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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Tyler Kistner, Thomas Settell, Leilani Holmstadt, Dan Hall, Jose W. Jimenez, Fern A. Smith, Mariah de la Paz, Cynthia Lonnquist, Pam Myhra, Megan Olson, Sandra A. Jimenez, Deborah Coxe, and Greg Buck,

Contestants,

v.

Steve Simon, only in his official capacity as the Minnesota Secretary of State, Andy Lokken, only in his official capacity as the Elections Director for Dakota County, Angie Craig, Matt Klein, Karla Bigham, Lindsey Port, Greg Clausen, Liz Reyer, Rick Hansen, Ruth Richardson, Jessican Hanson, Robert Bierman, and John D. Huot,

Contestees.

Court File No.: 19AV-CV-20-2183

MEMORANDUM OF LAW IN SUPPORT OF CONTESTEE ANGIE CRAIG'S MOTION TO DISMISS

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INTRODUCTION

The people of Minnesota have spoken—and in the State's second congressional district, did so loudly. On November 24, 2020, the State Canvassing Board certified that Contestee Angie Craig received 9,580 more votes than Contestant Tyler Kistner.[1] Contestants now ask this Court to overturn that decisive victory, but their effort fails as a matter of law and should be dismissed.

The allegations in Contestants' notice are plainly inadequate. Contestants stitch together a series of perceived election irregularities into what they allege to be a statewide—or even international—conspiracy. Their allegations, however, rest entirely on speculation, rumor, and conclusory assertions of bad faith. Their kitchen-sink pleadings do not give rise to *any* cognizable legal claim, let alone the one that establishes the sole basis for this election contest: that Representative Craig did not receive the most votes in her election. At most, Contestants argue that certain statutory election rules were not followed. But even accepting these assertions as true—which, for many of the allegations, requires a hefty suspension of disbelief—they do not allege that any ballots were improperly counted or rejected. As a result, the notice of contest fails to satisfy its central requirement—alleging that the outcome of the election would have been different had the perceived irregularities not occurred.

Because the notice's woeful substantive deficiencies divest this Court of jurisdiction to entertain the election contest, the Court must dismiss this action. And because the deadline for

[1] *See Minnesota State Canvassing Report*, Minn. Sec'y of State 18 (Nov. 24, 2020), https://officialdocuments.sos.state.mn.us/Files/GetDocument/125081. The Court can take judicial notice of "readily verifiable facts" from a government website. *In re Welfare of Clausen*, 289 N.W.2d 153, 157 (Minn. 1980); *see also* Minn. R. Evid. 201(b); *United States ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014) (interpreting analogous federal rule and concluding that court may take judicial notice of "'government documents available from reliable sources on the Internet,' such as websites run by governmental agencies" (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG (POR), 2009 WL 6597891, at *2 (S.D. Cal. Dec. 23, 2009))).

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serving this election contest has now passed, Contestants have no opportunity to amend their notice. This contest must therefore be dismissed with prejudice.

ARGUMENT

I. Contestants' allegations are facially inadequate to support their contest.

An election contest is not a garden-variety civil action; it is instead a narrowly drawn proceeding in which the Court may answer *only* the questions identified in the governing statute. Minnesota law expressly limits the grounds upon which an election contest may be brought to the following four issues: (1) whether there was "an irregularity in the conduct of an election or canvass of votes," (2) "who received the largest number of votes legally cast," (3) "the number of votes legally cast in favor of or against a question," and (4) whether there were "deliberate, serious, and material violations of the Minnesota Election Law." Minn. Stat. § 209.02, subd. 1.

According to their notice, Contestants bring this contest on two grounds: "who received the largest number of votes legally cast" and "deliberate, serious, and material violations of Minnesota Election Law." Notice of Election Contest Under Minnesota Statutes Chapter 209 ("Notice") 2. But when a contest challenges the outcome of a congressional race, "the *only* question to be decided by the court is which party to the contest received the highest number of votes legally cast." Minn. Stat. § 209.12 (emphasis added). *That's it*. While "[e]vidence on any other points specified in the notice of contest, including but not limited to the question of . . . deliberate, serious, and material violation of the provision of the Minnesota Election Law, must be taken and preserved by the judge trying the contest, . . . *the judge shall make no findings or conclusion on those points*." *Id.* (emphasis added). Consequently, the only question this Court may adjudicate with respect to this contest is whether Representative Craig received the most legal votes. And because the State Canvassing Board's certification of Representative Craig as the

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winner of this election constitutes "prima facie evidence that [Craig], the contestee, has been elected to the office," Contestants "bear[] the burden of proof" to "show that the Board's certification was in error." *In re Contest of Gen. Election Held on Nov. 4, 2008 for Purpose of Electing U.S. Senator from State of Minn.*, 767 N.W.2d 453, 458 (Minn. 2009) (per curiam).

To meet their burden at the pleading stage, Contestants' notice of contest must "stat[e] facts upon which, if proved, relief could be granted." *Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W. 2d 86, 90 (Minn. App. 1986). In the election context, this pleading requirement is jurisdictional; if the notice fails to allege sufficient facts suggesting that Representative Craig did not obtain the most valid votes, this court lacks jurisdiction and is "powerless to entertain such proceedings." *Christenson*, 119 N.W. 2d at 38.

The factual allegations contained in Contestants' notice, even accepted as true, fall fatally short of this standard. In attempting to piece together alleged irregularities into a cognizable action, they fail to identify how exactly such irregularities would have "change[d] the result of the election," *Hancock v. Lewis*, 122 N.W.2d 592, 524 (Minn. 1963)—which they *must* do, since "[i]t has been the rule in this state for well over 100 years that violation of a statute regulating the conduct of an election is not fatal to the election in the absence of proof that the irregularity affected the outcome or was the product of fraud or bad faith." *Hahn v. Graham*, 225 N.W.2d 385, 386 (Minn. 1975). Here, Contestants offer "mere surmise that errors *may* have occurred in counting the ballots." *Christenson*, 119 N.W.2d at 39 (emphasis added). That is simply not enough to reverse Representative Craig's 9,580-vote victory.

The deadline for serving an adequately pled notice has expired. Notice of an election contest "must be *served* and filed . . . within seven days after the canvass is completed in the case of a . . . general election." Minn. Stat. § 209.021, subd. 1 (emphasis added). The canvass is

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completed when all postelection reviews ("PERs") under Minnesota Statutes section 206.89 are concluded, which occurs once the Secretary of State reports the results of all postelection reviews at the meeting of the State Canvassing Board. *Id.* § 206.89, subds. 6, 10. Here, the State Canvassing Board met and completed its canvass on November 24. *See supra* at 1 n.1. The deadline to file and serve this election contest notice was therefore seven days after November 24—December 1, 2020. That deadline has now passed. Because Contestants' notice is insufficient to confer this Court with jurisdiction, the Court has no power to allow Contestants to amend their notice: "the court cannot appropriate to itself jurisdiction which the law does not give by permitting such amendments after the time for initiating the proceeding has expired." *Christenson*, 119 N.W.2d at 39. As a result, dismissal with prejudice is required.

A. Contestants' effort to invalidate mail ballots cast in reliance on a court-approved consent decree is barred by the doctrines of laches and the U.S. Constitution.

Contestants ask this Court to invalidate ballots cast in reliance on a consent decree entered by Ramsey County District Judge Sara Grewing in August 2020, which temporarily suspended the State's witness-signature requirement for mail ballots during the November general election. *See* Notice 4, 8–9, 18; *see also* Declaration of Charles N. Nauen ("Nauen Decl.") Ex. 1. But just days ago, in a separate action that *these same Contestants* filed with the Minnesota Supreme Court, that court held that it is far too late to litigate this issue for the November election. *See* Order, *Kistner v. Simon*, No. A20-1486, slip op. at 3–4 (Minn. Dec. 4, 2020) (attached as Nauen Decl. Ex. 2). Indeed, the doctrine of laches bars a challenge to the consent decree that could have—and should have—been raised months ago.

When there has been "such an unreasonable delay in asserting a known right" that it "result[s] in prejudice to others," the doctrine of laches prohibits granting the requested relief. *Piepho v. Bruns*, 652 N.W.2d 40, 43 (Minn. 2002) (per curiam) (quoting *Fetsch v. Holm*, 52

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N.W.2d 113, 115 (Minn. 1952)); *see also* Order, *Kelly v. Commonwealth*, No. 68 MAP 2020, slip op. at 2 (Pa. Nov. 28, 2020) (per curiam) (dismissing postelection challenge to certification under "doctrine of laches given [Contestants'] complete failure to act with due diligence") (attached as Nauen Decl. Ex. 3). Minnesota courts routinely apply laches in the elections context. *See Clark v. Reddick*, 791 N.W.2d 292, 294–96 (Minn. 2010) (per curiam); *Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008) (per curiam); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952). Indeed, enforcing laches is critical in the context of elections because the "very nature of matters implicating election laws and proceedings routinely require 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).

Here, the consent decree Contestants challenge was entered on August 3. *See* Nauen Decl. Ex. 1. After that consent decree was signed, Contestants did nothing. They waited as August, September, and October passed. During these intervening months, the Secretary, state and local officials, voter education groups, and the media publicized the consent decree's provisions, including the instruction that mail ballots may be submitted without a witness signature. On September 18, election officials began distributing mail ballots with instructions that "[a] witness is not required for registered absentee voters for the 2020 Minnesota State General." Nauen Decl. Ex. 4, at 3–8. Contestants should have known of this critical date, as it was emphasized in both Judge Grewing's order, Nauen Decl. Ex. 1, at 18, and the consent decree itself, Nauen Decl. Ex. 5, at 3, 6. And yet still Contestants waited, as Election Day came and went and Minnesotans' ballots were tallied and canvassed by county officials. Contestants did not challenge the consent decree until they filed initiated this contest, well after the general election was conducted pursuant to the challenged consent decree—including the receipt and processing of *1.9 million* mail ballots.

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Contestants' delay is as apparent as it is inexcusable. They could have challenged the consent decree months ago, well before mail ballots were distributed, voted, and tabulated. In the context of election litigation, courts require parties to "bring the[ir] grievances forward for *pre*-election adjudication," and bar such claims if brought only after the election. *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (en banc). This is for good reason: "the failure to require prompt pre-election action . . . as a prerequisite to post-election relief may permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action." *Id.* (quoting *Toney v. White*, 476 F.2d 203, 209 (5th Cir. 1973)). This case is a perfect example of such unreasonable delay. *See Kistner*, slip op. at 3–4.

The prejudice that would be caused by allowing Contestants to assert this challenge in the *post*-election phase is readily apparent as well. Election laws and rules engender significant reliance interests on the parts of both voters and officials. *See, e.g., Bognet v. Sec'y of Commonwealth*, No. 20-3214, 2020 WL 6686120, at *17 (3d Cir. Nov. 13, 2020) (concluding that "[u]nique and important equitable considerations, including voters' reliance on the rules in place when they made their plans to vote and chose how to cast their ballots," counsel against late-hour change to election law); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made."). This is especially true of postelection challenges like this, which threaten disenfranchisement of voters who cast their ballots in reliance on previously settled election rules—precisely the risk that Contestants have created with this untimely contest. Accordingly, the Minnesota Supreme Court has "insisted that [parties] move expeditiously . . . because the time constraints associated with elections demand diligence in asserting known

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rights." *Kistner*, slip op. at 3.

Here, Contestants ask to nullify the votes of Minnesotans who followed the official rules and guidelines and cast their ballots accordingly—a result not only prejudicial, but likely unconstitutional as well. *See, e.g.*, *United States v. Saylor*, 322 U.S. 385, 387–88 (1944) ("[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place."); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595, 597–98 (6th Cir. 2012) (concluding that rejection of ballots invalidly cast due to poll worker error likely violates due process); *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020) ("Plaintiffs ask this Court to disenfranchise almost seven million voters. This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated."). This case illustrates well why the doctrine of laches carries such force in the election context: the risk of prejudice to voters, officials, and candidates is unconscionably high, especially where Contestants could have and should have brought their challenges at an earlier, less disruptive point. *See Kistner*, slip op. at 4 ("We [] must consider the impact of petitioners' requested relief on election officials, candidates, and voters who participated in the 2020 general election knowing that the witness requirement was suspended.").

In short, "[g]iven the undisputed public record regarding the suspension of the witness requirement for absentee and mail ballots, [Contestants] had a duty to act well before November 3, 2020, to assert claims that challenged that procedure; asserting these claims 2 months after voting started[and] 3 weeks after voting ended . . . is unreasonable." *Id*. This Court should therefore follow the Minnesota Supreme Court and conclude that laches bars any challenge to the

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consent decree.[2]

B. Contestants' allegations of purported irregularities fail to indicate any impact on the outcome of Representative Craig's 9,580-vote victory.

Contestants' notice also offers a hodgepodge of purported irregularities, many of which lack any meaningful description or explanation. None of these alleged irregularities—even when considered cumulatively—provides any reason to believe that Representative Craig did not obtain the most valid votes in the race for Minnesota's second congressional district. Because this is the only ground on which Contestants can assert their election contest against Representative Craig, *see* Minn. Stat. § 209.12; *see also supra* at 2, this insufficiency is fatal and this contest must be dismissed.

1. Dominion Voting Machines

Contestants baldly claim that "the entire world has been following news about tampering with Dominion voting machines" and that "[t]here are many examples of [] vote count anomalies in Minnesota" and "issues with systems being down or experiencing unexplained so-called 'glitches' during the night allowing for the alteration of vote counts." Notice 5. Yet they do not cite or describe a *single* example of such anomalies or glitches. Unadorned assertions of irregularities and fraud cannot serve as the basis of an election contest. *See Hancock*, 122 N.W.2d at 595. As a result, their allegations involving the Dominion voting machines are not actionable.

Indeed, instead of specific irregularities, Contestants present only what they apparently

[2] Moreover, Contestants' vague assertion that the consent decree's elimination of the witness-signature requirement created a mere *opportunity* for fraud is not, and cannot be, sufficient to overturn this election. *See* Notice 18. Contestants do not allege that a single instance of voter fraud actually occurred as a result of the consent decree. As the Minnesota Supreme Court has held, the simple allegation that fraud *potentially* occurred during an election is insufficient to confer courts with jurisdiction to adjudicate election contests. *See Christenson*, 119 N.W.2d at 37 (affirming dismissal of election contest in which contestant alleged only that there was "reason to believe that possible errors could have occurred in counting of ballots").

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believe is a smoking gun: a "520-pound Dominion voting machine" that was apparently "delivered FEDEX to Dakota County *after* the election and just a few days prior to its November 16, 2020, postelection review." *Id.*; *see also id.* at 14. But Contestants do not bother to explain *why* this fact supports their election contest. It is not the Court's role to make these arguments for Contestants. Nor is it Contestee's. Without any information about this machine—or, more importantly, any argument as to why Contestants believe it amounts to an irregularity that affected the outcome of the election at issue—Contestee cannot provide a meaningful response to this claim. As a result, this aspect of the notice is plainly deficient. *See Greenly*, 395 N.W.2d at 90 (noting that, at minimum, notice of contest must "apprise the contestee of the grounds of the contest so that he is given a fair opportunity to meet the asserted claims").

2. Ballot Board Election Judges

Similarly, Contestants' unexplained assertion that "the Ballot Boards in Dakota County failed to utilize election judges of different major political parties" cannot serve as a ground for an election contest. Notice 4–5. The Minnesota Supreme Court has squarely held that "improper appointment or conduct of election judges" is not an adequate basis to sustain an election contest, even when "the 'opportunity to influence' has been present." *Hahn*, 225 N.W.2d at 387. While Contestants claim "[t]hese officials were responsible to ensure the absentee ballots were properly accepted or rejected" pursuant to Minnesota law, they do not assert that any ballots were improperly accepted or rejected. Notice 4. Once again, that is fatal to this contest.

Moreover, even if this vague allegation *could* support a proper election contest, this assertion still fails because Ballot Boards are not necessarily subject to any partisan-balancing requirement. Ramsey County District Judge Thomas Gilligan recently rejected similar claims regarding the composition of Ballot Boards in Duluth, Ramsey, and Olmstead Counties, as well as

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the City of Minneapolis. *See In re Petitions by the Minnesota Voters Alliance, et al. for Writs of Mandamus*, No. 62-cv-20-4124 (Ramsey Cty. Dist. Ct. Sept. 24, 2020) (attached as Nauen Decl. Ex. 6). As that court explained, Minnesota Rule 8210.2450 provides that absentee ballots may be reviewed either by partisan Ballot Board members (in which case the partisan-balancing requirement applies) *or* trained deputies. *Id.* at 33. If trained deputies are used, then the partisan-balancing requirement does not apply. *Id.* at 33–34. Contestants' notice does not specify which option Dakota County employed for its Ballots Boards, and so it is equally likely that no partisan-balancing requirement applied there either. Thus, not only does Contestants' objection to the Dakota County Ballot Board's actions fail to identify an irregularity that impacted the outcome of the election, it fails to identify an irregularity at all.

3. Postelection Reviews

The vast majority of Contestants' allegations relate to the PER process, specifically in Dakota County. But irregularities that occurred in a PER cannot serve as the basis for an election challenge. A PER does not determine which candidate in a race won the most votes; rather, as Contestants' own evidence explains, the PER is simply "a manual recount (or 'audit') of randomly-selected precincts for specific offices." Affidavit of Jane L. Volz ("Volz. Aff.") Ex. D, at 5. Accordingly, irregularities occurring during the PER do not impact the *outcome* of the election. Instead, the PER merely serves as a check to ensure that the vote totals—which have already been completed—are correct.

Nonetheless, even if irregularities occurring during the PER could support an election contest (which they cannot), the PER-related allegations in Contestants' notice offer no reason to infer that Representative Craig did not win this election.

Inter-County Procedural Differences. Contestants' claim that counties "had completely

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different procedures" when performing the PER process does not indicate that Representative Craig did not win the election. Notice 12. Contestants offer just two examples to support their claim that counties performed their PERs differently. Ramsey County allegedly delayed its PER date by two days, causing individuals who were not properly notified of the change to "show[] up to observe the PER" two days early. *Id.* at 12–13. However regrettable it might be that residents of Ramsey County had to travel to the PER site twice, this inconvenience does not give rise to a viable legal claim, let alone in the limited context of an election contest. Contestants' other cited example is Hennepin County, which allegedly decided to allow the public to observe its PER process remotely instead of in person, given the surging COVID-19 cases in the area. *Id.* at 13. But, again, Contestants do not allege that, in doing so, Hennepin County improperly counted or rejected any votes. Most importantly, neither Hennepin County nor Ramsey County are in the second congressional district. Thus, even if these amounted to irregularities, they had no impact on the election at issue here.

Ballot Delivery. Contestants' claim that "[b]allots were delivered to the Dakota County [PER venue] in a variety of ways" also fails to suggest that votes were improperly counted or rejected. *Id.* at 14. Contestants' allegations in this respect are difficult to pin down. According to their notice, some ballots were delivered too haphazardly. *See id.* (describing ballots arriving in boxes). But other ballots were apparently *too neatly stacked*. *See id.* (describing stack of ballots that were "squared up" and had "identical crease[s] that ran through the pile in the same direction"). Contestants' argument implies that this Court should assume that any ballot reviewed during the PER process was fraudulent unless it passed some sort of ill-defined, Goldilocks-inspired appearance test. That assertion flips the burden of proof in an election contest on its head, and certainly provides no indication of unlawfully counted ballots.

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Election Judges. Contestants' allegation that members of the staff of Dakota County Elections Director Andy Lokken ("Director Lokken") assisted the PER process, rather than election judges, is not an irregularity at all, let alone one that gives rise to an inference that Representative Craig did not win her election. Notice 13. There is no requirement that election judges be appointed to assist the PER process. While the PER official "*may* be assisted by election judges designated by the [PER] official for this purpose," election judges are not required to be in attendance. Minn. Stat. § 206.89, subd. 3. And as the PER Manual explains, the PER officials' staffs may assist this process. Volz Aff. Ex. D, at 9.

In any event, as already discussed, "improper appointment or conduct of election judges" is not an adequate basis to sustain an election contest, even when "the 'opportunity to influence' has been present." *Hahn*, 225 N.W.2d at 387. Contestants do not claim that any staff member assisting the Dakota County PER process engaged in any improper activity. While they allege that one member of the staff "appeared very biased," Notice 13, they do not explain why that person appeared biased, nor do they allege that this staff person did anything that would have affected the outcome of the election in the second congressional district.

Observational Access. Contestants' claim that they were not permitted to "meaningfully observe" the counting process similarly fails. Notice 13–14. As an initial matter, Contestants fail to point to any legal requirement that observers be permitted to stand over the shoulders of PER workers. *Cf. State v. Jorgenson*, 946 N.W.2d 596, 605 (Minn. 2020) (refusing to add words to provision in manner that "would rewrite the statute"). Indeed, to the contrary, the PER Manual states that the PER venue should be assembled such that the PER process occurs in a different "area" than where observers are permitted to stand. Volz Aff. Decl. D, at 10. As it explains: "[o]nly those people directly involved in the review should be present *within* the reviewing area," and

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those individuals comprise "the review officials and legal advisor and officials of the election jurisdiction." *Id.* (emphasis added). PER observers are permitted only to "be admitted into the room where the review is being conducted to observe proceedings from *outside the review area*." *Id.* (emphasis added). Contestants do not assert that they were denied the ability to be in the room where the PER was taking place, or that they were denied the ability to observe the proceedings from outside the area in which the PER was occurring. Thus, no alleged irregularity occurred. *See In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895, at *8 (Pa. Nov. 17, 2020) (noting that similar observation law "contemplates an opportunity to broadly observe the mechanics of the canvassing process" but does "not set a minimum distance between authorized representatives and canvassing activities," and declining to "judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so").[3]

Tabulation Sheets. Contestants' complaints about Director Lokken's handling of the PER tabulation sheets do not give rise to any claim that Representative Craig did not win this election. They first assert that Director Lokken "promised" Jane Volz, who attended the PER, that he would "give [Volz] a copy of all of the worksheets at the end of the day," but he instead sent Volz an electronic copy of the results the following day. Notice 15. Unsurprisingly, Contestants fail to identify a legal basis upon which this Court could (or should) overturn an election because an election official did not keep his word to a PER observer. Next, Contestants allege that Lokken

[3] Contestants' notice asserts that the PER is subject to the Open Meeting Law contained in Minnesota Statutes section 13D.01. *See* Notice 11. But nothing in the Open Meeting Law mandates that the public be permitted to stand within a particular distance of the open meeting at issue, let alone within *six feet* of election staff performing their duties in the midst of a deadly pandemic. Even assuming that the PER is subject to the Open Meeting Law, the only relevant requirement that statute imposed on the PER process was that it be made "open to the public." Minn. Stat. § 13D.01, subd. 1. There can be no question that the Dakota County PER was open to the public.

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recycled the tabulation sheets after transferring them to electronic form. *Id*. But, again, that fact does not indicate that the vote count that the PER was *reviewing* was inaccurate.

Finally, Contestants claim that the electronic version of the PER hand-count results differed from the results indicated on hand-written tabulation sheets that Volz captured on her phone during the PER process. *See* Notice 15. But a review of the documents provided in Volz's affidavit makes clear that there is no meaningful mismatch between the handwritten and electronic versions of the worksheet. For the second congressional district election, Volz's declaration offers handwritten and digital worksheets from three polling places: Eagan P-13, Hastings W-2 P-1, and West Paul W-2 P-2. At the Hastings W-2 P-1 polling place, there is no difference in the hand-count results between the electronic and handwritten version of the tabulation sheets. *Compare* Volz Aff. Ex. B, *with id.* Ex. C. For the Eagan P-13 polling place, the number of counted votes for Republican Tyler Kistner differed from the handwritten version by *three* votes—surely not enough to overcome his deficit of 9,580 votes. And while there *is* a significant difference between the electronic and handwritten PER vote counts for the West St. Paul W-2 P-2 polling place, that difference resulted in Representative Craig receiving 606 fewer votes and Kistner receiving just 183 fewer votes.[4] In other words, any differences Contestants have identified between the handwritten and electronic PER reports ended up being more harmful to Representative Craig than they were to her opponents.[5]

[4] In the electronic version of the West St. Paul W-2 P-2 precinct worksheet, the apparent vote difference appears to be accounted for in the "Total Unadjusted Difference" category. Volz Aff. Ex. C. Moreover, this worksheet confirms that those votes were counted, and that there was a "difference of not more than 0.5%" from the original vote totals. Accordingly, while it is not clear why the votes were segregated in the "Total Unadjusted Difference" category in this worksheet, they were accounted for and counted.

[5] Contestants further assert that Lokken failed to report the number of "blank for office" votes cast in particular races, referring to ballots where the voter failed to choose a candidate in that race.

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In sum, none of the purported irregularities identified by Contestants in their notice would have altered the outcome of Representative Craig's decisive 9,580-vote victory in the race for Minnesota's second congressional district. As a result, this election contest is "insufficient to invoke the jurisdiction of the court" and must be dismissed. *Christenson*, 119 N.W.2d at 41.

II. Even if this Court had jurisdiction to address Contestants' assertions of deliberate, serious, or material violations of Minnesota election law, that claim fails.

As discussed, to the extent this contest challenges Representative Craig's congressional election, this Court has no power to adjudicate claims of deliberate, serious, or material violations of Minnesota election law. *See* Minn. Stat. § 209.12. And for the reasons above, the Court lacks jurisdiction to adjudicate the only permissible question present—which candidate won the most votes in the election for the second congressional district.

But even if this Court had jurisdiction to consider Contestants' claim that deliberate, serious, and material violations of Minnesota's election law occurred, their notice of contest fails to identify any such violations. "For a violation to be 'deliberate,' it must be intended to affect the voting at the election." *Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn. 1979). For a violation to be "serious," it must be "one that is not trivial." *Id*. And a violation is "material" only if it contributed in "any 'material' degree" to the outcome of the election. *Effertz v. Schimelpfenig*, 291 N.W. 286, 288 (Minn. 1940); *see also Dart v. Erickson*, 248 N.W. 706, 708 (Minn. 1933).

None of the purported irregularities identified in the notice qualifies as a deliberate, serious, or material violation of Minnesota election law. Any challenge by Contestants to the consent decree is barred by the doctrine of laches and risks violating the due process rights of voters who relied on it. *See supra* at 4–7. Contestants' vague and conclusory allegations regarding Dominion

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Notice 15. But again, even assuming that failure amounts to an irregularity, it would not change the result of in the second congressional district.

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voting machines fail to identify any violation of Minnesota law, let alone a deliberate, serious, or material one. *See supra* at 8–9. And Contestants' challenge to the alleged partisan imbalance of the Dakota County Ballot Board fails because Minnesota law does not necessarily require Ballot Board members to be balanced on a partisan basis—and even if it did, Contestants do not explain how a lack of such balance was "intended to affect voting" or impacted the outcome of the election in any way. *See supra* at 9–10.

Nor do the allegations regarding the PER process suggest deliberate, serious, or material violations of Minnesota election law. *See supra* at 10–14. Ramsey County's delay of its PER by two days and Hennepin County's use of remote access for PER observers did not violate Minnesota law, let alone deliberately, seriously, or materially. While Contestants claim that ballots were transported to the PER venue in improper containers (and that a stack of ballots was too neatly aligned), they do not explain how that impacted the outcome of the election. Their allegation that the Dakota County PER was performed by Director Lokken's staff, rather than election judges, does not identify a violation of Minnesota law. Contestants similarly fail to identify any Minnesota law that was violated when PER observers in Dakota County were not permitted to stand within six feet of those performing the PER. And their assertions about any discrepancies between the handwritten and electronic versions of the PER results worksheets cannot constitute a deliberate, serious, or material violation of law for purposes of this contest because, if anything, those discrepancies *narrowed*, rather than expanded, Representative Craig's margin of victory.

CONCLUSION

Contestants' notice of contest does not contain sufficient allegations of irregularities to confer jurisdiction on this Court. And because the time for filing a contest has now passed, the Court cannot provide Contestants an opportunity to amend their notice. For these reasons, this

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Court should dismiss this action with prejudice.

Dated: December 8, 2020

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**Pro hac vice* motion pending