

STATE OF MINNESOTA

IN SUPREME COURT

A06-1871

OFFICE OF
APPELLATE COURTS

OCT 10 2006

FILED

Tim Breza, Larry Buboltz,
Dan Dorman, Morrie Lanning,
Michael Lang, Keith Langseth,
Jerry Miller, H. Dan Ness,
Tom Rukavina, Kathy Serva,
Eric Sorensen, Mark Voxland,
Lauri Winterfeldt-Shanks,

Petitioners,

vs.

**PETITIONERS'
LACHES MEMORANDUM**

Mary Kiffmeyer, Minnesota
Secretary of State,

Respondent.

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ATTORNEY FOR PETITIONERS

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This Memorandum is submitted in response to the Order of the Court, dated October 6, 2006, requesting that Petitioners address "why [their] petition could not have been filed at an earlier time and whether laches should apply."

The Equitable Doctrine of Laches

The application of laches in the context of election challenges is set forth in Piepho v. Bruns, 652 N.W.2d 40 (Minn. 2002):

With respect to the timeliness of the petition, in the election context we especially consider the application of laches, an equitable doctrine applied 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. Aronovitch v. Levy, 238 Minn. 237, 242, 56 N.W.2d 570, 574 (1953). The doctrine has particular application in challenges to ballot preparation and election proceedings. Peterson v. Stafford, 490 N.W.2d 418, 419 (Minn. 1992). "In considering laches, we have held that the practical question in each case is whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." Fetsch v. Holm, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952).

At 43.

Why Laches Does Not Apply in this Case

There are a number of reasons:

1.

There Has Been No "Unreasonable Delay".

It takes time for a disparate group of people to coalesce, to talk, to brainstorm, to seek a preliminary legal opinion, to raise money, to commit.

The Petitioners hereto represent no established organization, no ready-made advocacy group. They come from both political parties, from various corners of the state, from diverse roles in the public and private spheres. They had no staff attorney to charge with the task.

2.

**Petitioners Were Required to Wait
(a) for the Attorney General's Letter
Explaining the Ballot Question, and
(b) the Secretary of State's Entitling
of the Ballot Question.**

In our Petition (at p. 16) we reference **Minnesota Statutes section 3.21** and its requirement that the attorney general "furnish to the secretary of state a statement of the purpose and effect of all amendments proposed" along

with "the portions of the context that the attorney general deems necessary to understand the amendment."

We also cited the case of Knapp v. O'Brien, 288 Minn. 103, 179 N.W.2d 88 (1970), where this Court held that just such an AG's statement saved an otherwise confusing ballot question.

Given this precedent, Petitioners had no choice but wait to see whether the 3.21 statement clarified the MVST ballot question. The statement was not issued by the Attorney General's office until July 3, 2006.

The same principle applies but with greater force to the title affixed by the Secretary of State's office to the ballot question. That title was not released until July 5th and not posted on the Secretary of State's website until September 21. (A.1)

As with the Attorney General's letter, had that title actually clarified the amendment, this Petition would have been unnecessary.

3.
Petitioners Had to Wait to See
How the Press Handled the Issue

It was not until the accumulation of press stories in late summer and early fall that it became clear a real problem existed, that the electorate was not being properly

informed.

Not only has the press not succeeded at clarifying the ballot question for voters, it has largely admitted its own bewilderment. We detail this at pages 14-15 of our Petition. Not one of the articles attached to our Petition clearly spells out the crucial fact of this case, namely that the proposed amendment does not, as it would appear, allocate a firm 40/60 split between transit and roads of the MVST revenues but in fact authorizes the legislature to direct 100 percent of that revenue toward transit with 0 percent going to roads.

The confusion persists. We have attached at pages A.2 - A.6 of the Appendix two additional news stories filed since the Petition was submitted to the Court. We note especially the story of October 9th from Minnesota Public Radio entitled "Confusion in the driver's seat on transportation initiative." (A.2). And we note, as well, that the story of October 5th from the Minnesota Daily does not even mention the 40/60 issue. (A.4).

4.

The Campaigns of Disinformation by Certain Advocacy Groups Were Slow to Develop.

It was not until the past month that lawn signs with "VOTE YES" inside a Minnesota license plate began appearing

in such abundance around the state. Those signs, along with the other efforts of the advocacy group that created them, have perpetuated the misinformation of the ballot question in at least three significant ways:

1. The use of an official-looking Minnesota license plate as the medium for its message (A.4) creates the impression that it is the State of Minnesota itself that wants you to vote "yes" on the issue.

2. That misimpression is furthered at the Secretary of State's website's "Ballot Questions - List of Individuals and Groups . . . providing information - for, against, or neutral." (A.7). The only individual or group listed is this same advocacy group.

3. A voter who then follows the link provided by the Secretary of State to that advocacy group's website is greeted with another of the official-looking "VOTE YES" license plates plus photos of the two major party candidates for governor - Governor Pawlenty and Attorney General Hatch - both urging a "yes" vote. (A.8)

Under these circumstances, even informed and attentive voters would be excused for assuming the proposed amendment promises nothing but sweetness and light and that all good and ethical citizens are in favor of it.

This advocacy group could have used its ample resources

to educate the public and help untangle the 60/40 issue. It could have taken it upon itself to make it clear to voters what is cloaked in the verbiage of the ballot question.

Instead, it has chosen to hitch a ride on the confusion, a tactic which has not until the last month become fully apparent.

5.

A Remedy Is Readily Available

If the remedy to the confusing ballot question required that language be added to the ballot, this Petition likely would not have been filed. Obviously such relief would have been problematic in light of the expense and logistics involved with printing ballots, absentee ballots, etc.

But what we ask for - namely, that the ballot question at issue be removed from voters' consideration - can be effectuated readily and inexpensively:

If it is too late to remove the printed language from the ballots, it can be stricken by the ballpoint pens of election officials at the polling places; or those officials can simply tell voters to ignore the ballot question; or the votes can simply not be counted.

No doubt the remedy of striking language can be knotty when the contest is between candidates. A change to one

candidate's presentation on the ballot can have an impact, beneficial or adverse, to his or her opponent.

But that is not a problem here. The ballot question stands alone.

Bottom line, there is available in this case a remedy that "can be made in an acceptable way within the time available, at a cost which is reasonable considering the danger of unfairness to be apprehended." Mattson v. McKenna, 301 Minn. 103, 222 N.W.2d 273 (1974).

6.

That Remedy Will Save Time and Money.

A simple cost/benefit analysis reveals that the "drastic" course of action in this case would be to **not** order the remedy requested by Petitioners. Moe v. Alsop, 288 Minn. 323, 331, 180 N.W.2d 255, 260 (1970).

It must not be forgotten what is at stake here: The electorate is about to vote, not on some transitory referendum issue, but on an alteration to the State Constitution. A serious matter, indeed, itself involving a "drastic" change to the core document of the state.

If we can agree that this proposed constitutional amendment has been confusingly - perhaps deceptively -

presented so that the vote will likely not be an informed one, all of the practical considerations say, correct it now.

Make the legislature go back and do it right. Sooner the better. It will save time and trouble and expense and a long period of uncertainty. It will preserve the integrity of the election process. And it will send a message to the legislature that it, too, like the rest of us, cannot get away with slapdash work.

7.

No One Has Been or Will Be Prejudiced.

An essential element of laches is such "prejudice to others, as would make it inequitable to grant the relief prayed for." Fetsch v. Holm, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952).

Again, in contrast to a race between candidates, there is no opposing party to be impacted upon when it is a single amendment question that is stricken from the ballot.

The only one who might claim prejudice arising from the Petition in this case is the advocacy group that has spent such considerable resources on placing its "VOTE YES" license-plate signs throughout the state.

But they are not a party to this action.

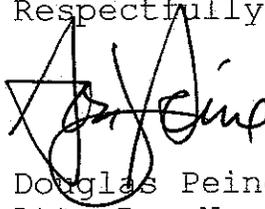
And even if they were, they would be hard-pressed to claim laches when they themselves do not have the "clean hands" required.

The equitable doctrine of "clean hands" arises from the notion that "he who seeks equity must do equity." Gully v. Gully, 599 NW2d 814, 825 (Minn. 1999). Stated simply, the party claiming laches cannot have contributed to the very problem sought to be remedied.

In this light, the "VOTE YES" advocacy group most definitely does **not** have clean hands, because it is precisely they who have done so much to perpetuate the confusion on the ballot question.

And so they cannot be heard now to complain of Petitioners' efforts to correct the situation.

Respectfully submitted,



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DATED: 10/10/06

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).