

STATE OF MINNESOTA

IN SUPREME COURT

A06-1871

OFFICE OF
APPELLATE COURTS

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FILED

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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'
REPLY MEMORANDUM**

Mary Kiffmeyer, Minnesota
Secretary of State,

Respondent.

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REPLY POINTS

Petitioners respond as follows to selected arguments in the Response of the Secretary of State and in the Amicus Curiae Brief of Rep. Ron Erhardt et al.:

1.

Laches Does Not Apply in Public Interest Cases.

This Court has held that, in contrast to a proceeding in which "purely private interests [are] involved," where "a constitutional principle is invoked . . . in the public interest," "[t]he doctrine of laches is not properly applicable." Fugina v. Donovan, 259 Minn. 35, 104 N.W.2d 911, 913 (1960).

2.

Even if Laches Did Apply, the Petitioners' Timing Was Not Only Reasonable, It Was Obligatory.

The Secretary of State says our reasons for not commencing this action earlier are "unpersuasive." At 6. She suggests that we were required to file suit at least at the end of the 2006 legislative session when it became clear the legislature was not going to make any changes to the 2005 amendment and ballot question. At 5-6.

Her position is inconsistent with the doctrine of laches, the fundamental question of which is: When did the plaintiff or petitioner have knowledge "of the facts which should have prompted action"? Bausman v. Kelley, 38 Minn. 197, 36 N.W. 333 (1886).

Had we filed the petition before the Attorney General's 3.21 letter was released, her counsel no doubt would have come before this Court, Knapp v. O'Brien¹ in hand, and insisted we were jumping the gun, that under Knapp there was no justiciable controversy until the 3.21 letter was made public.

Had we commenced this action before the Secretary of State formulated and made public her heading to the ballot question, counsel would have come before this Court, Knapp v. O'Brien in hand, and insisted that the Knapp principle applied in spades in that situation.

And when was that heading released? By her own admission, not until September 20th. At 3. Consistent with that is the Affidavit of Rep. Connie Bernardy, attached hereto at A.8, in which she details attempts to learn the wording of the heading prior to September 20.

¹288 Minn. 103, 179 N.W.2d 88 (1970); see, Petition at 16 and Petitioners' Laches Memorandum at 7; see also, Elbers v. Grove, 502 N.W.2d 810, 814 (Minn.App. 1993).

Here's the point: The Secretary of State and the Amicus take it upon themselves, now, to argue that our evidence of confusion surrounding the ballot question is weak. To the contrary, that evidence is overwhelming and uncontradicted. But imagine what they would have said had Petitioners not waited until it became clear that efforts by the Attorney General and the Secretary of State - not to mention the media and the advocacy groups - were adding to rather than clearing up the confusion?

3.

An Unclear Ballot Question Is a Constitutional Problem.

The Secretary of State says that although she "neither supports nor opposes adoption of the constitutional amendment," she does

have an interest in assuring the orderly conduct of elections and protecting the rights of Minnesota citizens to vote. . . .

Response of Sec. of State at 1.

What could be more fundamental to that purpose than that the ballot questions she submits to those citizens are clear in their effect?

The issue is not one of mere procedural nicety. As this Court has recognized, a "misleading" ballot question is

"a palpable evasion of the constitutional requirement to submit the law to a popular vote." State v. Stearns, 72 Minn. 200, 75 N.W. 210, 214 (Minn. 1898), reversed on other grounds, 21 S.Ct. 73, 179 U.S. 223, 45 L.Ed. 162.

If the people don't understand what they're voting on, it is no better than denying them the vote in the first place.

4.

A Confused Voter Is Not an Informed Voter.

Counsel for the Secretary of State says the ballot question is "essentially a question of subjective fact upon which each individual voter has an interest in making an independent judgment." At 5.

But the crux of State v. Stearns is that, where the ballot question is misleading, the voter is essentially denied the opportunity to make an independent judgment.

The proper choice for the voter is between "yes" and "no", not between "yes I understand this" and "no I do not."

5.

The Secretary of State Has Herself Gone on Record Saying the Ballot Question Is Confusing.

In the Appendix at page A.2 is a verbatim transcript of

the Secretary of State's remarks made on August 2nd this year at the Coalition of Greater Minnesota Cities Conference in Red Wing. She appeared on stage with a moderator and her election opponent, Mark Ritchie.

The transcript in the Appendix includes the entirety of her remarks. Here are the important excerpts:

MODERATOR: Your thoughts on the wording of the Minnesota Vehicle Sales Tax Constitutional Amendment. Do you think it's clear, do you think it is misleading?

SEC. KIFFMEYER: . . . There is no doubt that - there were two, actually, constitutional amendments - the first one I think is a little more confusing, especially the language that says, you know, that at least 40 percent and no more than 60 - and what does that mean and how much does really go for roads? . . . And I think the second constitutional amendment authored by Mary Liz Holberg was written a lot more clearly and a lot better, however that one did not get through the conference committee so the one we're stuck with on the ballot this year, the actual statutory language is written in statute, it's the language that goes on the ballot. . . . But the real fact of the matter is that, I don't like it very much either. I would have much preferred a more clear and well-written constitutional amendment. But it's my job as Secretary of State, whatever I feel personally, to put it on the ballot, and work together in that regard, and then leave the legislative process, and hopefully we may be able to make some changes either legislatively or maybe a better constitutional amendment in the future.

6.

The Secretary of State Is the Appropriate Respondent.

Counsel for the Secretary of State argues that because the Secretary herself has done nothing wrong, therefore she should not be a party hereto. However, by both statute (i.e., **Minn.Stat. 204B.44**) and established practice, the Secretary of State is the proper respondent in such actions involving state-wide ballot issues. E.g., Elbers v. Growe, 502 N.W.2d 810 (Minn.App. 1993); Fugina v. Donovan, 259 Minn. 35, 104 N.W.2d 911 (Minn. 1960); Williams v. Donovan, 253 Minn. 493, 92 N.W.2d 915 (1958); Marsh v. Holm, 238 Minn. 25, 55 N.W.2d 302 (1952); Winget v. Holm, 244 N.W. 331, 332 (Minn. 1932).

7.

Evidence of the Confusing Nature of the Ballot Question Is Not "Anecdotal"; It Is Overwhelming and Uncontradicted.

Instead of refuting the extensive evidence of the confusing nature of the ballot question, the Amicus characterizes that evidence as "little more than anecdotes." At 3.

Anecdotes? That would be a couple of citizens stopped

and quizzed on the street and left scratching their heads.

But where you have the media repeatedly, the Secretary of State frankly, and a goodly number of legislators confessedly saying it is confusing, then what you have is not anecdote but consistent and overwhelming evidence of the fact.

And it continues. On October 9, 11 and 12 WCCO television broadcast pieces on the MVST amendment. The recaps from WCCO's website are attached hereto at A.1 - A.5.

The first story does not mention the 40/60 issue. It simply quotes a trucking association representative as saying the MVST revenue will "go to roads, bridges, transit." A.1.

The second story, which ironically is intended as a "Reality Check" - that is, an assessment of the accuracy of the television ad campaign that urges a "yes" vote - is more troublesome. "This amendment," it says, "would require *all* that money to go to roads, phasing it in over five years." (Emphasis theirs) A.3.

The truth is just the opposite: Under the amendment none of the money is required to go to roads.

Finally - and a vivid example of the persistence of the confusion surrounding the Amendment - is the October 12 story entitled "Update" to the "Reality Check":

A number of viewers contacted us expressing concern we did not spend enough time explaining the distribution of funds if the Transportation Amendment to the Constitution is adopted. We agree.

A promising start. But then the ballot question is interpreted:

Up to 60 percent of the funds can be spent on road-related matters, and 40 percent on transit.

The first clause is technically correct (although "can" should more accurately be "could"): Yes, the maximum that can be spent on roads is 60 percent. But the second clause is dead wrong: the maximum that can be spent on transit is not 40 percent but 100 percent.

Again the crucial fact - that roads may get 0 percent - is not simply lost in the confusion but actually contradicted.

8.

The Proper Governing Principle of This Case Is Not "Separation of Powers" but "Checks and Balances".

The Amicus invokes the Separation of Powers as a reason why the Court should not enjoin the ballot question.

But the essential partner of the doctrine of Separation of Powers - the doctrine of Checks and Balances - is more apt:

It must be conceded settled by McConaughy v. Secretary of State, 106 Minn. 392, 119 N.W. 408, 411, that courts have jurisdiction to determine whether an amendment to the Constitution proposed by the Legislature and submitted to the electors was proposed, submitted, and ratified conformably to the mandate of the Constitution, so as to become a part thereof.

Winget v. Holm, 187 Minn. 78, 244 N.W. 331, 332 (Minn. 1932).

9.

The Ballot Question Is Not Ambiguous, It Is Confusing.

The Amicus characterizes the ballot question as "ambiguous." At 8. The Amicus is too kind. The problem with the ballot question is not that it has more than one meaning but that the true meaning - that transit may get 100% and roads 0% - is hidden away.

10.

The Legislature Had an Obligation to Present to Voters a Clear Ballot Question.

The Amicus says that "Petitioners' complaint is not with the ballot question, but with the text of the Transportation Amendment itself." At 7.

The point is irrelevant. It makes no difference what

the source was that infected the ballot question. The end result is still the same - an uninformed electorate.

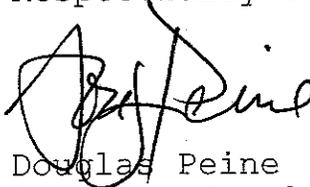
The legislature had an obligation to create a ballot question that offered the electorate a clear choice. If the amendment language itself was confusing - which it obviously is - it was their duty to choose other language that would clear up that confusion.²

Really, all they had to say was that the allocation under the amendment was 40 to 100 percent for transit and from 0 to 60 percent for roads. That would have been an easy and honest presentation of the question.

The fact that such alternative language was readily and obviously available raises once more the prospect that the ballot question was the result less of poor draftsmanship and more of calculation.

²A confusing amendment is bad enough. But at least it can be studied and interpreted in the normal, unhurried legislative and judicial processes. Not so the ballot question, which many voters will be reading for the first time in the voting booth.

Respectfully submitted,



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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).