STATE OF MINNESOTA

IN SUPREME COURT

File No. A22-1081

Bill Kieffer, et al.,

Petitioners,

vs.

The Governing Body of the Municipality Rosemount, MN,

Respondents.

SECRETARY'S RESPONSE TO MINN. STAT. § 204B.44 PETITION

Dominion Voting Systems ("Dominion") is a technology firm that contracts with the City of Rosemount and other municipalities and counties in Minnesota to provide hardware and software products that permit the jurisdictions to conduct elections. In 2021, Dominion published a new version of Dominion Democracy Suite, the software operating system that powers Rosemount's Dominion vote tabulation equipment. As required by Minnesota law, the Secretary of State examined the new version of the software. Because the software met state standards for accurately recording and tallying votes cast on optical-scan ballots, the Secretary certified it for use in Minnesota. In 2022, in turn, Rosemount conducted the public accuracy test of the Dominion system that is required by state law and concluded that the system, complete with its new software, accurately recorded and tallied votes.

Petitioners Bill Kieffer and Erik Van Mechelen contend that Respondent Rosemount City Council was required to notify voters of a "new voting system" and give

instructions and demonstrations on how to use it. They assert this despite the fact that Rosemount's voting system consists of the same Dominion optical-scan equipment that Rosemount voters have used for years, only with an updated software operating system. Petitioners filed their present petition nearly eight weeks after they claim Respondent was required to provide this notice, more than a month after Rosemount residents had begun early voting in Minnesota's 2022 primary election, and only one week before voting in the primary election ends.[1] They ask the Court to order Rosemount to conduct the primary without the Dominion equipment it has used for years.

The Court should deny the petition for two reasons. First, it is without merit because it is founded on basic misconceptions regarding the purpose and function of the voter-instruction process required by Minn. Stat. § 206.58, subd. 1. The Dominion system Rosemount intends to use in Tuesday's primary election is not a "new voting system," for the purposes of the voter-instruction statute. The software upgrade changes nothing about the voting process, including the steps an individual Rosemount voter must take to cast a ballot. In short, because nothing about the voter's experience has changed, they are not in

[1] The Court ordered Petitioners to serve the Secretary with the petition, its exhibits, and the Court's August 3 order no later than 12:00 p.m. on Thursday, August 4. Though the Attorney General's Office maintains a web page and e-mail address for the specific purpose of accepting service of process on state officials, *see* https://www.ag.state.mn.us/Office/OpposingCounsel.asp, Petitioners' counsel called the Secretary's staff and then his undersigned counsel to arrange to serve the petition and accompanying documents. Petitioners' counsel called the Secretary's counsel at 12:20 p.m. on August 4. After the undersigned agreed to accept service via e-mail, Petitioners' counsel sent the petition, exhibits, and August 3 order at 12:29 p.m. This service was untimely under the terms of the Court's order.

need of instruction, the system at issue is therefore not "new," and the law does not require the processes Petitioners demand.

Second, the petition is invalid on the basis of laches. Petitioners unaccountably waited close to two months after the deadline that they claim Respondent missed and only filed the petition after weeks of early voting had already taken place, just seven days before Rosemount voters will go to the polls on election day. Petitioners cannot justify imposing the prejudice that the eleventh-hour relief they request will visit on Respondent and election officials across the state after having sat on their claims for months. The petition should therefore be dismissed.

FACTS

I. ACCURACY TESTING AND ROSEMOUNT'S DOMINION SYSTEM

Each county in Minnesota contracts with a private vendor to provide crucial services pertaining to elections. (Maeda Decl. ¶ 3.) Dominion is one such vendor; it prints ballots and manufactures, markets, and maintains computer hardware and software products that permit local governments to conduct elections. (*Id*. ¶ 4.) Dominion is the current contracted ballot vendor for six counties in Minnesota: Aitkin, Crow Wing, Dakota, Mahnomen, Scott, and Sherburne. (*Id*.)[2]

Minnesota election law requires multiple levels of testing to ensure that voting systems used in this state accurately and properly administer our elections. First, voting

[2] Meanwhile, Big Stone, Chisago, and Ramsey counties get their balloting services from Hart InterCivic Inc., and the remaining 78 counties in the state contract for such services with Election Systems & Software (ES&S). (Maeda Decl. ¶ 5.)

systems must be examined and approved by the Secretary before being used in Minnesota elections. Minn. Stat. § 206.57, subd. 1 (2020); *see also* Minn. R. 8220.0325-.0700 (2021) (governing Secretary's examination, initial certification, reexamination, and recertification of "electronic voting systems hardware [and] software"). The Secretary's review includes all system functions pertaining to ballot programming, electronic ballot marking, vote counting, and vote accumulation. *Id.* The Secretary examines and reports on the system's compliance with the state law and its "accuracy, durability, efficiency, and capacity to register the will of voters." *Id.* A ballot vendor like Dominion must submit each of its voting systems for the Secretary's examination both when the system is new and when "significant changes" are subsequently made to it. *Id.*

Second, every voting system used in the state is subjected to public accuracy testing by the local election jurisdiction (i.e., the municipality or county conducting elections) no more than 14 days before each election. Minn. Stat. § 206.83 (2020); Minn. R. 8220.1550 (2021). The testing, which any member of the public is permitted to attend and observe, ensures that the system "will correctly mark ballots using all methods supported by the system, including through assistive technology, and count the votes cast for all candidates and on all questions." Minn. Stat. § 206.83.

The Dominion hardware and software that Respondent is using to tabulate votes in the 2022 primary election have passed all accuracy tests required by law. As the petition concedes, the Secretary examined both Dominion's scanning hardware and the then-current versions of the Dominion Democracy Suite operating system in 2013, 2014, and 2015 and certified them for use in Minnesota elections pursuant to Minn. Stat. § 206.57,

subd. 1. (Pet. p. 20-22.) The scanning and tabulating hardware currently in use in Rosemount in the 2022 primary is the Dominion hardware the Secretary approved. (Maeda Decl. ¶ 8.)

In 2021, Dominion submitted version 5.5-C of its Democracy Suite software operating system for the Secretary's review under section 206.57. (Pet. 23.) The Secretary examined the new software version and approved it. (*Id.*; https://officialdocuments.sos.state.mn.us/Files/GetDocument/131989.) Petitioners allege, and the Secretary does not dispute, that Democracy Suite version 5.5-C is the operating system installed on the Dominion hardware currently in use in Rosemount in the 2022 primary. (Pet. 36-37.)

Upon information and belief, Rosemount conducted the public accuracy testing on its Dominion equipment, including the Democracy Suite version 5.5-C software powering it, on July 26—exactly 14 days before the August 9 primary election. (Maeda Decl. ¶ 9.)

II. VOTER INSTRUCTION ON NEW VOTING TECHNOLOGY

Since 1986, when Minnesota election jurisdictions were in the process of retiring punch-card and lever-based election machinery and replacing it with modern optical-scan ballot tabulators, Minnesota law has required jurisdictions acquiring such new election technology to provide notice and instruction to voters on its use. *See* 1986 Minn. Laws ch. 362, § 8, at 162 (amending Minn. Stat. § 206.58, subd. 1); Maeda Decl. ¶ 6. A municipality adopting new election technology must provide public notice of the adoption at least 60 days prior to the election and must "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, subd. 1 (2020).

The voter-instruction process required by section 206.58 does not involve any inspection of computer code or other determination of an election system's accuracy, durability, or efficiency. (Maeda Decl. ¶ 7.) Instead, its function is to allow voters to educate themselves about how they will go about submitting their ballots going forward—that is, about a balloting process that is different than the one by which they have voted in previous cycles. (*Id.*)

Materials included in the petition state, and the Secretary does not dispute, that Dakota County and the City of Rosemount carried out the voter-instruction process required by section 206.58 in 2015, when the Dominion equipment was new to county and city voters. (Jul. 20, 2022, e-mail of Erin Fasbender, Pet. 37.) The subsequent operating-system upgrade at issue in this case has no effect on a voter's balloting experience, including the steps a Rosemount voter must carry out to submit a ballot. (Maeda Decl. ¶ 10.) As in the past, voters will receive a paper ballot and then use a pen to fill in a bubble next to their preferred candidate in each race. (*Id*. ¶ 12.) They will then either return the ballot to election officials (if voting absentee) or insert the ballot into an optical-scanning machine for tabulation (if voting in person). (*Id*.) Like voters in most election jurisdictions in Minnesota, Rosemount voters have been following these same steps for many years. (*Id.*)

ARGUMENT

Petitioners' claims rest entirely on their fundamental misunderstanding of the function of the voter-instruction requirement in section 206.58. Specifically, the petition is founded on the misconceived notion that state law requires county and municipal elections offices to conduct a voter-education initiative every time their ballot vendor publishes a substantial update to the software that runs the vendor's tabulation machines and associated computer hardware. To the contrary, Rosemount voters do not need, and Minnesota law does not require the city to provide, instruction pertaining to new software that the voters will never directly use. From a voter's perspective, the election system Rosemount is using in 2022 is not *new*: it requires voters to cast ballots in precisely the same way they have been casting them for several years. Meanwhile, the Secretary has carried out all of the examination and certification of Dominion hardware and software that is required by state law for security and election integrity purposes. Petitioners' claims thus fail as a matter of law.

Even if this were not the case, however, the petition is void on the basis of laches. Under Petitioners' legal theory, Respondent violated the voter-instruction statute no later than Friday, June 10—60 days before the August 9 primary election. They have no excuse for waiting nearly eight weeks after that date to file the petition.

I. RESPONDENT HAS NOT VIOLATED STATE LAW.

Petitioners repeatedly state and darkly imply that the current case involves a vital statutory mandate that "counter[s] th[e] risks" to election security posed by "any number of possible nefarious actors." (Pet. 1-2.) They are wrong. The legal process they claim

Respondent unlawfully ignored is, on its face, nothing more than a voter-education initiative that exists to smooth individual voters' path through transitions in balloting technology. Section 206.58 exists to prevent new technology from confusing and frightening voters, not to foil or deter "nefarious actors." The plain terms of the statute indicate that a simple operating-system update does not render a voting system "new" for purposes of voter instruction, and as a result Respondent has not violated state law.

The goal of all statutory interpretation is to ascertain legislative intent. Minn. Stat. § 645.16 (2020). Courts apply a statute's plain meaning when the legislature's intent is clear from plain and unambiguous statutory language. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). Determining whether a statutory provision has a plain meaning, however, requires "reviewing [its] content and framework" within the entire Act. *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001). "Plain meaning presupposes the ordinary usage of words that are not technically used or statutorily defined . . . and draws from the full-act context of the statutory provision." *Occhino v. Grover*, 640 N.W.2d 357, 359 (Minn. Ct. App. 2002); *see also Glen Paul Court Neighborhood Ass'n v. Paster,* 437 N.W.2d 52, 56 (Minn. 1989) (holding that statutory sections must be read together to give words their plain meaning).

The statute at issue in this case authorizes municipal governments to "provide for the use of an electronic voting system in one or more precincts." Minn. Stat. § 206.58, subd. 1. In turn, when a municipal government adopts such a "new voting system," it must provide voters with notice and information regarding its use and allow them to try out a

"demonstration voting system in a public place" for six weeks before the first election at which it is to be used. *Id.*

Read in the context of the entire subdivision, the meaning of the phrase "new voting system" is clear: a system (such as the "electronic voting system" authorized in the first sentence)[3] is "new" when it requires voters to submit ballots through a process that was different than the one they were previously familiar with—a process, that is, that many voters would doubtlessly need "instruction" on.

In the current case, there can be no credible contention that a mere system-software upgrade, one which has no effect on the process by which a voter fills out and submits their ballot, creates a "new voting system" for the purposes of section 206.58. Notably, petitioners provide no hint of what "instruction" Rosemount voters *need* to help them continue submitting ballots by precisely same process they have used since at least 2015. The Office of Secretary of State is unaware of any election jurisdiction in Minnesota that has ever conducted section 206.58's notice-and-instruction process to familiarize voters

[3] How the Minnesota Legislature constructed Minn. Stat. § 206.58, subd. 1, over time makes plain its purpose and intention. The legislature created section 206.58, and most notably its explicit authorization of electronic voting systems, in 1984, just as such systems were beginning to supplant balloting technology that was based on punch cards and levers. 1984 Minn. Laws ch. 447, § 4, at 166-67; Maeda Decl. ¶ 6. Two years later, the legislature revised subdivision 1 to add what is now the second sentence—the provision mandating voter education on new voting systems. 1986 Minn. Laws ch. 362, § 8, at 162. Placed in that historical context, the legislative intent to ease voters into the experience of submitting ballots to electronic machines is undeniable. Meanwhile, the historical context provides no support for Petitioners' notion that the voter-instruction provision has any connection to election security.

with a software update that had no effect on their experience in the balloting process. (Maeda Decl. ¶ 11.)

Petitioners' entire legal theory rests on the extremely slender reed of a comment made in an e-mail from an alleged employee of the federal Election Assistance Commission (EAC):[4] according to a message Petitioners submitted from Paul Aumayr, who is allegedly an EAC official, Dominion's Democracy Suite 5.0 "is considered by the EAC to be a new voting system[.]" (Pet. Ex. 2.) The sole direct factual basis Petitioners provide for their claims is that that three-word phrase appears in both the Aumayr e-mail and Minn. Stat. § 206.58, subd. 1.

There is no suggestion in the record, however, that Aumayr had any knowledge of Minn. Stat. § 206.58, much less that he was opining (or had the expertise to opine) that an upgraded operating system rendered Rosemount's Dominion products a "new voting system" for the purposes of that statute.[5]

In short, what constitutes a "new voting system" from the perspective of a *software tester* is categorically different than what constitutes a "new voting system" from the

[4] In light of Petitioners' overwhelming dependence on the Aumayr e-mail, it is no small matter that Petitioners have provided no evidentiary foundation for it—for the proposition that it accurately expresses the institutional conclusion of the EAC—nor any explanation for why it should not be excluded as inadmissible hearsay. Many other allegations in the petition suffer from similar foundation and hearsay problems.

[5] Indeed, the plain text of the e-mail exchange in Exhibit 2 reveals that the phrase "new voting system" did not originate with Aumayr but was instead fed to him by Petitioners' declarant, Rick Weible, who did not explain the statutory context for that phrase. There is no indication that Aumayr understood that he was being asked to provide a statement that Petitioners intended to repurpose as a legal conclusion regarding a statutory term plucked from a law about which Aumayr almost certainly knows nothing.

perspective of a *legislative initiative to educate voters* on the use of new balloting technology. Petitioners entirely ignore this distinction, and as a result their petition fails on its merits.

Seen in its proper context, Aumayr's comment clearly examines the Dominion software update in a context entirely unrelated to the central voter-education function of Minn. Stat. § 206.58, subd. 1. Even if—very implausibly—an EAC official attempted to state a legal opinion about the update's status as a "new voting system" for the purposes of that statute, his opinion carries no weight in a court's construction of Minnesota law. For the reasons explained above, such an opinion is also clearly wrong.

In simple terms, the Dominion software update at issue in this matter is functionally no different than a software update on an iPhone or similar device. While a software engineer or tester might conclude that upgrading an iPhone from version 4.3 of its operating system to version 5.0 (or, for that matter, from version 4.14-E straight to version 5.5-C) created a "new phone system" for the purposes of his area of technical expertise, the idea that it creates a *new iPhone*, from the perspective of the person using the phone, is absurd.

Finally, the Secretary notes the truly seismic nature of the change that Petitioners seek to make to Minnesota election administration. Petitioners would convert the modest voter-education initiative that the legislature enacted in Minn. Stat. § 206.58, subd. 1, to a sweeping mandate that would newly require public notice and related procedures every time that a local jurisdiction's balloting vendor—not Dominion alone—introduces a software update to an existing certified machine. Contravening the uniform practice of election jurisdictions statewide during the 36 years since the legislature added the notice-

and-instruction requirement to section 206.58, Petitioners' demands would ultimately affect thousands of pieces of election equipment in every corner of the state. Meanwhile, the regime Petitioners seek would provide no improvement in election security or integrity, because every single one of those pieces of equipment is already examined and certified by Minnesota's state and local election officials under currently existing law. Petitioners' demands would inflict immense disruptions on the state's election system while providing no meaningful benefit to Minnesota voters.

For all of the above reasons, the petition should be denied.

II. THE PETITION IS BARRED BY LACHES.

Even if Petitioners' legal theory were sound, however, the petition should be denied based on laches. By sitting on their rights for nearly eight weeks, Petitioners forfeited their ability to challenge Respondent's alleged failure to obey the requirements of section 206.58.

The equitable doctrine of laches "prevent[s] 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." *Monaghen v. Simon*, 888 N.W.2d 324, 328–29 (Minn. 2016). The Court has repeatedly denied election challenges due to laches. *See Clark v. Reddick*, 791 N.W.2d 292, 294–96 (Minn. 2010); *Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952). Laches is a critical doctrine in the election context because 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 ballot preparation and distribution process." *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992).

A petition filed under Minn. Stat. § 204B.44 is barred by laches when (1) the petitioner unreasonably delays in filing their petition and (2) the relief the petitioner requests would prejudice election officials, other candidates, and the Minnesota electorate in general. *Pawlenty*, 755 N.W.2d at 299-303. Both elements are met in this case.

Here, Petitioners sat on their rights for 54 days—from June 10, the date on which section 206.58 required a municipality introducing a new voting system to provide public notice, until late in the day on August 2, when Petitioners filed their petition in this Court. If they had sued in June, the issues Petitioners now press could have been resolved before hundreds of Rosemount residents cast absentee ballots, and in time for city election staff to make alternate arrangements for election procedures on August 9. Petitioners offer no excuse for their delay.

Moreover, granting Petitioners' requested relief—which the Secretary takes to be conducting the Rosemount primary by hand rather than with optical ballot scanners[6]—would inflict severe prejudice on the city's election officials. Barred at the eleventh hour from using the optical scanners that have been a central element of polling-place procedure

[6] It is extremely unclear what election process Petitioners want Rosemount to carry out in Tuesday's primary. In light of the facts that (1) the city cannot now obey the 60-day notice deadline in section 206.58 for an election that is four days away and (2) the city's Dominion equipment cannot possibly be downgraded at this late date to an earlier version of the operating system (Maeda Decl. ¶ 13), the Secretary can only surmise that Petitioners want Rosemount's primary ballots to be collected and counted by hand. (*See* Pet. 46 ¶ 78, 49 bullet point 2.)

for many years, officials would be afforded just a few days, if not mere hours, to devise and promulgate alternate processes for accepting, collecting, interpreting, and tallying the votes cast within the city.

Finally, the harm would likely not be confined to Rosemount. *Cf. Clark*, 755 N.W.2d at 303 (holding that, when analyzing laches, court "cannot ignore the potential prejudice to the electorate in general"). As noted above, Dominion is the ballot vendor for Aitkin, Crow Wing, Mahnomen, Scott, and Sherburne counties as well as for Dakota. Given that Minnesota election jurisdictions have never provided notice-and-instruction to the public under section 206.58 for mere software upgrades that do not affect an individual voter's experience, it is doubtful that Rosemount is the only jurisdiction in the state that intends to conduct an election on Tuesday (1) using Dominion hardware that is running version 5.5-C of the Democracy Suite operating system but (2) without notifying the local populace of this allegedly "new" system. A last-minute injunction directed at Rosemount could therefore have severe consequences for the conduct of election across the state.

Because Petitioners have provided no excuse for waiting to file until 54 days after a claim under sections 206.58 and 204B.44 could have arisen, their petition should be dismissed. *Cf. id.* ("[W]e conclude that it would be inequitable to grant the relief sought by petitioners with respect to the primary ballot even if we were to conclude that their arguments had merit.").

CONCLUSION

For these reasons, the petition suffers from fundamental and fatal legal flaws. The Court should dismiss the petition on the grounds of laches and because Petitioners' claim

that the Respondent Rosemount City Council violated Minn. Stat. § 206.58 is false as a matter of law.

Dated: August 5, 2022

Respectfully submitted,

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