

NO. A12-0920

State of Minnesota
 In Supreme Court

League of Women Voters Minnesota, et al.,
Petitioners,

vs.

Mark Ritchie, in his capacity as
 Secretary of State of the State of Minnesota,
Respondent,

87th Minnesota House of Representatives
 and 87th Minnesota Senate,
Intervenor-Respondents.

**BRIEF OF *AMICUS CURIAE* MINNESOTA MAJORITY
 IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE..... 1

ARGUMENT 1

I. This Court Does Not Have Subject Matter Jurisdiction Over Petitioners’ Claims. .. 2

 A. Section 204B.44 Authorizes Claims Regarding Errors and Omissions
 Attributable to Election Officials. 3

 B. Petitioners Do Not Allege an Error or Omission Attributable to an Election
 Official..... 3

II. Petitioners’ Lack Standing Because Their Claims Are Not Justiciable. 6

III. Petitioners’ Claims Lack Merit. 9

CONCLUSION 9

CERTIFICATION OF BRIEF LENGTH 11

TABLE OF AUTHORITIES

Cases

<i>Breza v. Kiffmeyer</i> , 723 N.W.2d 633 (Minn. 2006)	5
<i>Common Cause/Georgia v. Billups</i> , 554 F.3d 1340 (11th Cir. 2009).....	9
<i>Crawford v. Marion County Election Bd.</i> , 553 U.S. 181 (2008)	9
<i>In re Travis</i> , 767 N.W.2d 52 (Minn. Ct. App. 2009)	7
<i>Rukavina v. Pawlenty</i> , 684 N.W.2d 525 (Minn. Ct. App. 2004)	6
<i>Schiff v. Griffin</i> , 639 N.W.2d 56 (Minn. Ct. App. 2001)	3, 5
<i>Schroeder v. Johnson</i> , 311 Minn. 144, 252 N.W.2d 851 (Minn. 1976)	3
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	6
<i>State by Humphrey v. Philip Morris Inc.</i> , 551 N.W.2d 490 (Minn. 1996)	6
<i>State ex rel. Marr v. Stearns</i> , 72 Minn. 200, 75 N.W. 210 (Minn. 1898).....	5
<i>State v. Duluth & N. Minn. Ry. Co.</i> , 102 Minn. 26, 112 N.W. 897 (Minn. 1907).....	5

Statutes, Rules, and Legislation

Minn. Stat. §§ 204D.11	3
Minn. Stat. § 204D.15	3
Minn. Stat. § 204B.44	<i>passim</i>
Minn. R. Civ. App. P. 129.03.....	1
Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009),.....	8
Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986).....	8

INTEREST OF THE AMICUS CURIAE

Minnesota Majority, Inc., is an advocate for election integrity in Minnesota. It is a nonprofit corporation that promotes social welfare, including the protection of the election process.¹ For more than four years, Minnesota Majority has invested significant time and resources into uncovering voter fraud and other voting irregularities and bringing that information to the attention of Minnesota citizens and their elected officials. Minnesota Majority played an integral role in the creation and passage of legislation aimed directly at combatting voter fraud and improving election integrity by providing expert advice to the Minnesota Legislature. After Governor Mark Dayton vetoed that legislation, Minnesota Majority played a significant role in the creation and passage of the Amendment that is the subject of this action.

Minnesota Majority sought to intervene as a respondent to protect its interests in the case. This Court issued an Order denying its intervention on Friday, June 15, 2012. In the same Order, this Court granted Minnesota Majority leave to file a brief as amicus curiae in support of Respondents.

ARGUMENT

The Petition should be dismissed. First, the Court does not have subject matter jurisdiction over Petitioners' claims. Second, even if this Court has jurisdiction,

¹ Pursuant to Minnesota Rules of Civil Appellate Procedure 129.03, the undersigned counsel certifies that this brief was authored by counsel for Minnesota Majority. No person or entity, other than Minnesota Majority, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Petitioners' claims are not justiciable. Alternatively, the Petition lacks merit and should be denied.

I. This Court Does Not Have Subject Matter Jurisdiction Over Petitioners' Claims.

The statutory authority invoked by Petitioners² is decidedly narrow.³ It allows individuals to file petitions for the limited purpose of correcting specified errors, omissions, or wrongful acts. Yet, the Petition fails to allege any of such error, omission, or wrongful act, and this Court therefore does not have subject matter jurisdiction to hear Petitioners' claims.

² "Petitioners" refers to all petitioners before this Court. Specific petitioners will be listed by name as appropriate.

³ Minnesota Statutes Section 204B.44(a), (b), and (c) provide, in part, that:

Any individual may file a petition . . . for the correction of any of the following errors, omissions, or wrongful acts which have occurred or are about to occur:

- (a) an error or omission in the placement or printing of the name or description of any candidate or any question on any official ballot;
- (b) any other error in preparing or printing any official ballot; . . .
- (d) any wrongful act, omission, or error of . . . the secretary of state . . . concerning an election.

The petition shall describe the error, omission, or wrongful act and the correction sought by the petitioner. . . .

Minn. Stat. § 204B.44.

A. Section 204B.44 Authorizes Claims Regarding Errors and Omissions Attributable to Election Officials.

Section 204B.44 does not authorize courts to correct all errors, “but only errors attributable to election officials.” *Schiff v. Griffin*, 639 N.W.2d 56, 60 (Minn. Ct. App. 2001) (citing *Schroeder v. Johnson*, 311 Minn. 144, 145-46, 252 N.W.2d 851, 852 (Minn. 1976)). Even then, courts may not correct all errors attributable to election officials, but only errors committed by election officials in their “procedural and mechanical duties attendant to the election process.” *Schroeder*, 252 N.W.2d at 852. Subject matter jurisdiction of a challenge under § 204B.44 thus depends on whether the respondent election official—in this case, Respondent Secretary of State (“Secretary”)—has or is about to commit a procedural or mechanical error or omission in his duties attendant to the election process. The Court lacks subject matter jurisdiction to hear an errors-and-omissions case when none has been, or is about to be, made.

B. Petitioners Do Not Allege an Error or Omission Attributable to an Election Official.

To be sure, Petitioners characterize their claims as “errors or omissions,” but they are not errors or omissions attributable to the Secretary or to any other election official. Thus, they are not the errors and omissions contemplated by § 204B.44 and this Court lacks subject matter jurisdiction.

As the state’s chief elections official, the Secretary has a duty to ensure that ballots are properly printed. *See* Minn. Stat. §§ 204D.11, 204D.15; *Letter from Respondent to Chief Justice Gildea* (June 14, 2012) (“Secretary’s Letter”). According to the Secretary himself, he has only “the ministerial duty to ensure that the ballots are properly printed,

not to take a side as to whether a ballot question proposed by the Legislature accurately or completely represents a Constitutional amendment under consideration.” (Secretary’s Letter.) Petitioners do not, however, allege the Secretary will commit an error or omission in fulfilling this duty. Indeed, Petitioners’ challenge is premised on the assumption that the Secretary will in fact print the ballots using the language the Minnesota Legislature provided for in the Proposed Amendment. (Petr.’ Br. at 2 (“Petitioners respectfully request that this Court restrain the Secretary of State from placing [the ballot question] on the November 2012 general election ballot.”).) To print the ballots, as the law requires, does not constitute an error or omission under Section 204B.44. The opposite is true—printing the ballots using the Legislature’s language would fulfill the Secretary’s ministerial duty attendant to the election process.⁴

Petitioners’ complaints lie not with the Secretary, but with the Legislature.

Petitioners allege that the description of the question is “misleading.” (Petr.’ Br. at 2.) Even if this were true, it would not evidence an error or omission on the part of the Secretary, because the Secretary has no duty or discretion to draft the ballot question. The Secretary cannot, in other words, commit an error or omission with respect to a duty he does not have.⁵

⁴ In fact, the Secretary independently changing the language would violate his duty to print the ballot in an accurate and complete manner. The Legislature has the exclusive authority to submit constitutional amendments to the people. (Intervenors-Respondents’ Br. At 7, 9, 10 n. 6, 18-19.)

⁵ This point is confirmed by the Secretary choosing not to file a brief in this case. If he had a duty relevant to Petitioners’ claims, a response would be warranted.

In their brief, Petitioners implicitly admit their alleged injury is a result of the *Legislature's* actions, not the Secretary's. "[T]he ballot question the *legislature* has formulated and mandated is unconstitutionally misleading," they say. (Petr.' Br at 2 (emphasis added)). This implied concession imperils the jurisdictional grounding for their claims because, as discussed above, Section 204B.44 is not intended to correct errors and omissions committed by the Legislature, "but only errors attributable to election officials." *Schiff*, 639 N.W.2d at 60.

Moreover, even with respect to the Legislature, Petitioners' complaints are not the type this Court is authorized to remedy. Petitioners allege the ballot question does not accurately describe the proposed amendment. (Petr.' Br. at 1.) Yet this Court has held that § 204B.44 allows for the correction of only true errors and omissions, and not for the Court to substitute its judgment for the Legislature's in terms of how the question is phrased. *See Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006) (*citing State v. Duluth & N. Minn. Ry. Co.*, 102 Minn. 26, 30, 112 N.W. 897, 898 (1907)). Constitutional Amendments "are left to the judgment and discretion of the legislature, subject only to the implied limitation that they must not be so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote." *State ex rel. Marr v. Stearns*, 72 Minn. 200, 218, 75 N.W. 210, 214 (1898), *rev'd on other grounds*, 179 U.S. 223 (1900); *accord State v. Duluth*, 112 N.W. at 898.

The Petition fails to allege that the Secretary has or is about to commit an actual error or omission. Therefore, this Court lacks subject matter jurisdiction to hear this challenge.

II. Petitioners' Lack Standing Because Their Claims Are Not Justiciable.

To bring suit, a party must show it has standing, otherwise known as a “sufficient stake in a justiciable controversy to seek relief from a court.” *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). A party has standing if it “has suffered some ‘injury-in-fact’” or if it “is the beneficiary of some legislative enactment granting standing.” *Id.* (internal references omitted).

Section 204B.44 contemplates standing for “any individuals” bringing claims of errors or omissions. Among the Petitioners, there are three organizations: the League of Women Voters Minnesota, Common Cause, and Jewish Community Action. Because none of these organizations has suffered an injury in fact and instead only assert speculative “concern” about the functioning of future enabling legislation, they are not within the class of contemplated plaintiffs under § 204B.44. These three organizations lack standing.⁶

The same is true of the Petitioners generally—the individuals and the organizations. Their claims are based upon mere “concerns” about the legislation that will result from the proposed amendment and, for that reason alone, the Petition should be dismissed. The Petitioners’ entire case is based on speculation about future enabling legislation. These claims are not ripe as all of the “concerns” can be addressed when the Legislature meets in 2013.

⁶ See *Rukavina v. Pawlenty*, 684 N.W.2d 525, 532-33 (Minn. Ct. App. 2004) (establishing elements for associational standing, none of which have been pled by the Organizational Petitioners).

“If an issue involves only a hypothetical possibility, then the issue is not justiciable because [n]either the ripe nor the ripening seeds of a controversy are present.” *In re Travis*, 767 N.W.2d 52, 58 (Minn. Ct. App. 2009) (internal citations omitted). Petitioners “must show that they received a ‘direct and imminent injury’ from the allegedly unconstitutional section.” *Id.* (internal citations omitted).

None of the Petitioners, including those who are individuals, has established a direct and immediate injury. For example, Petitioner Gabriel Herbers is “concerned that voters will be misled or confused by the ballot proposal and will not understand all of the provisions that will be added to the Minnesota Constitution.” (Pet. at 4.) But “concern” over whether or not voters would be misled is wholly speculative and lacks concreteness.

Petitioner Gretchen Nickence is “concerned” about whether she will be able to vote using her tribal identification card and whether others will be “confused and misled” by the proposed amendment. (Pet. at 5-6.) Again, this purported injury is not ripe as enabling legislation can easily address this “concern.”

Petitioner Kathryn Ibur is “concerned” that, if the proposed amendment is adopted, her current identification cards will not be sufficient to allow her to vote. (Pet. at 6.) She is also “concerned” that others will be misled because the ballot question does not specify that government-issued identification is required. (Pet. at 6.) Once more, enabling legislation may resolve all of Ibur’s concerns.

Petitioner John Harper Ritten is “concerned” that the proposed amendment will affect his ability to vote absentee in the future and that other voters will not be “adequately inform[ed]” about the proposed amendment. (Pet. at 7.) Petitioner Doty also

alleges “concern” about other voters not being “fully informed” about the proposed constitutional amendment. (Pet. at 5.) The “concerns” of Ritten and Doty about what the enabling legislation will contain are too speculative to render these claims justiciable.

Petitioner Shannon Doty’s claim is not just unripe, it is nonexistent. Doty, a member of the Wisconsin National Guard currently deployed in Afghanistan, is “concerned that the proposed constitutional amendment will adversely affect her right and ability to vote absentee.” (Pet. at 5.) However, under federal law, such concerns are unwarranted. For example, the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) mandates that Minnesota allow Petitioner Doty to register and vote absentee while she is deployed overseas. Pub. L. No. 99-410, 100 Stat. 924 (1986). Other federal laws, such as the Military and Overseas Voter Empowerment Act (“MOVE”), Pub. L. No. 111-84 §§ 577 to 582, 583(a), 584 to 587, 123 Stat. 2190 (2009), which amended UOCAVA, and the Federal Voting Assistance Program, ensure that Petitioner Doty’s right to vote is protected while she is abroad. For example, Federal law permits use of a Federal Write-in Absentee Ballot (FWAB). The FWAB is no more than a postcard on which Doty need merely write the names of the candidates she supports, and the postcard must be accepted without any additional requirements. The FWAB may be used in circumstances where a state ballot has not been received.

Finally, all Petitioners argue that the ballot question should not be placed on the ballot because the amendment’s “‘substantially equivalent’ language is so vague that it is anyone’s guess what effect it will ultimately have on Minnesota’s voting system, either by future legislation or judicial construction.” (Petr.’ Br. at 2.) Even if this were true, it

confesses that Petitioners' claims are not ripe. "Concern" over legislation which has not even been introduced is an archetypical example of want of ripeness.

III. Petitioners' Claims Lack Merit.

Petitioners' claims lack merit because, at their heart, they require a finding that a voter identification law negatively impacts the right to vote. But courts have upheld voter identification laws as constitutional. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009). The U.S. Supreme Court, in upholding the validity of Indiana's voter identification law, even addressed, and rejected, many of the same claims advanced by Petitioners. *Crawford*, 553 U.S. at 198. ("For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.").

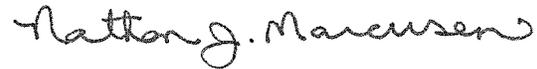
Minnesota Majority asks this Court to let the voters of Minnesota decide whether they wish to adopt this widely accepted and constitutional step to ensure election integrity.

CONCLUSION

For these reasons, *amicus curiae* Minnesota Majority urges this Court to dismiss the Petition or, in the alternative, find for the Respondents.

This 27 day of June, 2012.

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**Pro Hac Vice Motions Granted*

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,356 words. This brief was prepared using Microsoft Word 2010.

Dated: June 27, 2012

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