

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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

Court File No. 19AV-CV-20-2183  
(Judge Jerome B. Abrams)

Contestants,

vs.

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,  
Jessica Hanson, Robert Bierman,  
and John D. Huot,

**CONTESTEE STEVE SIMON'S  
MEMORANDUM SUPPORTING  
MOTION TO DISMISS**

Contestees,

Contestants Tyler Kistner and other candidates and voters filed an election contest challenging the conduct of eleven races in the 2020 November general election in Dakota County. In addition to naming as contestees the successful candidates in their races and the Dakota County election manager, they named Secretary of State Steve Simon. The contestants' attempt to join the Secretary as a contestee to this action falls outside of the subject-matter jurisdiction that state law grants to this Court. As a result, the contest must be dismissed as to the Secretary.

## FACTS

Voting in Minnesota's 2020 general election ended November 3. Nearly 3.3 million Minnesotans cast ballots, including more than 260,000 residents of Dakota County. *See* 2020 State of Minnesota Canvassing Report at 1, 4, available at <https://www.sos.state.mn.us/media/4364/mn-2020-state-general-canvassing-report-post-per.pdf>.

The contestants are a congressional candidate, ten candidates for Minnesota Legislature, and two individual voters. (Notice of Contest ¶¶ 1-12.) On November 27, they served the Secretary with a joint notice of contest of eleven races that were conducted as part of the general election. Contestants allege that the eleven elections at issue are subject to questions regarding who received the largest number of votes legally cast, and they contend that the elections were affected by deliberate, serious, and material violations of state election law. (*Id.* at 2.)<sup>1</sup>

On November 30 and December 1, various individuals filed six further election contests in Clay and Ramsey Counties contesting particular races conducted in the 2020 statewide general election. The six contests are substantially similar to the current contest and contain predominantly the same factual claims and declaration testimony. The contests challenge all five incumbent Democrats who were re-elected to the U.S. House and Senate in 2020, as well as a

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<sup>1</sup> Among the materials Contestants filed and served in support of their contest is a declaration signed by Jane L. Volz that contains extensive eyewitness testimony regarding the conduct of post-election reviews conducted by Dakota, Scott, and Hennepin Counties. (*See* Volz Aff.) Ms. Volz is also Contestants' counsel of record in this matter. Should she intend to be a fact witness in an evidentiary hearing, her representation would likely violate the rules of professional conduct. *See* Minn. R. Prof. Conduct 3.7(a). Unless her fact testimony is not necessary to the case but "merely cumulative, or quite peripheral"—in which event the Court may exclude it under the rules of evidence—Ms. Volz would likely be disqualified from representing Contestants. *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535, 541 (Minn. 1987); *see also* Minn. R. Evid. 403 (permitting exclusion of relevant evidence if its probative value is "substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

Democratic candidate who was elected to the Minnesota House. The Secretary is named as a contestee in all six contests.

### ARGUMENT

State courts only have subject-matter jurisdiction over an election contest against the Secretary of State if the contest pertains to his own re-election or to a proposed amendment to the state constitution. Because the contest meets neither of these conditions, it must be dismissed as to the Secretary.

On procedural questions, Minnesota courts hearing election contests “shall proceed in the manner provided for the trial of civil actions so far as practicable.” Minn. Stat. § 209.065 (2020). This includes motions to dismiss under Minn. R. Civ. P. 12.02. *Derus v. Higgins*, 555 N.W.2d 515, 516 n.4, 520 (Minn. 1996).

Dismissal is appropriate here because the Court lacks subject-matter jurisdiction over the election contest as to the Secretary. “Subject-matter jurisdiction is the court’s authority to hear the type of dispute at issue and to grant the type of relief sought.” *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). Whether subject-matter jurisdiction exists is a question of law. *Centra Homes, LLC v. City of Norwood Young Am.*, 834 N.W.2d 581, 585 (Minn. Ct. App. 2013). Subject-matter jurisdiction cannot be conferred by consent of the parties, nor can lack of such jurisdiction be waived. *Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 430 (Minn. 2005). While modern pleading rules are liberal, they are not “a substitute for substantive law.” *N. Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186, 188 (Minn. Ct. App. 1984). Dismissal under rule 12 is appropriate in cases that are fatally flawed in their legal premises and certain to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). On a rule 12 motion, factual allegations in the complaint are entitled to some deference. *Bahr v. Capella*

*Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Legal conclusions, however, are entitled to no deference. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

Minnesota courts' jurisdiction over election contests is "solely statutory." *Moulton v. Mewton*, 144 N.W.2d 706, 710 (Minn. 1966). As a result, state courts are "powerless to entertain such proceedings" except to the extent that the contestant brings them within the limitations provided by the contest statute. *Christenson v. Allen*, 119 N.W.2d 35, 38 (Minn. 1963).

Chapter 209 governs election contests and strictly limits the individuals who can be named as the contestee to a contest. *See* Minn. Stat. § 209.021, subd. 3 (2020). "In all contests relating to the nomination or election of a candidate," it is only a "*candidate* who is the contestee." *Id.* (emphasis added). Presuming that the Secretary himself is not the candidate whose (re-)election is being contested, the statute only permits the Secretary to be named as a contestee "[i]f the contest relates to a constitutional amendment." *Id.* Any contest filed against the Secretary that does not fit within this limitation must be dismissed as to the Secretary. *In re Contest of General Election Held on November 4, 2014, for the Purpose of Electing a United States Senator from the State of Minnesota*, No. 62-CV-14-7915, Order at 5-6 (Ramsey Cty. Dist. Ct. Dec. 30, 2014) ("2014 U.S. Senate Contest"), appeal dismissed, No. A14-2201 (Minn. Jan. 15, 2015).<sup>2</sup>

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<sup>2</sup> For the Court's convenience, copies of these decisions are attached to the Declaration of Nathan Hartshorn. When the 2014 U.S. Senate contest was decided, the relevant provision in section 209.021, subdivision 3, stated that the Secretary was the contestee in any contest "relat[ing] to a constitutional amendment or other question voted on statewide or voted on in more than one county." Minn. Stat. § 209.021, subd. 3 (2014) (emphasis added). The contestant unsuccessfully argued that the 2014 Senate election constituted an "other question voted on statewide." *2014 U.S. Senate Contest*, Order at 5-6. Five months later, during the legislative session following the 2014 election, the legislature deleted the "or other question" language from subdivision 3, further narrowing the circumstances under which the Secretary can be named as a contestee. 2015 Minn. Laws ch. 70, art. 1, § 53, at 848 (amending Minn. Stat. § 209.021, subd. 3).

No constitutional amendment was on the 2020 general election ballot, and the contestants do not assert otherwise. The Secretary was not a candidate for re-election in 2020. As a result, this Court lacks subject-matter jurisdiction over the current contest insofar as the Secretary is a contestee. The contest must therefore be dismissed as to the Secretary.

Moreover, the contest statute repeatedly states that each election contest has *one* contestee. Specifically, the statute refers to “the contestee” to a particular contest, both in the singular and with the definite article “the,” no fewer than seven times. *See* Minn. Stat. § 209.021, subds. 2-3. This is further underscored by Chapter 209 outlining different case processes for different types of contests. *See, e.g., id.* §§ 209.10, .12 (2020) (providing different procedures for state legislative contests and congressional-race contests). No provision in state law states or even suggests that an election contest can have more than one contestee. As a result, the statute provides state courts no jurisdiction over the Secretary (or anyone else) when a contestant attempts to name him as a co-contestee along with the individual who is identified by the statute.

Indeed, the statute’s consistent practices of (1) describing an election contest as a proceeding involving a single contestant and a single contestee and (2) assigning different procedures based on the specific facts of the contested race calls into serious question Contestants’ unilateral decision in this case to file a single contest for what amounts to eleven separate election contests without any apparent statutory basis or judicial permission. The Court, however, need not reach this issue to grant the Secretary’s motion to dismiss.

### CONCLUSION

This Court’s jurisdiction over election contests is strictly limited to the matters specified in the contest statute. The statute, in turn, does not permit an election contest against the Secretary unless it pertains to a constitutional amendment or to his own re-election—conditions

that indisputably are not met here. The Secretary therefore respectfully requests that the Court dismiss the contest as to the Secretary.

Dated: December 2, 2020

Respectfully submitted,

KEITH ELLISON  
Attorney General  
State of Minnesota

/s/ Nathan J. Hartshorn

NATHAN J. HARTSHORN  
Assistant Attorney General  
Atty. Reg. No. 0320602

445 Minnesota Street, Suite 1400  
St. Paul, Minnesota 55101-2131  
(651) 757-1252 (Voice)  
(651) 297-1235 (Fax)  
nathan.hartshorn@ag.state.mn.us

*Attorneys for Contestee Steve Simon*

#4853664

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