

**STATE OF MINNESOTA
IN SUPREME COURT**

No. A22-1081

Bill Kieffer and Erik van Mechelen,

Petitioners,

vs.

The Governing Body of the Municipality
Rosemount, MN,

Respondents.

**RESPONDENTS' MEMORANDUM
OF LAW IN RESPONSE TO
PETITIONERS' PETITION TO
CORRECT ERRORS AND
OMISSIONS**

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INTRODUCTION

Under the guise of voter protection and election integrity, Petitioners Bill Kieffer and Erik van Mechelen bring a claim against the governing body of the City of Rosemount (the “City”), i.e, the Mayor and members of the City Council (“Respondents”), alleging a technical violation of election law for not disseminating information under Minnesota Statutes Section 206.58. This Section provides that a municipality may provide for the use of an electronic voting system at elections and when doing so must disseminate information to the public about the new voting system at least 60-days prior to an election and provide voters with an instruction and demonstration of the voting system. This occurred in 2016, when the Dominion voting machines at issue were first used by the City, through an agreement with Dakota County. The “new” voting system about which the Petitioners claim is a software update. This updated software has *no impact whatsoever* on the voter experience – Rosemount voters will complete and submit their paper ballot in the same manner as they have in every election since 2016. Simply put, Petitioners’ claims have no factual basis. Moreover, Petitioners submitted this challenge far too late, filing it *after early voting started* and the voting machines are already in use for the August 9, 2022 primary election.

For the reasons explained in detail below, Respondents respectfully request that the Supreme Court dismiss the Petition because it is without factual or legal merit and Petitioners’ delay in bringing their claim should be barred by the doctrine of laches.

STATEMENT OF LEGAL ISSUES

1. Are Petitioners' claims barred by the doctrine of laches because they are egregiously delayed and the relief sought would cause prejudice to the City and its residents?
2. Should Petitioners' claims be dismissed for insufficient service of process?
3. Do Petitioners' claims fail to satisfy both the technical requirements and substantive scope of Minn. Stat. § 204B.44 for a ballot challenge?
4. Do Petitioners' claims fail on the merits because there is no factual basis upon which to assert that the software update is a "new voting system" that would trigger the requirements of Minn. Stat. § 206.58?
5. Do Petitioners' fail to state a claim for injunctive relief?

STATEMENT OF FACTS

Respondents' Statement of Facts is supported by the Declaration of Erin Fasbender ("Fasbender Decl.") and attached exhibits A through V, filed with this response. Ms. Fasbender is currently employed as Rosemount City Clerk. *Id.* ¶ 1. In this capacity, she administers and supervise elections at the City. *Id.* She has held this position since 2018. *Id.* Additionally, from 2016 to 2018, she was employed as a Public Works Office Specialist with the City and also assisted with the administration of elections in that role. *Id.*

The City's Voting System

Rosemount is a City located in Dakota County of approximately 25,000 residents as of the 2020 census. *Id.* ¶ 2. As part of the City's role administering elections, the City

entered an intergovernmental agreement with Dakota County (the “County”) concerning election hardware, software, and related services. *Id.* ¶ 2, Exhibit A. This agreement is embodied in the “Cost Share Agreement Between City of Rosemount and County of Dakota for Election Hardware, Software and Related Services” dated November 6, 2013 (the “Election Agreement”).

The purpose of the Election Agreement is to authorize the County to purchase election hardware, software and related services for both the City and County. *Id.* ¶ 3; Ex. A at 1. Specifically, the Election Agreement provides that the County would prepare a Request for Proposals (RFP) for an electronic voting system meeting the qualifications of Minn. Stat. § 206.57, to be used by all local government units in Dakota County, including the City. *Id.* It further provides that the RFP would include vendor-supplied technical maintenance and upgrades of the election hardware and software. *Id.* The Election Agreement provides that the County owns the election hardware and software purchased, and provides all necessary repairs, maintenance, and upgrades to the election hardware and software between election seasons. *Id.* at 2. The County also obtains all licenses and rights necessary for the City to use the election hardware and software. *Id.* The City is responsible for safe handling and storage of the election hardware and software and to pay 50% of the initial cost of the hardware and software, as well as on ongoing pro rata share of the annual maintenance. *Id.*

In 2015, pursuant to the Election Agreement and following a competitive solicitation process, Dakota County purchased a voting system from Dominion Voting Systems. *Id.* ¶ 4; *see also* Ex. K at 2. In this system, voters complete paper ballots and

feed them into a tabulation machine. Fasbender Decl. ¶ 4. The voting machine scans the ballots to read the voter's choice, counts the votes, and calculates and compiles the results. *Id.* On December 31, 2015, the County invoiced the City for its portion of the cost of the voting system in the amount of \$36,669.85. *Id.* ¶ 4; Ex. A at 4-7. The City paid this invoice on approximately January 14, 2016. *Id.* at 5. Since this initial purchase, the County has annually invoiced the City for its share of the voting system's software licensing and maintenance. *See, e.g.,* Ex. A at 7-11.

The City has continued to use the same voting machines since the 2016 election. *Id.* ¶ 5. The machines in use in the 2022 primary election are the same machines purchased in 2015. *Id.* The County owns and manages the software and firmware licenses to operate the system, which includes the applicable upgrades, enhancements, and revisions. *Id.* The maintenance and software updates do not require any significant action on the part of the City and are undertaken by the County and its vendor. *Id.* There have been several such upgrades to the software since the system was purchased, but the machines themselves—and the voter experience in using them to cast a ballot—remain the same. *Id.*

On May 4, 2022, the County emailed the City and other municipalities to inform them that the County Elections Department would be making arrangements to visit, conduct preventative maintenance on the machines, and install a certified software update and modems to the voting system. *Id.* ¶ 6 Ex. B. This visit incorporated annual preventative maintenance, cleaning, acceptance and diagnostic testing, any necessary repairs. *Id.* With respect to the software update, *Id.* ¶ Dakota County Elections Director

Andy Lokken explained that “other than transmitting election results by modem, functionality will remain the same for election judges.” *Id.* He noted that election staff may also notice a few differences such as an improved boot-up processes and improved ballot scanning speeds. *Id.*

As a part of this upgrade, the County purchased cellular modems for the precinct ballot counters to be used in the 2022 elections. *Id.* ¶ 7. Prior to this, when the polls would close, election judges would physically remove memory cards with the results contained upon them and deliver them to Ms. Fasbender as City Clerk. *Id.* (Each machine has two memory cards, one primary card and one backup card. *Id.*) Ms. Fasbender would then take each of the memory cards and place it into a device connected to a secure laptop provided by the County and use this to securely upload the results to the County. *Id.* The County would then transmit the results to the State. *Id.* Ms. Fasbender would also hand deliver the memory cards to the County. *Id.* The City also maintains the paper ballots for 22 months following the election as required by state statute. *Id.*

The only change to this system for the 2022 election is the use of the wireless modem to report the results instead of the secure laptop. *Id.* ¶ 8. Now, when the polls close, elections staff will plug a wireless modem into each of the tabulation machines, the modem will connect to a server and transmit the results directly to the County, rather than necessitating removal of the memory card and use of a separate laptop. *Id.* As a backup, the memory cards will still be removed and given to Ms. Fasbender, who will deliver them to the County. *Id.* The City will continue to maintain the paper ballots for 22 months following the election. *Id.*

The software updates provided through the County and its vendor and the provision of the wireless modem for reporting election result has not resulted in any change whatsoever to the voter experience, the way in which the voter completes their ballot, or the way in which the voter places their ballot in the voting machine. *Id.* ¶ 9. The machines and the voting process remain identical. *Id.*

Mr. Kieffer's Participation

William Kieffer is a registered voter in the City of Rosemount and has been active in City the political process this election cycle, beginning in approximately April of 2022. *Id.* ¶ 10. Ms. Fasbender does not recall encountering Mr. Kieffer prior to this time. *Id.* To Ms. Fasbender's knowledge, and based upon her review of City records, Erik van Mechelen does not reside in the City of Rosemount and is not a registered voter in the City. *Id.* ¶ 11.

Mr. Kieffer initially contacted the City Clerk's office with various election related questions on April 8, 2022. *Id.* ¶ 12, Exhibit C. In these communications, Mr. Kieffer complains about what he perceived as potential violations of state election law concerning absentee ballot boards, their composition, the appointment of election judges to the ballot board, and party balance. *Id.* Around this time, Mr. Kieffer was registered to become an election judge. *Id.*

On May 9, 2022, Ms. Fasbender reached out to persons who had expressed interest in serving as an election judge, including Mr. Kieffer and his spouse Kymi Kieffer. *Id.* ¶ 13, Exhibit D. Mr. Kieffer inquired about observing the election machine testing, serving on the absentee ballot board, and setting up a meeting with me to go over his questions

about the upcoming elections. *Id.* ¶ 14. Ms. Fasbender responded regarding all topics, explaining that the Public Accuracy Test of the voting machines would be held 14 days prior to the election, that the required notice would be published at least two days prior to the test, and that it would be open to the public. *Id.* She also offered to meet with the Kieffers at a mutually agreeable time, and they eventually agreed to meet on May 26th at 2:00pm. *Id.* In advance of this meeting, the Kieffers sent a list of questions they wished to discuss. *Id.*

Ms. Fasbender and the Kieffers met on May 26, 2022 as planned and discussed the Kieffers' questions. *Id.* ¶ 15. Ms. Fasbender also followed up in email with written answers to the Kieffers' questions. See *Id.* ¶ 15, Exhibit E. Question number 6 asked about how polling location results are transmitted to the City. *Id.* Ms. Fasbender explained that "Election Judges hand deliver them to city hall following [the] poll being closed. However, this year there is a new modem being supplied per tabulator which will transport results to [the] county – yet to learn more about this." *Id.* at 4.

The City Council appointed election judges for the 2022 elections at the public Council meeting held on June 21, 2022. *Id.* ¶ 16; *see also* Exhibit F (staff report and recommendation on election judges), Exhibit G (Resolution 2022-71 Appointing Election Judges for 2022 Elections), Exhibit H (staff report and recommendation on absentee ballot board), Exhibit I (Resolution 2022-72 Establishing an Absentee Ballot Board).

Mr. Kieffer and seven other individuals were sworn and took the oath of an election judge and signed the Absentee Ballot Board Official Certification on June 28, 2022. *Id.* ¶ 17, Exhibit J.

Around this time, the County provided Ms. Fassbender a copy of a letter from Dakota County Attorney Kathryn M. Keena to Ms. Heidi Flodin (one of the affiants supporting Petitioners in this case), dated June 29, 2022, related to Ms. Flodin’s election related complaints to the County. *Id.* ¶ 18, Exhibit K. This letter refers to correspondence from Ms. Flodin to the County dated June 22, 2022, in which Ms. Flodin contends that the software update to the Dominion Voting Systems Democracy Suite 5.5C is a “new electronic voting system” requiring municipalities to disseminate information to the public pursuant to Minn. Stat. § 206.58, subd. 1. *Id.* In response, County Attorney Keena explains that the County has not implemented a new electronic voting system as defined in Minn. Stat. § 206.56, subd. 8. *Id.* ¶ 19, Ex. K. As she describes in the letter, the fact that the County has replaced two servers and that Dominion sought certification of software version 5.5C does not make it a “new” system. *Id.* Ms. Keena notes that of all of the other hardware belonging to the County (some 443 pieces of hardware) remain the same – including the equipment used by voters. *Id.*

On June 27, 2022, Ms. Fassbender contacted those persons who had been appointed election judges by the City to inquire as to their availability for service, the required training, and to notify them of the Public Accuracy Test scheduled to be held on July 26, 2022, at 12:30 p.m. *Id.* ¶ 20. Mr. Kieffer received this email and responded on July 4, 2022, stating that he would be available to attend the Public Accuracy Testing. *Id.* ¶ 20, Exhibit L.

On July 14, 2022, City staff received an email from Ms. Heidi Flodin inquiring about which she characterized as the “new” electronic voting system, public notice, and demonstration. *Id.* ¶ 22, Exhibit N.

The City provided public notice of the July 26, 2022, Public Accuracy Test by posting the notice at City Hall and publishing a notice in the newspaper. *Id.* ¶ 23, Exhibit O (notice posted at City Hall, July 19, 2022), Exhibit P (notice published in the Dakota County Tribune, July 22, 2022).

The Public Accuracy Test was held at City Hall as planned on July 26, 2022, at 12:30 p.m. *Id.* ¶ 24. Both Mr. and Mrs. Kieffer attended the test. *Id.* Mr. Kieffer participated in the test by sliding ballots into the machine and verifying the accuracy of the results against the “test deck.” *Id.* at the conclusion of the test, Mr. Kieffer signed Certificate of Preliminary and Public Accuracy Tests *Id.* ¶ 24, Exhibit Q. In signing, Mr. Kieffer voluntarily certified that the test counts were errorless and that the results tape agreed with the predetermined results of the test deck. *Id.* Mr. Kieffer also signed the results tape printed out by the machine, and the accompanying certification. *Id.* ¶ 24, Exhibit R.

Dakota County Elections staff also provided instructions that were utilized in the election judge training provided to all City election judges and which were followed when the City conducted the Public Accuracy Testing. Fasbender Decl. ¶ 21, Exhibit M; ¶ 25 Exhibit S (Modem Instructions).

Between June 28 and August 3, 2022, Mr. Kieffer completed several trainings and attended numerous meetings related to his duties as an election judge and absentee ballot

board member. Fasbender Decl. ¶¶ 26-27, Exhibit T (sign-in sheets), Exhibit U (training records).

Early voting has already begun, and absentee ballots have been received. *Id.* ¶ 28, Exhibit V. As of August 4, 2022, at 12:49 p.m., 65 absentee ballots have been returned to the City. *Id.* Early voting – which allows voters to deposit their ballot into the voting machine just as they would on Election Day – began seven days before the primary, on August 2, 2022. *Id.* Based on past records, Ms. Fasbender estimates that 20 or more people will vote via early voting each day on August 2-5, and that the City will have a large number of residents come to vote early on Saturday, August 6, 2022, when the early voting will be open from 10 am to 3 pm. *Id.* Early voting will also be available on Monday, August 8, 2022 from 8 am until 5 pm. *Id.* Early voting in person utilizes the same Dominion voting machines that will be in use for the primaries on August 9 and on Election Day. *Id.* In terms of the voter experience, the machines and the voting process in 2022 remain identical to 2016. *Id.* ¶¶ 5, 8-9.

ARGUMENT

I. Petitioners’ Claims Are Barred by Laches.

The equitable doctrine of laches applies when:

“[T]here 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. The purpose of the doctrine is 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.”

Harr v. City of Edina, 541 N.W.2d 603, 606 (Minn. App. 1996) (citing *Fetsch v. Holm*, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952); *Aronovitch v. Levy*, 238 Minn. 237,

242, 56 N.W.2d 570, 574 (1953)) (internal quotations omitted). Although a claim may be barred by laches even absent a showing of prejudice, “it is a circumstance of importance in determining whether a plaintiff’s delay was reasonable.” *Id.* (citing *Aronovitch*, 56 N.W.2d at 574).

In the context of Minnesota election law, this Court has “repeatedly stressed the need for diligence and expeditious action by parties bringing ballot” or other election-related challenges. *Clark v. Reddick*, 791 N.W.2d 292, 295 (Minn. 2010) (citations omitted). “The very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by courts facing considerable time constraints imposed by the [election] process.” *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992) (citing *Mattson v. McKenna*, 301 Minn. 103, 222 N.W.2d 273 (1974)). In *Reddick*, the Court held that a delay of more than two months between public filing of the affidavit of candidacy being challenged and the petition was unreasonable because (1) the candidacy had been a matter of public record for months, and (2) there were only 15 days left before the ballots would be made available to absentee voters. *Reddick*, 791 N.W.2d at 292.

Similarly, in *Clark v. Pawlenty*, 755 N.W.2d 293 (Minn. 2008), this Court found that a claim to strike Justice Gildea’s name, or alternatively the candidate’s “incumbent” designation, from the official state primary ballot was barred by laches because the petitioners’ claim was unreasonably delayed. In that case, the claim was filed approximately six weeks following the candidate’s filing. *Id.* at 298. The Court noted that by the time the petition was filed and properly served, ballots had already been printed,

absentee ballots sent to voters, some absentee votes already cast, and voting machines programmed, tested, and certified. *Id.* at 301. As such, the Court found that granting the relief requested would be prejudicial to “respondents, other election officials, other candidates, and the Minnesota electorate in general.” *Id.* For instance, there was not enough time to reprint ballots, reprogram and retest voting machines, and it would impact numerous other races on the ballot. *Id.* at 302.

Like the petitioners in *Reddick* and *Pawlenty*, Petitioners have unreasonably delayed filing their election challenge. The Petition fails to state the date upon which they discovered the alleged violation. Based on the facts alleged, however, it is reasonable to assume they knew or should have known about the lack of the 60-day “dissemination of information” about which they complain far earlier than August 3, 2022, the date upon which their petition was filed.

For instance, Petitioner Kieffer has been communicating with City and County representatives regarding the election statutes and election processes since at least April 2022. He has also participated in the municipal election administration process directly – seeking and obtaining appointment by the City Council as both an election judge and as a member of the absentee ballot board. In addition, Kieffer observed and participated in the Public Accuracy Test that the City conducted as required by law and he personally signed off on the results. Petitioner van Mechelen is a candidate for Secretary of State, and by virtue of the position he seeks to hold, which oversees the administration of voting across the state of Minnesota, one may assume he has some working knowledge of state election laws. Petitioners also rely upon the statement of Affiant Heidi Flodin. Ms. Flodin

received a letter from Dakota County Attorney Kathryn Keena dated June 29, 2022 addressing her question whether municipalities within Dakota County were utilizing a new electronic voting system. County Attorney Keena informed her that the software update was not considered a new system. *See* Fasbender Decl. Ex. K. To the extent that Ms. Flodin and the Petitioners with whom she is associated still disagreed with the Dakota County Attorney's Office, knowing that the elections were rapidly approaching, they could have filed their claim at that time.

The crux of Petitioners' claim is that there should have been a dissemination of information about the "new" system provided at least 60 days prior to the date of the primary, August 9, 2022. Pet. at 29-30. Given their ongoing involvement, attention, and interest in the state elections process and the various inquiries made, at some point on or shortly after June 10, 2022, they could have determined at that time whether information had been provided to the public, and promptly filed their claims. The evidence demonstrates that Petitioners' affiant Ms. Flodin was aware of and had communicated this same complaint to Dakota County on June 22, 2022. *See* Fasbender Decl. ¶ 18, Ex. K. Petitioners did not timely bring their claim and the claim should be barred by the doctrine of laches.

Moreover, Petitioners' egregious delay prejudices Respondents and the general public. The City and its residents are faced with the very same prejudice that necessitated dismissal of the petition in the *Pawlenty* case. Here, not only have ballots already been printed, absentee ballots sent to voters, some absentee votes already cast, and voting

machines programmed, tested, and certified, but early voting is in process and votes have already been cast. Fasbender Decl. ¶ 28. Petitioners' claims should be barred by laches.

II. Petitioners Have Failed to Effectuate Service of Process on All Respondents.

Petitioners have not effectuated service of process on Mayor Bill Droste or Councilmember Paul Essler. No affidavit of service for service upon these individuals has been filed with the Court.¹ Counsel for Petitioners filed an affidavit on August 4, 2022, suggesting that because the undersigned counsel has entered an appearance on behalf of all the Rosemount Respondents, Mr. Droste and Mr. Essler “have received the Petition and have accepted counsel in this matter.” Smith Aff. at p. 3. Such an assumption is unavailing to Petitioners' efforts to satisfy this Court's August 3, 2022 Order requiring them to serve all parties by noon on August 4.

It is well settled that “[s]ervice of process in a manner not authorized by [Minn. R. Civ. P. 4.03] is ineffective service.” *Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 311 (Minn. 1997) (citation omitted). Indeed, even actual notice of the lawsuit or participation in the case “will not subject defendants to personal jurisdiction without substantial compliance with Rule 4.03.” *Id.* (citation omitted). Waiver of a Rule 12.02(d) defense for insufficient service of process does not occur unless omitted from the responding party's answer or not addressed in a motion to dismiss. Minn. R. Civ. P.

¹ Additionally, the Affidavits of Personal Service upon Tamara Block and Heidi Freske both appear technically deficient on their face. The portion of the form that is intended to confirm that the process server “personally hand[ed] a true and correct copy of the document(s) to _____.” has not been completed on either affidavit. *See* Proof of Service filed August 3, 2022.

12.08(a). Respondents Droste and Essler have not waived any such argument and assert it by way of this responsive pleading. As such, these Respondents should be dismissed.

III. Petitioners' Claim Pursuant to Minnesota Statutes Section 204B.44 Is Improper.

The Court should deny Petitioners' Section 204B.44(a)(4) claim for a "wrongful act, omission, or error of any . . . other individual charged with any duty concerning an election" because (1) the Petition fails to demonstrate compliance with the technical requirements of the statute and (2) by its plain language § 204B.44 should not apply to an alleged violation of Minn. Stat. § 206.58.

A. The Petition Fails to Adhere to the Plain Requirements of the Statute.

When bringing a petition pursuant to Minn. Stat. § 204B.44, the statute requires that,

The petitioner shall serve a copy of the petition on the officer, board or individual charged with the error, omission, or wrongful act, *on all candidates for the office in the case of an election for state, federal, county, municipal, or school district office*, and on any other party as required by the court.

Minn. Stat. § 204B.44(b) (emphasis added). *See, e.g., Moulton v. Simon*, 883 N.W.2d 819, 822 (Minn. 2016) (noting that the Court ordered petitioner to serve his petition and the scheduling order on all other candidates for the judicial seat implicated by petitioner's claim that he be added to the primary election ballot).

Petitioners' claim necessarily implicates the entire contents of a ballot to be cast via the electronic voting system they allege is "new." As such, all candidates whose names will be on the ballots the Petitioners now challenge are entitled to proper notice

under the statute. Indeed, Petitioners claims are premised on the notion that a “disregard of election law would jeopardize the integrity of election results,” and “perpetuate and further the mistrust of voters in the election system.” Petition p. 7. Yet Petitioners neglect to take into account those who are also seeking election to public office and who may be aggrieved by a last-second change in the election process. Petitioners demand strict compliance with election statutes by others while failing to do the same. The Court should likewise dismiss the Petition for failure to comply with Minn. Stat. § 204B.44(b)’s notice requirements.

B. Section 204B.44 Does Not Apply to a Challenge Based on Minnesota Statutes Section 206.58.

Viewed as a whole, Minn. Stat. § 204B.44 is intended to remedy ballot errors, not serve as an enforcement tool for the entire body of state election law. *Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (courts construe “a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.”).

First, section 204B.44 is codified within the portion of Chapter 204B pertaining to “Ballots.” and is titled “Errors and Omissions; Remedy.”² It provides that an individual may file a petition as outlined in subpart (b) for the “correction of any of the following errors, omissions, or wrongful acts.” Minn. Stat. § 204B.44(a). It then identifies four

² Although headings are not part of the statute, they are relevant to legislative intent “where they were present in the bill during the legislative process.” *State v. Cruz Montanez*, 926 N.W.2d 434, 438 (Minn. App. 2019) (citing *Minn. Express, Inc. v. Travelers Ins. Co.*, 333 N.W.2d 871, 873 (Minn. 1983)).

types of “errors, omissions, or wrongful acts,” the first three which are very specific and directly related to the form and contents of a ballot, such as the description of any candidate or question, an error in the preparation or printing of an official ballot, or the failure of a political party to execute or file a certificate of nomination for a candidate. *Id.* § 204B.44(a)(1)-(3). Subpart (a)(4) then contains the “catch-all” provision upon which Petitioners rely in bringing their claim: “any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.” This provision was first enacted in 1981, *see Laws 1981, c. 29, art. 4, § 44*, and appears to have remained the same since that time.

Additionally, the preceding provisions contained within the Ballots section address how ballots must be prepared, Minn. Stat. § 204B.35; the form of the ballot, *id.* § 204B.36; contents of the back of the ballot, *id.* § 204B.37; how to format candidate names that may be similar to one another, *id.* § 204B.38; how the official in charge is to prepare substitute ballots in the event official ballots are stolen or destroyed, *id.* § 204B.39; and retention requirements for ballots and election records, *id.* § 204B.40.

In this context, it appears evident that “[t]he ‘principal purpose’ of this statutory remedy ‘is to provide a mechanism for correcting errors alleged to have occurred before the election, such as ... in preparing or printing the official ballot.’” *Begin v. Ritchie*, 836 N.W.2d 545, 548 (Minn. 2013) (quoting *Coleman v. Ritchie*, 762 N.W.2d 218, 231 n. 13 (Minn. 2009)).

In *Begin*, this Court explained that the scope of § 204B.44 is not intended to provide a remedy for every conceivable, election-related challenge, stating:

[S]ection 204B.44 “is not a broad vehicle through which any conduct with any relationship to an election, however tangential, can be challenged.” While paragraph (d) of section 204B.44 refers broadly to “any wrongful act, omission, or error” by the Secretary of State, the final clause of the paragraph limits our jurisdiction to claims relating to “any duty concerning an election.” Minn. Stat. § 204B.44(d). The plain language of this provision does not embrace claims based on conduct that may only generally implicate elections. In short, our precedent recognizes that section 204B.44 “provides a remedial process *only for correction of the ballot and directly related election procedures.*”

Begin, 836 N.W.2d at 548 (Minn. 2013) (emphasis added) (citing *Carlson v. Ritchie*, 830 N.W.2d 887, 894 (Minn. 2013); *Minn. Majority v. Ritchie*, No. A09–0950, Order at 5 (Minn. filed July 22, 2009) (dismissing petition challenging Secretary’s failure to maintain and distribute statewide voter registration lists, noting “[w]e do not understand section 204B.44(d) to authorize claims . . . for any and all disputes concerning official conduct that relates to or may affect elections in general.”); *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn.2008); *Schroeder v. Johnson*, 252 N.W.2d 851, 852 (1976) (noting that the legislature intended to protect potential candidates from the errors of those charged with properly completing the procedural and mechanical duties attendant to the election process)). The Court should decline to expand § 204B.44(b)’s scope to include a challenge under Minn. Stat. § 206.58.

Examining the plain language and intent of § 206.58 further underscores this point. The crux of Petitioners’ complaint is that the City Council failed to “disseminate information to the public about the use of a new voting system at least 60 days prior to

the election and shall provide for instruction of voters with a demonstration voting system in a public place for the six weeks immediately prior to the first election at which the new voting system will be used.” Minn. Stat. § 206.58. The City Councilmembers dispute that the electronic voting system to be used in this year’s primary and general elections is “new.” *See* Fasbender Decl.

Petitioners appear to concede that the only difference is related to a version of the software that operates the electronic voting machine. A software update is irrelevant to the purpose of § 206.58, which is intended to familiarize voters with the voting process—how to complete and submit their ballot—and to avoid voter confusion when they go to the polls. *See* Maeda Decl.; *see also* Fasbender Decl. and Ex. K (letter from County Attorney Keena stating that the hardware, machines, and voter experience remains the same). If the intent were to require notice of every technical update, such as a software update that does not impact the voter experience in any way whatsoever, that would be an absurd result. Indeed, § 206.58 was enacted before electronic voting systems were commonly used. *See 1984 Ch. 447-H.F.No. 1338*. Therefore, the Court should reject Petitioners’ challenge under § 204B.44.

IV. Petitioners’ Claims Fail on the Merits.

The voting system is not new, and Petitioners provide no credible evidence to the contrary. As such, Petitioners fail to state a meritorious claim on the facts. As explained by Dakota County Attorney, City Clerk, and the Director of Elections for the State of Minnesota, the software upgrades on the Dominion equipment has no effect on the machines, ballots, or the voter’s experience. *See* Maeda Decl.; Fasbender Decl. and Ex.

K. Petitioners have submitted an unauthenticated email from an IT professional as the sole piece of evidence that it is “new.” *See* Petition p. 26. All the other documentation, including the official certification report, state that the software is a modification. *Id.* at 23. This court has previously assessed the extent to which software upgrades can constitute a “new” instrument in the context of alcohol breath detection (Intoxilyzer) devices. *Jasper v. Commissioner of Public Safety*, 642 N.W.2d 435 (Minn. 2002). There, the Court affirmed a finding that software upgrades which did not alter the fundamental method of analysis or include any material alteration to the original device, did not constitute a new device that would require the Commissioner’s approval. *Id.* at 438. So too here.³

V. Injunctive Relief Is Not Appropriate.

Even if Petitioners’ could overcome laches and the other defects identified above, and even assuming, *arguendo*, that their claims had any factual basis, Petitioners are not entitled to the injunction sought in their prayer for relief. *See* Petition p. 49. First, Petitioners have not fully articulated the action that they wish to enjoin the Respondent *councilmembers* from taking during the primary or on Election Day. Instead, it appears that Petitioners seek to enjoin the *City*, which has not been named a party here, from moving forward with use of the electronic voting system in place since 2015. Rather, they

³ It should be readily apparent based on the City Clerk’s responsiveness and the correspondence that exists between Kieffer or others with the City and County that information *is* readily available to Petitioners and the public regarding the voting machines and process. *See* Fasbender Decl. and attached exhibits.

appear to request that the Court compel the Respondents to take certain actions and direct certain things to occur.⁴

In addition, Petitioners do not even attempt to address the relevant factors that Minnesota courts consider when seeking a temporary injunction. Because Petitioners do not even argue that they satisfy the standards for an injunction, the Respondents will not address each *Dahlberg* factor,⁵ but note that, as described above, the harm to the City and the general public that would be suffered and the administrative burdens involved would be significant. Petitioners have not established a likelihood of success on the merits. As noted, the election process utilizing the electronic voting system has already begun, with early voting commencing in Rosemount on August 2, 2022. An injunction would harm the voting public and disrupt the election that is currently in progress.

⁴ While Petitioners do not bring a claim for writ of mandamus, if they had, “the district court has exclusive original jurisdiction in all cases of mandamus.” Minn. Stat. § 586.11.

⁵ The Minnesota standards for proving the right to an injunction are set forth in *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274–75, 137 N.W.2d 314, 321–22 (1965):

- (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;
- (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;
- (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief;
- (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal; and,
- (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

CONCLUSION

For these reasons, Respondents request that the Supreme Court dismiss the Petitioners claims.

Respectfully submitted,

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