applied challenge shown a justification for the Secretary's blanket refusal to enforce the witness requirement."

On July 31, Judge Sara Grewing heard the Republican Party's motion to intervene and the request to grant, and opposition to, the consent decree in *LaRose*. On August 3, Judge Grewing—in a 25-page order—granted the motion to intervene, found the consent decree "fair and appropriate," and entered the decree. In her order, Judge Grewing acknowledged Judge Tostrud's order and stated she was "deeply concerned about two courts in Minnesota reaching opposite conclusions, especially on something so essential to a functioning government as the right to vote." Judge Grewing concluded that "this Court is not bound by the same overbreadth reasoning that drew the federal court to the opposite conclusion" because the state case "relies both on claims raised under the Minnesota Constitution and the U.S. Constitution" and the court was bound by *Erlandson v. Kiffmeyer*, 659 N.W.2d 724 (Minn. 2003), in which the Minnesota Supreme Court broadly construed the right to absentee ballots. Judge Grewing also entered the consent decree in the NAACP case.

The Republican Party appealed the *LaRose* and NAACP injunctions, but on August 18 agreed to dismiss its appeal and "waive the right to challenge in any other judicial forum the August 3, 2020 Orders and the August 3, 2020 Stipulations and Partial Consent Decrees" Thus, Judge Grewing's order remained standing and Minnesota's election officials did not enforce the witness requirement in the 2020 elections.

Ballot receipt deadline

Minnesota statutes require that absentee ballots may be counted only if received by Election Day—by 3:00 p.m. if delivered in person, or by 8:00 p.m. if delivered by mail or a package delivery service. Minn. Stat. §203B.08, subd. 3, and §204B.45, subd. 2. The ballot receipt deadline was heavily litigated in Minnesota, as were similar provisions nationwide. Plaintiffs in *LaRose*, *supra*, challenged enforcement of the Election Day deadline for receipt of mailed absentee ballots. Plaintiffs alleged that many more voters may use mail ballots because of the pan-



demic and mail delivery may be delayed, resulting in disenfranchisement of voters whose ballots were not received by Election Day. In the parties' initial consent decree, the secretary agreed to accept and count mail ballots received within two days of the primary election. In their subsequent general election consent decree, the secretary agreed that election officials would count absentee ballots if they were postmarked on or before Election Day and received by 8 p.m. on November 10, seven days after Election Day. As explained above, Judge Grewing granted the consent decree regarding the general election over Republican Party objections. The Republican Party appealed but dismissed its appeal.

Republicans mounted two later challenges to the one-week extension of the ballot receipt deadline for mail ballots. On September 22, two Republican electors brought suit against the Secretary of State in federal court, seeking an injunction forbidding the counting of ballots "received in violation of Minnesota law." The complaint alleged that the "Consent Decree is nothing but a contract between the Secretary of State and certain voters prohibiting the Secretary of State from enforcing Minnesota law." Plaintiffs claimed that the consent decree's one-week extension for receipt of mail ballots violated the U. S. Constitution's electors clause, Article II, §1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.") and that only the Legislature, not the Secretary of State or state court,

could extend the period for receipt and counting of mail ballots. Plaintiff also claimed that the extension for mail ballots changed the date of the election in violation of U.S. Constitution, Article II, §1, cl. 4, and 3 U.S.C. §1 ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."). On October 16, Judge Nancy Brasel denied plaintiffs' motion for preliminary injunction, finding that plaintiffs lacked standing. *Carson v. Simon*, No. 20-CV-2030 (NEB/TNL), 2020 U.S. Dist. LEXIS 191445 (D. Minn. 10/16/2020).

Plaintiffs appealed to the 8th Circuit Court of Appeals. In a 2-1 decision issued on October 29, the 8th Circuit panel reversed the district court's order. *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). The 8th Circuit majority found that "the Electors have standing as candidates" and concluded that "the Secretary's actions in altering the deadline for mail-in ballots likely violates the Electors Clause" "[O]nly the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota. Simply put, the Secretary has no power to override the Minnesota Legislature." The court also noted that "[t]here is no pandemic exception to the Constitution." The court ordered the secretary to segregate the ballots received after the statutory deadlines to allow such votes for presidential electors "to be removed from vote totals in the event a final order is entered... determining such votes to be invalid or unlawfully counted."

While awaiting the results of the *Carson* appeal, the Trump campaign filed a petition in the Minnesota Supreme Court under Minn. Stat. §204B.44, seeking an order requiring the Secretary of State to segregate mail ballots received after the statutory deadlines. *Donald J. Trump for President, Inc. v. Simon*, A20-1362 (Minn. 11/3/2020). On November 2, after the *Carson* opinion was issued, the Trump campaign withdrew its petition.

After the 8th Circuit opinion was filed, the Secretary of State mounted a campaign to inform Minnesota voters to return their ballots so that they would be received on or before Election Day. According to the Secretary of State, 1.9 million Minnesota voters cast absentee ballots. Only 2,500 ballots arrived after the Election Day deadline. Those late-arriving votes were included in the count for presidential electors (the *Carson* opinion only applied to the presidential race) but were also segregated. There were no further court orders on the subject, so the votes received after Election Day remain in the final counts. The *Carson* case was dismissed by stipulation on December 9.

Assistance to absentee voters

Minn. Stat. §204C.15, subd. 1, provides that “[a] voter who claims a need for assistance because of inability to read English or physical inability to mark a ballot” may “obtain the assistance of any individual the voter chooses.” The statute provides that “a candidate for election” may not provide such assistance, and that an individual who provides assistance cannot “mark the ballots of more than three voters at one election.” Under Minn. Stat. §203B.08, subd. 1, an individual voting by absentee ballot “may designate an agent” to deliver or mail the sealed absentee ballot envelope to election officials, but an individual cannot deliver or mail completed ballots of “more than three voters in any election.”

St. Paul City Council member Dai Thao and others challenged Minn. Stat. §204C.15’s restrictions on assisting voters in marking their ballots, contending that federal law preempted the restrictions. (Ramsey County had criminally charged Thao under Minn. Stat. §204C.15 for unlawfully marking a voter’s ballot in the 2017 mayoral election. *State v. Thao*, No. 62-CR-18-927 (Ramsey Cnty.). District Judge Nicole Starr found that Section 208 of the Voting Rights Act, 52 U.S.C. §10508, preempted Section 204C.15’s prohibition against a candidate assisting a voter and found Council member Thao not guilty.) In the civil case, plaintiffs and the Secretary of State entered a consent decree, agreeing that the candidate as-

sistance and three-voter limit were preempted by the Voting Rights Act, and Judge Thomas Gilligan entered the consent decree on April 21, 2020. *Thao v. Minn. Sec'y of State*, No. 62-CV-20-1044 (Ramsey Cnty.).

On January 17, 2020, Democratic Committees filed a separate lawsuit challenging Minnesota’s restrictions on the number of voters an individual may assist in marking and delivering their absentee ballots. The Democratic Committees moved to enjoin enforcement of these statutes, arguing that they “directly contradict federal law, unduly burden the fundamental right to vote, and infringe on the core political speech and associational rights of organizations and citizens that work to increase voter turnout.” Judge Thomas Gilligan granted the Democratic Committees’ request for a temporary injunction against enforcement of the three-voter assistance and delivery

with a few exceptions. 52 U.S.C. §10508 (emphasis added). The Court concluded “that Minnesota’s three-voter limit on marking assistance can be read to stand as an obstacle to the objectives and purpose of section 208 because it could disqualify a person from voting if the assistant of choice is, by reason of other completed assistance, no longer eligible to serve as the voter’s ‘choice.’”

The Supreme Court found no such conflict between Minnesota’s limit on the number of voters whose ballots an individual may return and federal law. Minnesota’s limit was not “an obstacle to accomplishing” the purposes of Section 208 because Minn. Stat. §203B.08 was not limited to “voters with disabilities or language impairments” like Section 208, and the Minnesota statute provided multiple options for returning an absentee ballot. The Supreme Court also rejected the Democratic Committees’ arguments that the delivery restriction unduly burdened their First Amendment free speech and associational rights. The Court found that the burden placed on the committees by the “three-voter limit on collecting and delivering marked ballots is not severe.” The Court also acknowledged the “State’s important regulatory interests” such as preventing “one person or a group of people from tampering with or mis-delivering a large number of ballots.”

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Mail ballots for all

In addition to seeking suspension of the witness requirement for absentee ballots, plaintiffs in the NAACP lawsuit, *supra*, sought an order to require Minnesota’s election officials to mail absentee ballots to all registered voters regardless of whether they had requested them. On August 3, Judge Grewing approved the consent decree enjoining the witness requirement but denied plaintiffs’ motion for a preliminary injunction to require that absentee ballots be mailed to all voters. The court concluded that “it is difficult to imagine the application process [for an absentee ballot] being any easier than as currently provided for in state law” and “the very modest restriction imposed by the absentee ballot application does not rise to the level of an undue restriction on a constitutional right.” The court acknowledged that some voters may “want to go to the polls to vote in person” and found that requiring that ballots be mailed to such voters may create chaos and unnecessary expense. Later, the Secretary of State reached a settlement with plaintiffs in which the secretary agreed to mail an application for absentee ballot in the general election to all registered voters who had not already requested one.



COUNTING ABSENTEE BALLOTS

In July 2020, the Minnesota Voters Alliance, Republican Party of Minnesota, and others filed petitions for writs of mandamus against the City of Duluth, City of Minneapolis, Olmsted County, and Ramsey County, contending that Minn. Stat. §203B.121 required them to appoint only partisan-balanced election judges and not city or county employees (who were not partisan election judges) to absentee ballot boards. Such boards are responsible for taking possession of absentee ballot return envelopes and accepting or rejecting the envelopes according to statutory standards. The respondents stated that they had appointed, or would appoint, partisan election judges to the boards, but contended that the statute authorized them also to appoint city or county employees (who had not disclosed partisan affiliation) to the boards.

The Minnesota Supreme Court consolidated the actions and assigned them to Judge Thomas Gilligan in Ramsey County. Minn. Stat. §203B.121 provides: “The [absentee ballot] board must consist of a sufficient number of election judges trained in the handling of absentee ballots and appointed as provided in sections 204B.19 to 204B.22. The board may include deputy county auditors or deputy city clerks who have received training in the processing and counting of absentee ballots.” Judge Gilligan denied petitioners’ requests for writs of mandamus, concluding that cities and counties may appoint their trained employees to absentee ballot boards and that both partisan election judges and the city or county employees may review absentee ballots.

In re Minn. Voters Alliance, Nos. 62-CV-20-4124, 27-CV-20-9085, 69DU-CV-20-1252, 55-CV-20-4446, 2020 Minn. Dist. LEXIS 282 (Ramsey Cnty. 9/24/2020). The plaintiffs have appealed the order.

ELECTION DAY FOR SECOND CONGRESSIONAL DISTRICT

Adam Weeks, Legal Marijuana Now Party’s (LMNP) congressional candidate in Minnesota’s Second District, died on September 21, 2020—43 days before the election. Because LMNP is a “major political party” under Minnesota law, his death triggered the Minnesota Nominee Vacancy Statute, Minn. Stat. §204B.13. Under the statute, if a candidate of a major political party dies less than 79 days before the general election, the election is postponed until the following February. After Mr. Weeks’s death, the Secretary of State issued a statement that the Second District Congressional race would still appear on the November 3 ballot, but the votes in that race would not be counted.

Second District Representative Angie Craig sued the secretary, seeking an injunction against enforcement of the Minnesota vacancy statute that would establish a special election for the seat on February 9. Republican candidate Tyler Kistner moved to intervene in the case and opposed the injunction. Representative Craig claimed, and U.S. District Judge Wilhelmina Wright concluded, that the vacancy statute was preempted by federal law, which requires elections for members of the United States Representatives to be held on the Tuesday after the first Monday in November in

every even-number year (2 U.S.C. §7). **Craig v. Simon**, No. 20-cv-2066 (WMW/TNL), 2020 U.S. Dist. LEXIS 187996 (D. Minn. 10/9/2020). Judge Wright rejected the secretary and Kistner’s argument that the election was to “fill a vacancy,” for which a different federal statute (2 U.S.C. §8(a)) permitted an election at a time set by state law. Judge Wright also found that potential harms to voters who might have to vote twice during a pandemic, to Second District residents who would be unrepresented in Congress for more than one month, and to Rep. Craig, who had “expended resources and structured her campaign” in reliance on the November 3 election date, favored an injunction.

Kistner appealed the injunction to the 8th Circuit Court of Appeals and requested a stay. The 8th Circuit concluded that federal law permitted a state to cancel an election only based on “exigent circumstances” not present in this case. The court relied principally on the fact that, even though the LMNP met Minnesota’s standard for a major political party, the party was not a major player in Minnesota elections. “Even if the death of a Republican or Democratic-Farmer-Labor candidate could qualify as an exigent circumstance that would allow the State to cancel an election and trigger a vacancy in office, we think it unlikely that the rationale would extend to the death of a third-party candidate from a party with the modest electoral strength exhibited to date by the Legal Marijuana Now Party in Minnesota.” The 8th Circuit denied the request for a stay, **Craig v. Simon**, 978 F.3d 1043 (8th Cir. 2020), and affirmed the district court’s order, **Craig v. Simon**, 980 F.3d 614 (8th Cir. 2020).



ACTIVITIES AT POLLS

Mask mandate

On July 22, 2020, Gov. Tim Walz issued Executive Order 20-81, requiring Minnesotans to “wear a face covering in indoor businesses and indoor public settings” to prevent the spread of covid-19. Minnesota Voters Alliance and other activists sued the governor and other government officials to prohibit enforcement of the executive order. *Minn. Voters Alliance v. Walz*, Case No. 20-CV-1688 (PJS/ECW), 2020 U.S. Dist. LEXIS 183108 (D. Minn. 10/2/2020). “Plaintiffs... framed [their] action as primarily relating to the impact of Executive Order 20-81 on their right to vote.” Plaintiffs’ principal argument was that the mask requirement directly conflicted with Minn. Stat. §609.735, which prohibits an individual from concealing her identity “in a public place by means of a robe, mask, or other disguise.” Plaintiffs argued that the conflict prevented them from entering “an indoor public place—such as a polling place, or a meeting hall, or even a grocery store—without committing a crime.” U.S. District Judge Patrick Schiltz denied plaintiffs’ motion to enjoin enforcement of the mask mandate, concluding that, based on the statute’s legislative history and language, Section 609.735 “is violated only when someone wears a face covering for the purpose of concealing his or her identity.” Therefore, wearing a mask pursuant to the executive order would not violate the statute.

Plaintiffs also argued that the mask mandate violated the U.S. Constitution’s elections clause (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be pre-

scribed in each State by the Legislature thereof...” Art. I, §4, cl. 1) because it was not adopted by the Legislature and violated the First Amendment because the mandate “does not permit them to enter indoor public spaces without face coverings as a way to protest the requirement that they wear face coverings when they enter indoor public spaces.” Judge Schiltz found that the mask mandate did not regulate the “manner of holding elections” and that the mandate “did not implicate the First Amendment at all or, at most, has an incidental and trivial impact on First Amendment freedoms.” In January, Judge Schiltz dismissed plaintiffs’ claims. *Minn. Voters Alliance v. Walz*, 2021 U.S. Dist. LEXIS 4770 (D. Minn. 1/11/2021).

Voter intimidation

On October 6, 2020, Atlas Aegis, a private security company, posted a job listing “for former special forces personnel to ‘protect election polls, local businesses and residences from looting and destruction’ in Minnesota.” *Council on Am.-Islamic Relations-Minn. v. Atlas Aegis, LLC*, No. 20-CV-2195 (NEB/BRT), 2020 U.S. Dist. LEXIS 201288 (D. Minn. 10/29/2020). The Council on American-Islamic Relations of Minnesota and the League of Women Voters of Minnesota sued Atlas and its chairman, Anthony Caudle, in federal court seeking an injunction to prevent Atlas from placing armed agents at polling places. Plaintiffs argued that Atlas’s plan to hire and deploy armed ex-soldiers to polling sites constituted illegal voter intimidation under Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. §10307.

Before plaintiffs’ motion was heard, the Minnesota Attorney General entered

into an “Assurance of Discontinuance” with Atlas, in which Atlas agreed not to provide any protective services or intimidate voters during the upcoming general election. U.S. District Judge Nancy Brazel found that the assurance did not render plaintiffs’ request moot because the agreement applied only to Atlas (not its chairman) and “lack[ed] complete overlap with the requested relief.” The court then granted a preliminary injunction to protect plaintiffs’ interests under the Voting Rights Act, enjoining defendants from “deploying armed agents within 2,500 feet of Minnesota polling places,” threatening to deploy armed agents, or “otherwise intimidating, threatening, or coercing voters in connection with voting activities in Minnesota.”

POST-ELECTION CHALLENGES

Supreme Court petition

On November 24, three weeks after the election, and hours before the State Canvassing Board was to meet to certify Minnesota’s election results, certain Republican candidates, legislators, and voters filed a Petition to Correct Errors and Omissions Under Minnesota Statute §204B.44 in the Minnesota Supreme Court. *Kistner v. Simon*, No. A20-1486 (Minn. 2020). The 56-page petition focused on (1) the consent decree that waived the witness requirement and (2) on alleged irregularities in counties’ postelection reviews (PER) required by Minn. Stat. §206.89 (i.e., a manual count of ballots in a small number of precincts to verify the Election Day vote totals). The petition also referenced newsworthy claims made in post-election challenges in other states: “In the past two weeks,

the entire world has been following the news about the alleged tampering with Dominion voting machines. Minnesota has many areas that use these machines. There are many examples of similar vote count anomalies in Minnesota as well as issues with systems being down or experiencing unexplained 'glitches' during the night allowing for alteration of vote counts." The petition requested that the Supreme Court enjoin the State Canvassing Board from certifying the November 3 election, issue an injunction to "ensure that every county has completed a PER in full compliance with MN Stat. §206.89," and order the county canvassing boards "to complete a full canvass [recount] of all the elections." Petitioners requested that the "statewide recount... be conducted using Minnesota election law," presumably disallowing mail ballots received without witness verification. Alternatively, petitioners sought "a new statewide election."

The Supreme Court dismissed the petition on December 4. The Court concluded that petitioners' complaints about suspension of the witness requirement were barred by laches. The Court noted that "suspension of the witness requirement was publicly announced in Minnesota well before voting began on September 18, 2020." "[P]etitioners had a duty to act well before November 3, 2020, to assert claims that challenged that procedure; asserting these claims 2 months after voting started, 3 weeks after voting ended, and less than 24 hours before the State Canvassing Board met to certify the election results is unreasonable. We must also consider the impact of petitioners' requested relief on election officials, candidates, and voters who participated in the 2020 general election knowing that the witness requirement was suspended." The Court also dismissed complaints about counties' post-election reviews because petitioners did not serve the petition "on the election official[s] charged with a wrongful act"—county auditors or other local officials.

District court contests

Republican candidates and voters filed election contests in Ramsey, Dakota, Clay, and St. Louis Counties under Minnesota Statute §209.12 against successful DFL candidates for United States Senate, for Second, Third, Fourth, and Fifth District Congress, and for 14 Minnesota legislative seats. A Chapter 209 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." Minn. Stat. §209.02. "When a contest relates to the office of senator or a member of the house of representatives of the United States, the only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election...." Minn. Stat. §209.12.

The contestants' arguments were similar to those made in the Supreme Court petition in *Kistner, supra*; they focused on the waiver of the witness requirement for absentee ballots and alleged irregularities in counties' post-election reviews. The contests also included allegations about the delivery of a "new 520-pound Dominion voting machine" to Dakota County after the election, an alleged "ballot harvesting scandal" in the Fifth Congressional District, and delivery of "a stack of ballots... in a large white purse by some employee of the City of Hastings."

In orders issued in Clay County (Judge Timothy Churchwell), in Dakota County (Judge Timothy McManus), in Ramsey County (Judge Leonardo Castro), in St. Louis County (Judge Eric Hylden), and by a three-judge panel for the U.S. Senate contest (as required by Minn. Stat. §209.045 for statewide races), the courts dismissed each of the contests. See *Hahn v. Simon*, No. 14-CV-20-433 (Clay Cnty. 12/14/2020); *Kistner v. Simon*, No. 19AV-CV-20-2183 (Dakota Cnty. 12/15/2020); *Jensen et al. v. Simon et al.*, No. 62-CV-20-5599 (Ramsey Cnty. 12/18/2020); *Bergstrom v. Nilsen, et al.*, No. 69DU-CV-20-2162 (St. Louis Cnty. 1/5/2021); *Quist et al. v. Steve Simon & Tina Smith*, No. 62-CV-20-5998 (Ramsey Cnty. 12/29/2020). In contests in which contestants complained about the consent decree's suspension of the witness requirement for absentee ballots, the courts relied on the Minnesota Supreme Court's finding that laches barred that claim. The courts also found that the contests were procedurally deficient, including that the contests were not timely filed and were not adequately served on the contestants.

The courts also found that the contestants had not adequately pleaded how any alleged irregularities in voting or counting votes, or in conducting post-election reviews, changed "who received the largest number of votes legally cast." For example, Judge Castro in Ramsey County concluded that the contests over congressional elections were facially inadequate because they alleged errors of a "relatively small number of ballots, but do not allege that the identified errors would be enough to reverse Contestee Craig's almost 10,000-vote victory, Con-

testee Phillips's more than 50,000-vote victory, Contestee McCollum's more than 133,000-vote victory, and Contestee Omar's more than 153,000-vote victory." Judge Castro further noted that the contestants conceded that their claims were "not necessarily about particularly who won," but were more about the post-election process, which was fatal to their Chapter 209 claims. In the contest over the U.S. Senate race the panel found that, while the contestants noted a number of irregularities, they "failed to allege that Senator Smith did not receive the highest number of votes legally cast because of these claimed irregularities."

CONCLUSION

In 2020, the covid-19 pandemic affected many aspects of campaigns and elections, and Minnesota political parties, voter organizations, voters, and election officials litigated many voting and election issues in the Minnesota courts. In several of the cases, the courts upheld application of Minnesota statutes. The courts declined to apply other provisions—notably, the three-voter limit on assisting voters in marking ballots and postponement of an election for U.S representative when a vacancy in nomination occurs close to Election Day.

Some cases highlighted issues for consideration by the Legislature. Other cases will be seen as a relic of this difficult year. While a pandemic may not plague future elections, the increasing partisan divide may assure that Minnesota courts will be an important and constant fixture in managing future elections in Minnesota. ▲

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