

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

CASE TYPE: Civil Other/Misc.

Tyler Kistner, Tomas Settell, Leilani
Holmstadt, Jose W. Jimenez, Fern A. Smith,
Mariah de la Paz, Cynthia Lonquist, Pam
Myhra, Megan Olson, Sandra A. Jimenez,
Deborah Coxe, and Greg Buck, Jerry Ewing,

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

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, Greg
Clausen, Liz Reyer, Rick Hansen, Ruth
Richardson, Jessica Hanson, Robert Bierman,
and John D. Huot,

Contestees.

**MEMORANDUM OF LAW IN SUPPORT OF
CONTESTEES MATT KLEIN, KARLA BIGHAM, GREG CLAUSEN, LIZ REYER,
RICK HANSEN, RUTH RICHARDSON, JESSICA HANSON, ROBERT BIERMAN,
AND JOHN HUOT'S MOTION TO DISMISS**

I. INTRODUCTION¹

Ten Republican candidates who lost in the November 3, 2020 General Election, along with individual voters,² filed this election contest under Minnesota Statutes Chapter 209 to contest the results of each of their respective races. Senator Matt Klein, Senator Karla Bigham, Senator Greg Clausen, Representative-Elect Liz Reyer, Representative Rick Hansen, Representative Ruth Richardson, Representative-Elect Jessica Hanson, Representative Robert Bierman, and Representative John Huot (“Contestees”) respectfully request the Court dismiss this contest in its entirety.

This action is nothing less than an attempt to undermine the public’s confidence in the integrity of Minnesota’s election process and sow doubt about the results; a pattern occurring across the United States. These contests are based on nothing more than spurious allegations and repackaged conspiracy theories. The Notice of Contest (“Notice”) alleges that the “irregularities” with the election in Dakota County were so widespread that they affected nine state races and one federal race, but curiously not widespread enough to implicate the other five State Senate and House races in Dakota County where the Republican candidates won. This partisan attack on the election and our election workers is meritless and should be dismissed for all the reasons stated below.

¹ By moving to dismiss, Contestees do not waive their right to challenge the Court’s jurisdiction on any basis.

² Although, solely for purposes of this motion to dismiss, Contestees accepts as true the factual allegations of the voter-Contestants that they are “eligible voters and taxpayers in Minnesota,” and “eligible voter[s] in the November 3, 2020 election,” they do not allege that they were eligible to vote in any particular congressional or state legislative district, which is required to be contestants in this matter. *See* Notice at 7; Minn. Stat. § 209.02, subd. 1 (providing that “[a]ny eligible voter . . . may contest . . . the nomination or election of any person for whom the voter had the right to vote if that person is declared nominated or elected to the senate or the house of representatives of the United States, or to a statewide, county, legislative, municipal, school, or district court office”).

At the outset, the Court lacks jurisdiction over this action for three reasons. First, the court lacks jurisdiction because contestants do not allege that the claimed irregularities would change the result of the election or that they are entitled to a decree changing the result of the election. Second, the court lacks jurisdiction because the Contestants did not comply with the strict procedural requirements of the statute, which clearly contemplates that an election contest is only intended to challenge the results of a single race, and is not intended to be a forum to challenge nine separate races. Third, the Court must dismiss the contest with respect to seven of the Contestees, Matt Klein, Greg Clausen, Liz Reyer, Rick Hansen, Ruth Richardson, Robert Bierman, and John Huot, because they were not timely served, and therefore the Court lacks jurisdiction over them.³ Should the Court reach the merits of this contest, it must be dismissed because Contestants have failed to state a claim on which relief may be granted.⁴ Finally, dismissal on any grounds must be with prejudice, because the deadline for serving this election contest has now passed and Contestants may not now amend their notice.

³ These individuals make an appearance solely for purposes of contesting jurisdiction.

⁴ Contestees further note that Contestants' Attorney, Jane L. Volz, has submitted a declaration in this case with extensive eyewitness testimony regarding the conduct of post-election reviews conducted by Dakota, Scott, and Hennepin Counties. Should this case proceed, Contestees will need to call Ms. Volz as a fact witness at trial. Accordingly, she should be disqualified from representing Contestants pursuant to Minn. R. Prof. Conduct 3.7(a). Ms. Volz cannot be heard to claim that her testimony is "not anticipated" when she herself affirmatively chose to file a fact declaration contemporaneously with the notice she filed initiating this contest. Nor can she argue that her testimony is peripheral, when the majority of the allegations in the contest regarding the post-election process are based on her declaration. Any hardship to her clients is of her own making and does not provide a basis upon which to allow her to continue in her representative role.

II. ARGUMENT

A. The Court Lacks Jurisdiction Over This Contest Because Contestants Do Not Allege That the Claimed Irregularities Would Change the Result of the Election or That They Are Entitled to a Decree Changing the Result of the Election.

To meet their burden at the pleading stage, Contestants' notice of contest must "state[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. In *Christenson v. Allen*, the Minnesota Supreme Court held that a notice of election contest fails to state a claim when it does not contain specific allegations of irregularities in voting and ballots and when the contestant did not claim he was entitled to a decree changing the declared election results. 119 N.W.2d 35, 38 (Minn. 1963). In *Christenson*, the contestant and contestee were opposing candidates for state senator. The contestant filed a notice of election contest claiming that irregularities occurred, but did not specify what they were. The contestee moved to dismiss, arguing that the courts lacked jurisdiction because the notice of the election contest failed to allege "that if such errors had not been made, contestant would have received a plurality of the votes cast." *Id.* at 37. The Minnesota Supreme Court agreed, holding:

a notice of contest designed to limit the contest to a recount of the votes cast, which fails to allege any irregularities either in the conduct of the election or the canvass of votes, or any violation of the election law, by a plain statement showing that the contestant is entitled to a decree changing the declared result of the election, is a nullity and insufficient to invoke the jurisdiction of the court.

Id. at 40. Subsequent cases have followed *Christenson's* lead in requiring a notice of contest to allege that irregularities actually caused the result of the election to change and entitled the contestant to a decree changing the result of the election. In *Hancock v. Lewis*, the contestant claimed that there were irregularities with respect to the issuance and counting of absentee ballots that deprived the voters of a fair opportunity to vote and asked the election be held invalid and the

results nullified. 122 N.W.2d 592 (Minn. 1963). The court held that these allegations were insufficient to confer jurisdiction on the court because, “[t]he contestant did not seek by his notice of contest to change the result of the election....” *Id.* at 595; *see also Greenly*, 395 N.W.2d at 91 (notice that referred only to “alleged voting violations that seemed to occur” that failed to state how they deprived voters of a fair election was insufficient to confer jurisdiction); *Hahn v. Graham*, 225 N.W.2d 385, 386 (Minn. 1975) (noting “[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”). Here, although contestants allege various irregularities in the election and its aftermath, never once do they claim that that these irregularities caused the results of the election to change or that they are entitled to a decree changing the results of the election. *Christenson*, 119 N.W.2d at 39 (finding that a “mere surmise that errors may have occurred in counting the ballots” is insufficient). And this is likely for good reason, since the closest margin in these races was 850 votes, and in the remainder, the Republican candidate lost by at least 2,670 votes.

Race	DFL Candidate	Republican Candidate	Margin Points
Senate District 52 ⁵	Matt Klein 29,730 60.58%	Tomas Settell 19,291 39.31%	+10,439 votes +21.27 points
Senate District 54 ⁶	Karla Bigham 25,530 52.85%	Leilani Holmstadt 22,712 47.02%	+2,818 votes +5.83 points

⁵ *See* Secretary of State, Results for State Senator District 52, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateSenate&DistrictId=540&show=Go> (last accessed Dec. 7, 2020).

⁶ *See* Secretary of State, Results for State Senator District 54, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateSenate&DistrictId=542&show=Go> (last accessed Dec. 7, 2020).

Race	DFL Candidate	Republican Candidate	Margin Points
Senate District 57 ⁷	Greg Clausen 30,897 56.41%	Jose Jimenez 23,825 43.50%	+7,072 votes +12.91 points
House District 51B ⁸	Liz Reyer 15,764 60.23%	Fern Smith 10,387 39.68%	+5,377 votes +20.55 points
House District 52A ⁹	Rick Hansen 15,704 65.47%	Mariah de la Paz 8,243 34.36%	+7,461 votes +31.11 points
House District 52B ¹⁰	Ruth Richardson 13,653 55.45%	Cynthia Lonnquist 10,947 44.46%	+2,706 votes +10.99 points
House District 56A ¹¹	Jessica Hanson 13,166 51.61%	Pam Myhra 12,316 48.28%	+850 votes +3.33 points
House District 57A ¹²	Robert Bierman 15,574 55.70%	Megan Olson 12,357 44.20%	+3,217 votes +11.5 points

⁷ See Secretary of State, Results for State Senator District 57, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateSenate&DistrictId=545&show=Go> (last accessed Dec. 7, 2020).

⁸ See Secretary of State, Results for State Representative District 51B, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateRepresentative&DistrictId=456&show=Go> (last accessed Dec. 7, 2020).

⁹ See Secretary of State, Results for State Representative District 52A, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateRepresentative&DistrictId=457&show=Go> (last accessed Dec. 7, 2020).

¹⁰ See Secretary of State, Results for State Representative District 52B, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateRepresentative&DistrictId=458&show=Go> (last accessed Dec. 7, 2020).

¹¹ See Secretary of State, Results for State Representative District 56A, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateRepresentative&DistrictId=465&show=Go> (last accessed Dec. 7, 2020).

¹² See Secretary of State, Results for State Representative District 57A, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateRepresentative&DistrictId=467&show=Go> (last accessed Dec. 7, 2020).

Race	DFL Candidate	Republican Candidate	Margin Points
House District 57B ¹³	John Huot 14,527 55.02%	Sandra Jimenez 11,857 44.91%	+2,670 votes +10.11 points

In order to overcome these margins, the Contestants would have to offer something more than speculation and innuendo. They have alleged no such facts, let alone evidence, that could potentially result in a change in the outcome of the election, and accordingly, the Court lacks jurisdiction over Contestants' claims and must dismiss the contest with prejudice.¹⁴

B. The Court Lacks Jurisdiction Over This Contest Because Contestants Failed to Strictly Comply with the Statute, Which Does Not Allow Multiple Contests to Be Brought in One Action.

“It is elementary that both the right to contest an election and the authority of the courts to hear and determine an election contest are purely statutory; and, absent statutory compliance, courts are powerless to entertain such proceedings.” *Christenson*, 119 N.W.2d at 38. The unambiguous language of Chapter 209 contemplates that an election contest is intended to challenge the result of a single race against a single contestee: “[i]n all contests relating to the nomination or election of a candidate, the notice of contest must be served on the candidate who is *the contestee*.” Minn. Stat. § 209.021, subd. 3 (emphasis added). Chapter 209 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, subs. 2-3. This point is further supported by the fact that Chapter 209 lays out different processes for state versus federal races, or for contests

¹³ *See* Secretary of State, Results for State Representative District 57B, <https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=136&scenario=StateRepresentative&DistrictId=468&show=Go> (last accessed Dec. 7, 2020).

¹⁴ The Court also 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.

based on just a question of who won the most votes versus contests based on violations of election law. *See* Minn. Stat. §§ 209.10; 209.12. Furthermore, joinder is improper because the statute only allows “an eligible voter, including a candidate” to bring a contest against a “person for whom the voter had the right to vote.” Minn. Stat. § 209.02. Therefore, while Mr. Settell, for example, can bring a contest against Mr. Klein, he cannot bring a contest against any of the other Contestees named in this action. No provision of state law authorizes a contest against multiple contestees challenging the results of multiple races, and no case that Contestees can locate have ever considered this circumstance.

The cases that Contestants cited in response to the Secretary’s argument on this point do not demonstrate anything different. *Aura v. Brandt*, 299 N.W. 910 (Minn. 1941) involved two contestants, but only a single contestee and challenged only the outcome of a single race. *In re Contest of General Election*, 767 N.W.2d 453 (Minn. 2009), similarly had two contestants, but again, only named a single contestee and challenged the outcome of a single race. *Hanson v. Village of Adrian*, 148 N.W. 276 (Minn. 1914), involved several contestees, but the issue in that case was whether those contestees were eligible to vote on a town ballot question—which is treated differently under the statute, but again, was limited to a single “race” on the ballot. And while principles of judicial economy may in some circumstances weigh in favor of joinder, that is not the case in the context of an election contest where the purpose of the contest is to determine who won a particular election or whether a particular election must be overturned, which is a fact-specific, race-by-race inquiry. *See* Minn. Stat. § 209.07. Accordingly, because there is no basis in the statute upon which to bring multiple contests in one action, Contestants have failed to strictly comply with the statutory procedures, and the Court lacks jurisdiction over this case and must dismiss it with prejudice.

C. **Dismissal is Required for the Seven Senate and House District Races Located Wholly in Dakota County.**

As noted, the right to contest an election is purely statutory, and “in order for the district court to acquire jurisdiction the provisions of the statute relating to filing and serving of the notice must be strictly followed.” *Petrafeso v. McFarlin*, 207 N.W.2d 343, 345 (Minn. 1973). The Minnesota Supreme Court has explained that contestants “must perform within a specified time and manner the acts that are necessary to invoke the court’s jurisdiction,” and that “[t]his is especially true of contests involving legislative offices because the legislature convenes only for a short time after the canvass of an election.” *Id.* at 346. Failure to do so will result in dismissal. *Id.*

Requirements governing the timing in which a notice of an election contest must be served have been set by the Minnesota legislature in Minn. Stat. § 209.021. When those procedural requirements are not adhered to strictly, the Court lacks jurisdiction over the contest; substantial compliance with the service requirements is not enough. *O’Loughlin v. Otis*, 276 N.W.2d 38 (Minn. 1979); *see also Gen. Election for Office of Mayor of City of Medford v. Kaiser*, No. A04-2355, 2005 WL 1804793, at *3 (Minn. App. Aug. 2, 2005) (applying *O’Loughlin*). Here, service was not timely with respect to Matt Klein (SD 52), Greg Clausen (SD 57), Liz Reyer (HD 51B), Rick Hansen (HD 52A), Ruth Richardson (HD 52B), Robert Bierman (HD 57A), and John Huot (HD 57B). Accordingly, the Court lacks jurisdiction over these Contestees and must dismiss them from this case.

Except for specific types of contests not relevant here, “notice must be *served and filed* within . . . seven days after the canvass is completed in the case of a special or general election.”

Minn. Stat. § 209.021, subd. 1 (emphasis added). Because Senate Districts 52¹⁵ and 57¹⁶ and House Districts 51B,¹⁷ 52A,¹⁸ 52B,¹⁹ 57A,²⁰ and 57B²¹ are located entirely within Dakota County, it is the Dakota County Canvassing Board that is required to complete a canvass of the general election returns and then “declare the candidate duly elected who received the highest number of votes for each county and state office voted for only within the county.” Minn. Stat. § 204C.33, subds. 1, 3.²² The Dakota County Canvassing Board completed its canvass and declared Klein, Clausen, Reyer, Hansen, Richardson, Bierman, and Huot the winners of their respective races on November 12, 2020. Lokken Decl. ¶ 2. These vote totals were certified by the Dakota County Elections Canvassing Board and conveyed to the Secretary of State. *Id.* Dakota County completed its Post-Election Review (“PER”) of these races on November 16, 2020. *Id.* ¶ 3. Thus, any notice of contest relating to the election of the candidates in these Districts was required to be served on the Contestees and filed with the Court within seven days of the completion of Dakota County’s

¹⁵ See Minn. Sec’y of State, Senate District 52 map, available at <https://pollfinder.sos.state.mn.us/docs/52.pdf> (last accessed December 7, 2020).

¹⁶ See Minn. Sec’y of State, Senate District 57 map, available at <https://pollfinder.sos.state.mn.us/docs/57.pdf> (last accessed December 7, 2020).

¹⁷ See Minn. Sec’y of State, Legislative District 51B map, available at <https://pollfinder.sos.state.mn.us/docs/51B.pdf> (last accessed December 7, 2020).

¹⁸ See Minn. Sec’y of State, Legislative District 52A map, available at <https://pollfinder.sos.state.mn.us/docs/52A.pdf> (last accessed December 7, 2020).

¹⁹ See Minn. Sec’y of State, Legislative District 52B map, available at <https://pollfinder.sos.state.mn.us/docs/52B.pdf> (last accessed December 7, 2020).

²⁰ See Minn. Sec’y of State, Senate District 57A map, available at <https://pollfinder.sos.state.mn.us/docs/57A.pdf> (last accessed December 7, 2020).

²¹ See Minn. Sec’y of State, Legislative District 57B map, available at <https://pollfinder.sos.state.mn.us/docs/57B.pdf> (last accessed December 7, 2020).

²² Contestees Karla Bigham (SD 54) and Jessica Hanson (HD 56A) were elected in districts that span two counties. Accordingly, their races were certified by the State Canvassing Board on November 24, 2020. Based on this date, they were timely served on December 1, 2020.

PER—that is, no later than November 23, 2020. Minn. Stat. § 209.021, subds. 1, 3; Minn. Stat. § 206.89, subd. 10 (canvass is completed and time for notice of contest of election begins to run after PER process is completed); *O’Loughlin*, 276 N.W.2d at 39-40 (failure to effect service within seven days of county canvassing board’s completion of the canvass deprived the court of jurisdiction over election contest relating to state legislative seat).²³

Contestants unquestionably missed that deadline with respect to Klein, Clausen, Reyer, Hansen, Richardson, Bierman, and Huot. The notice was not filed until November 27; four days too late. Contestants have filed Affidavits of Service for each of these individuals, each of which states that they were personally served on December 1, 2020; eight days too late.²⁴ Accordingly,

²³ After Dakota County’s PER was complete, the Secretary of State notified Dakota County of a potential error in the votes reported. Lokken Decl. ¶ 4. Dakota County reviewed the results on November 19, 2020, and concluded that the City of Lakeville failed to convey 1,093 absentee ballots to Dakota County, which resulted in those votes not being reported in the certified results. *Id.* ¶ 5. On November 20, 2020, the Dakota County Canvassing Board met and voted that the election judges had made an obvious error in counting or recording votes and notified each candidate in the precincts involved. *Id.* ¶ 6. The error was limited to the races in Lakeville Precincts 1-12. Dakota County submitted an addendum to the Secretary of State with the correct vote totals on November 24, 2020. *Id.* ¶ 7; Lokken Decl. Ex. 1. The error did not affect any other races and Dakota County was not required to re-canvass any other races. *Id.* ¶ 7. Accordingly, the date triggering service for Klein, Clausen, Reyer, Hansen, Richardson, Bierman, and Huot was the completion of Dakota County’s postelection review on November 16, 2020. *See* Minn. Stat. § 206.89, subd. 10.

²⁴ Although under Minn. Stat. § 209.021, subd. 3, certified mail may be sufficient to confer jurisdiction on the Court in limited circumstances, that method of securing jurisdiction is not available to Contestants with respect to Klein, Clausen, Reyer, Hansen, Richardson, Bierman, or Huot for two reasons: first, because the notice was not sent by certified mail until after the November 23 deadline; and second, because that method of securing jurisdiction requires a contestant to file both an affidavit of the person who sent the notice by certified mail and “an affidavit of the attempt by the person attempting to make service.” Minn. Stat. § 209.021, subd. 3; *see also Pearson v. Chmielewski*, 183 N.W.2d 566, 568 (Minn. 1971) (holding that that both the affidavit of the person sending the notice by certified mail *and* the affidavit of the person attempting personal service must be *executed and filed* before the expiration of the service deadline, because “if personal or substituted service cannot be obtained, jurisdiction can be acquired *only by the filing of the required affidavits.*” (emphasis added)).

the Court lacks jurisdiction over Klein, Clausen, Reyer, Hansen, Richardson, Bierman, and Huot, and must dismiss them from this contest with prejudice.

D. Contestants Have Failed to State a Claim on Which Relief May Be Granted.

Contestants purport to bring this contest “over the question of who received the largest number of votes legally cast, and on the grounds of deliberate, serious and material violations of Minnesota Election Law.” Notice at 1. Contestants appear to assert three discrete grounds for their challenge. First, they challenge a judicially approved consent decree waiving the witness requirement for absentee ballots cast in the 2020 general election, due to particular public-health risks that requirement would impose during a pandemic. Second, they allege that the Ballot Boards in Dakota County did not use election judges of different major political parties. And third, they make various claims regarding alleged shortcomings in Dakota County’s postelection review process.²⁵ None of these claims state a claim on which relief may be granted, and the contest should be dismissed.

²⁵ The notice also makes reference in a generalized way to a range of amorphous suspicions and concerns Contestants have regarding the election, including, for example: that “anecdotal evidence” (unsupported by any factual allegations or witness affidavits) suggested that some absentee applications were accepted or rejected based on the voter’s partisan affiliation; that unspecified news reports have alleged that unspecified voting machines within the State have been tampered with and that Dakota County uses voting machines; that unspecified “anomalies,” “glitches,” and other such phenomena in Minnesota could possibly have allowed vote counts to be altered on election night; that election processes were not transparent, that unspecified voters were intimidated in unspecified ways, that ballots or envelopes were lost, that results were transmitted too early, etc. *See generally* Notice at 4-5 and n.3. Most of these generalized suspicions and concerns are not alleged to relate to Dakota County, or to the conduct or outcome of the election in the races in question. They seem to be included to create an atmosphere of impropriety. They do not comply with Rule 8, and do not “apprise [Contestees] of the grounds of the contest and . . . give [them] a fair opportunity to meet the asserted claims.” *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590 (Minn. 1979) (citing *Christenson*, 119 N.W.2d at 39; *Moon v. Harris*, 142 N.W. 12 (1913)). To the extent this contest is based on these phantasms, they should be dismissed. *Walsh*, 851 N.W.2d at 605.

With respect to the allegation regarding the FedEx receipt witnessed by Ms. Volz, *see* Notice at 14-15, the Declaration of Mr. Lokken, the Dakota County Elections Director, filed herewith,

1. Standard of Review

Courts may dismiss election contests if they fail to state a claim, pursuant to Minn. R. Civ. P. 12.02(e); *Derus v. Higgins*, 555 N.W.2d 515, 516 n.4 (Minn. 1996). When reviewing a motion to dismiss, the court accepts the facts in the complaint as true and may construe all *reasonable* inferences in favor of the nonmoving party. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). Although Minnesota is a notice pleadings state, a Complaint must contain sufficient information to “fairly notify the opposing party of the claim against it.” *Id.* at 605. Moreover, a plaintiff must provide more than labels and conclusions and a legal conclusion in a complaint is not binding on the court. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (citation omitted).

2. The contest should be dismissed because it does not raise a triable claim as to who received the largest number of legally cast votes.

Contestants have failed to state a claim on which relief may be granted with respect to the issue of who received the largest number of votes legally cast. To the extent Contestants take issue with Dakota County’s postelection review processes, those claims have no bearing on which candidate won the most votes, or on the legality of any particular ballot. Therefore, the only allegations in the Notice that could possibly relate to the question of who won the most votes are

explains that the receipt was for two large printers manufactured by Dominion Voting, which happened to be delivered to the County’s Judicial Center loading dock on the date of the post-election review, November 16, 2020. Lokken Decl. ¶ 8. These were not voting machines, and were neither intended to be used in the 2020 general election or actually used in the 2020 general election. *Id.* Accordingly, any allegations or inferences based on Ms. Volz’s seeing this FedEx receipt should be disregarded as wholly irrelevant to this contest.

the allegations regarding the limited waiver of the witness requirement and the composition of the county's ballot board.

- a) *Challenges to the Secretary of State's Consent Decree Are Long Past Due and Barred by the Doctrines of Laches and Finality.*

Counts I and II of the Contestants' Notice of Contest appear to challenge the legality of the Consent Decree entered into by the Secretary of State waiving the witness requirement for absentee ballots for the 2020 general election. The history of the Consent Decree is well documented across several decisions from state and federal courts in Minnesota, and thus will be given only brief attention here.

On May 13, 2020, a group of Minnesota voters filed an action in state court against the Secretary arguing that Minnesota's Election Day receipt deadlines and witness-signature requirement for mail ballots violates the U.S. and Minnesota constitutions. *See LaRose v. Simon*, No. 62-CV-20-3149 (Ramsey Cty. Dist. Ct.). On July 17, the plaintiffs and the Secretary filed a proposed consent decree, in which the Secretary agreed not to enforce the challenged election laws during the November election. Nauen Decl. Ex. 1. The consent decree was vigorously opposed by the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee, all of whom were granted permission to intervene in the *LaRose* matter. Ramsey County District Judge Sara Grewing issued an order entering the consent decree on August 3. Nauen Decl. Ex. 2.

The Republican Committees sought and were granted an expedited appeal in the Minnesota Supreme Court but ultimately chose not to pursue it. Instead, on August 18, the *LaRose* parties (including all of the Republican parties) signed a stipulation to dismiss their appeals and "waive[d] the right to challenge in any other judicial forum the August 3, 2020 Orders and the August 3, 2020 Stipulations and Partial Consent Decrees that formed the basis for the above-captioned

consolidated appeals.” Nauen Decl. Ex. 3. The Supreme Court dismissed the appeal pursuant to the stipulation. Nauen Decl. Ex. 4.

Absentee and early voting began on September 18, 2020 in Minnesota. Voters who requested and received absentee ballots also received instructions that informed them that they were not required to have a witness for the 2020 Minnesota State General Election. Election officials accepted and counted more than 1,900,000 absentee and mail ballots from Minnesota voters in the general election.

On November 24, 2020, the day the State Canvassing Board was scheduled to meet, nearly three dozen petitioners, **including every single Republican candidate named in this contest**, filed an action in the Minnesota Supreme Court pursuant to Minn. Stat. § 204B.44 purporting to challenge the consent decree. Nauen Decl. Ex. 5 (“*Kistner*” matter). Their allegations and causes of action in that matter substantially parallel those in the present matter. Specifically, with respect to the consent decree, they alleged violations of the First and Fourteenth Amendments to the U.S. Constitution, as well as Article 1 of the Minnesota Constitution and violations of the separation of powers under the Minnesota Constitution. On December 4, 2020, the Minnesota Supreme Court dismissed the petition as it related to the consent decree on the grounds that it was barred by laches. Nauen Decl. Ex. 6. The same result should be reached here. Alternatively, or in addition, the Court should find that the claims are barred by the doctrine of finality.

(1) Laches Bars Contestants’ Claims.

The equitable doctrine of laches “prevent[s] 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.” *Monaghan v. Simon*, 888 N.W.2d 324, 328-39 (Minn. 2016). The Minnesota Supreme Court has repeatedly denied election challenges due to laches. *See Clark v. Reddick*, 791 N.W.2d 292, 294-96 (Minn. 2010); *Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008); *Marsh v. Holm*,

55 N.W.2d 302, 304 (Minn. 1952). Laches is a critical doctrine in the election context because the “very nature of matters implicating election laws and proceedings routinely required 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).

The question of whether Contestants’ challenges to the election based on the Consent Decree, which was entered into several months ago, should be barred by laches is distinct from the jurisdictional defect arising from their failure to timely file and serve their notice of contest. In a way, this delay in challenging the Consent Decree is far lengthier, because Contestants’ claims regarding the Consent Decree are based on events that occurred long before the election. Contestants could have intervened in the *LaRose* proceeding to assert their complaints regarding the legality of the Consent Decree or otherwise sued in this Court or elsewhere to challenge the Decree, and the issues they now press could have been resolved before millions of Minnesotans cast their ballots. As the Minnesota Supreme Court stated in its December 4 Order, “[g]iven the undisputed public record regarding the suspension of the witness requirement for absentee and mail ballots, petitioners had a duty to act well before November 3, 2020, to assert claims that challenged that procedure.” Nauen Decl. Ex. 6 at 4. This Court should follow the Supreme Court’s lead and dismiss Counts I and II of Contestants’ contest as barred by laches.

(2) Finality Bars Contestants’ Claims.

Alternatively, or in addition, Contestants’ claims with respect to the Consent Decree are barred by the doctrine of finality. *See, e.g., Clay v. Clay*, 397 N.W.2d 571, 579 (Minn. App. 1986) (noting that “the long established doctrine of finality of judgments [] is embodied in the concepts of res judicata, collateral estoppel, and certainly in” a statute that advances a “clear public policy” by setting strict filing deadlines). The doctrine is relevant here both to protect the interests of the 1.9 million Minnesotans who relied on the witness waiver in order to cast their ballots and because

the Contestants should be bound by the consent decree entered into by the Republican committees in August as well as by the result reached by the Minnesota Supreme Court on December 4.

First, Minnesotans had every reason to believe that the waiver of the witness requirement had been fully litigated and that the resolution of the legal question would not be further disturbed. The *LaRose* appeal to the Minnesota Supreme Court was dismissed in August—a full month before absentee and early voting began. Any order from this Court calling into question the votes of, or worse, disenfranchising the millions of Minnesotans, including the 160,303 voters in Dakota County who submitted absentee ballots, would do substantial damage to any expectation that Minnesotans can rely on the final decisions of the state judiciary when exercising their constitutional rights.

Second, *res judicata* should bar Contestants' claims. *Res judicata* is the finality doctrine that mandates there be an end to litigation. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). The doctrine provides that a judgment on the merits in a previous lawsuit “constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated therein.” *Id.* (quoting *Youngstown Mines Corp. v. Prout*, 124 N.W.2d 328, 340 (Minn. 1963)). Absent fraud, a valid judgment entered by agreement or consent has the same preclusive effect “as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties and those in privity with them.” *Hentschel v. Smith*, 153 N.W.2d 199, 203 (Minn. 1967) (quoting *Pangalos v. Halpern*, 76 N.W.2d 702, 706 (Minn. 1956)).

In this case, Contestants' contentions regarding the witness requirement have been litigated to a final judgment—twice. First, in the appeal to the Supreme Court in *LaRose*, and second, in

the § 204B.44 petition to the Supreme Court in *Kistner*. Contestants here are closely related to at least one of the intervenors in *LaRose*—the Republican Party of Minnesota, which endorsed the Contestant Candidates, and which intervened in *LaRose* “[o]n behalf of their supported candidates[and] voters,” citing their interest in “helping Republican candidates and voters” by “support[ing] Republican candidates for office.” Nauen Decl. Ex. 7 at 8, 12. Accordingly, as Republican voters and candidates, Contestants were and are expressly represented by the Republican Committees in *LaRose*, and therefore bound by the stipulation providing that the consent decree could not be challenged in any other forum—including this one. If that were not enough, the Supreme Court has again rejected a challenge to the witness requirement in its Order on December 4 and **every single Republican Candidate in this contest** was a party to that matter. This Court should not condone these serial attacks by the same individuals on a long-settled adjustment to absentee voting requirements, made during the course of a pandemic that is ravaging the state, and upon which 1.9 million Minnesota voters relied. *Res judicata* bars Contestants’ claims with respect to the consent decree and therefore this contest must be dismissed.

b) *Challenges to the Composition of the County’s Ballot Board Have No Basis in Law.*

Contestants allege that the ballot boards in Dakota County “failed to utilize election judges of different major political parties as required by Minn. Stat. § 203B.121, subd. 2(a)” and that the County “failed to allow bipartisan review of the absentee return envelopes to determine if they should be accepted or rejected.” Notice at 5. Contestants make this allegation in passing and without drawing even a single inference or conclusion based on it, let alone presenting evidence that this conceivably had an impact on the question of who received the most votes. Because these

allegations fail to give Contestees fair notice of Contestants' claims, they should be dismissed on that basis alone. *Walsh*, 851 N.W.2d at 605.

But even if the Court were to consider the allegations regarding the composition of the ballot boards, it should dismiss these complaints as having no basis in law. In a recent thorough and well-reasoned order, Ramsey County Judge Thomas Gilligan rejected similar claims regarding the composition of ballot boards in the Counties of Ramsey and Olmstead and the Cities of Duluth and Minneapolis. Nauen Decl. Ex. 8. ("Ballot Board Order"). The Court first held that the law governing ballot boards does not require that absentee ballots be reviewed exclusively by election judges from different major political parties. *Id.* at 32. The Court found that Minn. R. 8210.2450 makes clear that either partisan members of the absentee ballot board from different major parties must review ballots OR trained deputies may review the absentee ballots. *Id.* at 33. The Court further held that if trained deputies are used, there is no requirement that they be from different major political parties or that there be any partisan balancing. *Id.* at 33-34. This Court should follow Judge Gilligan's reasoning, and hold that Contestants have not stated a claim upon which relief can be granted based on any alleged shortcomings in the composition of the Dakota County ballot board.

3. The contest should be dismissed because it does not raise a triable claim that any deliberate, serious, and material violations of Minnesota election law occurred.

None of Contestants' theories state a claim for a "deliberate, serious, and material violations of the Minnesota Election Law,"²⁶ as is required to maintain an election contest. Minn.

²⁶ To the extent Contestants invoke miscellaneous constitutional and statutory authorities other than "Minnesota Election Law"—for example, the First Amendment, Equal Protection Clause, and Due Process Clause of the U.S. Constitution, Article I of the Minnesota Constitution, or 42 U.S.C. § 1983—those disputes are outside the limited realm of an election contest brought under Chapter

Stat. § 209.02, subd. 1. “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) (citing *Effertz v. Schimelpfenig*, 291 N.W. 286 (Minn. 1940)). For a violation of Minnesota Election Law to be “serious,” it must be “one that is not trivial.” *Schmitt*, 275 N.W.2d at 591. And a “material” violation is one that contributed to “any material degree” to the outcome of the election. *Effertz*, 291 N.W.2d at 329 (internal quotations omitted); *see also Dart v. Erickson*, 248 N.W 706, 708 (Minn. 1933).

For the same reasons discussed previously, to the extent Contestants’ allege that the Secretary of State’s Consent Decree constitutes a “deliberate, serious, and material” violation of the Minnesota Election Laws, this claim is barred by laches and finality. There is no reason why Contestants could not have challenged the Consent Decree on an earlier date, and they present no explanation for their delay. In addition, the doctrine of finality prevents re-litigating claims regarding the Consent Decree in this forum, because Contestants are in privity with the Republican intervenors in the original *LaRose* matter and directly overlap with the petitioners in the *Kistner* matter. Therefore, any claims based on the Consent Decree should be dismissed.

With respect to Contestants’ complaints regarding the composition of the ballot board, Contestants have not alleged a violation of any Minnesota election law, let alone a “deliberate, serious, and material” one. As discussed above, Dakota County was not required to use election judges or to ensure partisan balancing to the extent it used staff instead of election judges on its ballot board. And even if Contestants had alleged a violation, they are not “deliberate, serious, and material.” The ballot boards were convened to review ballots already cast, and therefore could

209. Even if those claims were not frivolous (which they are), they could not be properly brought through this special proceeding.

not have been “intended to affect voting at the election” or contributed to “any material degree” to the outcome of the election. Nor could such a violation be considered “serious,” particularly when the statute and rules governing ballot boards specifically allow for staff, rather than election judges, to conduct the review of absentee ballots. For these reasons, to the extent any of Contestants’ claims are based on the composition of the Dakota County ballot boards, those claims should be dismissed.

Finally, to the extent Contestants’ seek to use this contest to challenge various aspects of Dakota County’s postelection review process, that effort fails for multiple reasons. As an initial matter, none of the issues Contestants raise related to the PER are legal violations at all.

First, Dakota County was not required to use party-balanced election judges to perform the PER. The relevant law provides only that the postelection review official “may be assisted by election judges” in conducting the PER, and that if she is, the party-balance requirement applies to those election judges. Minn. Stat. § 206.89, subd. 3. By negative implication, where election judges are not used to assist in the PER, no party-balancing is necessary. *Cf.* Ballot Board Order at 33-34 (holding that party-balancing not required when canvass is performed by deputy clerks rather than election judges).

Second, the law does not require absentee ballot envelopes or applications to be reviewed as part of a PER, only the absentee (and in-person) ballots themselves. Minn. Stat. § 206.89, subd. 2; *see also id.* at subd. 3 (providing that a PER “must be performed in the manner provided by section 204C.21”); § 204C.21, subd. 1 (describing method of counting ballots, and including no requirements specific to the counting of absentee ballots, much less referencing their related applications or envelopes).

Third, although the level of access members of the public had may have been less than Contestants would prefer, it was no less than that required by law. By law, a PER “must be conducted in public.” Minn. Stat § 206.89, subd. 3. Contestants concede that Dakota County’s PER was public, they argue only that it was not public enough for their liking. *E.g.*, Notice at 13-14. They rely on alleged inconsistencies between Dakota County’s PER and the 2018 Post-Election Review Guide published by the Office of the Minnesota Secretary of State. *See* Notice at 15, Volz Affidavit, Exhibit D. But that guide itself states: “[p]ortions of this guide contain procedures based on best practices, rather than statute or rule. If employing these portions, do not consider the information to hold the same authority as that information governed by federal or state law.” Volz Aff. Ex. D, PER Guide at 5. Contestants do not—and cannot—point to any statute or rule that Dakota County violated, during the height of a pandemic, by limiting the number of observers in the public viewing area and locating that public viewing area to a space six feet away from the individuals performing the PER. Notice at 13-14. For example, in an election recount, only the candidates and a maximum of two designated representatives of each candidate are entitled to “observe the ballots as they are recounted,” and additional candidate representatives as well as members of the general public must remain “in the public viewing area of the room.” Minn. R. 8235.0700. The only allegations and affidavit testimony regarding the Dakota County PER reflect that members of the general public were, subject to reasonable space constraints, permitted to stay in a public viewing area of the room where the PER was underway. That is entirely permissible under the law.

But even if Contestants had violated some violation of Minnesota election law, such violations would be neither deliberate, nor serious, nor material. Any acts or omissions at the postelection review occurred, by definition, post-election. They could not logically have been

“intended to affect the voting at the election” and therefore could not be “deliberate” within the meaning of Minn. Stat. § 209.02, subd. 1. *Schmitt*, 275 N.W.2d at 591.

Nor are these alleged violations serious. Even if the use of county staff rather than election judges to conduct a postelection review failed to conform in some technical way to Minn. Stat. § 206.89 (and, as discussed above, it does not), such a violation is trivial. These reviews simply function as randomized “audits” of “the electronic voting system to determine if counting accuracy of the voting system meets a defined standard.” Volz Aff. Ex. D, PER Guide at 5. Similarly, even if Contestants could point to some specific legal requirement affecting the proximity and field of view that observers of a postelection recount should be afforded (and notably, they have not and cannot), those hypothetical requirements would not be violated in a serious, non-trivial way by a postelection review official’s decision to set reasonable public-safety-driven limitations during an intensifying and deadly pandemic transmitted through aerosol means to those in close physical proximity to an infected, potentially asymptomatic person. *See Schmitt*, 275 N.W.2d at 591 (a “serious” violation is “one that is not trivial”).

And in any event, because neither the identity of those conducting the postelection review nor the extent to which the public was able to observe it could “be said [to have] in any ‘material’ degree contributed to [Contestants’] defeat,” they are not material, within the meaning of Minn. Stat. § 206.89, subd. 1. *Effertz*, 291 N.W.2d at 329; *see also Dart*, 248 N.W. at 708. Dakota County’s PER did not even review the results of the State Senate and House Races. The statute requires a PER to be conducted only of the votes cast for president or governor, United States senator, and United States representative; a PER of any other offices is only conducted at the discretion of the postelection review official, and Dakota County’s postelection review official did not review votes cast for any additional offices. Minn. Stat. § 206.89, subd. 3; Minn. Sec’y of

State, 2020 Post-Election Review Results, Excel spreadsheet linked at <https://www.sos.state.mn.us/elections-voting/how-elections-work/post-election-reviews/?searchTerm=post%20election%20review> (last visited Dec. 7, 2020). Each Contestant here lost to their DFL Opponent by a substantial margin. Even if the PER had been conducted precisely as Contestants think it should have been, it could not have changed the outcome. Each Contestant still would have lost by a large margin. Any alleged shortcomings in the PER were not material to the election result.

For all these reasons, Contestants have failed to state a claim for a deliberate, serious, and material violation of Minnesota's election laws under any of their theories. This contest therefore should be dismissed.

III. CONCLUSION

For the reasons stated herein, Contestees respectfully request the Court dismiss this contest for lack of jurisdiction, or if the Court reaches the merits, on the grounds that Contestants have failed to state a claim upon which relief can be granted.

Dated: December 8, 2020

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Charles N. Nauen

Charles N. Nauen (#121216)

David J. Zoll (#0330681)

Kristen G. Marttila (#346007)

Rachel A. Kitze Collins (#0396555)

100 Washington Avenue South, Suite 2200

Minneapolis, MN 55401

(612) 339-6900

cnnauen@locklaw.com

djzoll@locklaw.com

kgmarttila@locklaw.com

rakitzeollins@locklaw.com

*Attorneys for Contestees Matt Klein, Karla
Bigham, Greg Clausen, Liz Reyer, Rick Hansen,
Ruth Richardson, Jessica Hanson, Robert
Bierman, and John D. Huot*

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