

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RICE

NINTH JUDICIAL DISTRICT

Case Type: Other Civil

Benda for Common-sense, a Minnesota  
Non-Profit Corporation, and Kathleen  
Hagen,

Court File No. 66-cv-22-2022

Judge: Carol M. Hanks

Petitioners/Plaintiffs

v.

Denise Anderson, Director of Rice County  
Property Tax and Elections,

**MEMORANDUM OF LAW  
IN SUPPORT OF RESPONDENT'S  
MOTION TO DISMISS  
PETITION FOR CORRECTION  
OF ERRORS AND OMISSIONS**

Respondent/Defendant;

and

Minnesota Secretary of State Steve Simon,

Intervenor.

**INTRODUCTION**

Denise Anderson, Director of Rice County Property Tax and Elections, Respondent for purposes of the Petition for Correction of Errors and Omissions Under Minn. Stat. § 204B.44 (“Petition”), respectfully requests that the Court dismiss the Petition. Petitioners have asked the Court to prohibit Rice County, through Ms. Anderson, from using “any Electronic Voting System that has hardware, software, or features that are not properly approved, certified or secure.” The Petition fails to provide any basis for this vague request and does not describe a specific error, omission, or wrongful act attributable to Ms. Anderson. In addition to the substantive defects of the

Petition, the Petition also suffers procedural and jurisdictional defects. Because Petitioners failed to abide by basic requirements of Minn. Stat. § 204B.44 and the rules of civil procedure, the Petition should be dismissed in its entirety.

## LEGAL STANDARD

### **I. Motion to Dismiss Standard**

A motion to dismiss for failure to state a claim is the proper method of testing the legal sufficiency of a claim. The legal issue in a motion to dismiss for failure to state a claim is whether the complaint sets forth a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 669 N.W.2d 550, 553 (Minn. 2003). “When reviewing cases dismissed for failure to state a claim on which relief can be granted, the only question . . . is whether the complaint sets forth a legally sufficient claim for relief.” *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). When determining whether a complaint survives a motion to dismiss for failure to state a claim, legal conclusions in the complaint are not binding upon the court. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). A plaintiff must provide more than labels and conclusions. *Id.*

### **II. Requirements of Minn. Stat. § 204B.44**

Petitioners brought this Petition under Minn. Stat. § 204B.44. The burden of proof rests with the Petitioners. Specifically, the Petitioners must show that Respondent committed an error, omission, or wrongful act that must be corrected under Minn. Stat. § 204B.44. *See Butler v. City of Saint Paul*, 936 N.W.2d 478, 484 (Minn. 2019) (stating that the petitioner “has the burden to prove that the City made an error that requires correction”); *Paquin v. Mack*, 788 N.W.2d 899, 904 (Minn. 2010) (stating that petitioner

“has the burden to prove that leaving his name off the ballot is an error that must be corrected under Minn. Stat. § 204B.44”); *see also* Minn. Stat. § 204B.44.

### **ARGUMENT**

#### **I. Petitioners Fail to Identify an Error, Omission, or Wrongful Act and Accordingly Cannot Meet their Burden.**

Under the plain language of the statute, a petition brought under section 204B.44 “shall describe the error, omission, or wrongful act and the correction sought by the Petitioner.” Here, the Petition does not describe the alleged error, omission, or wrongful act. The Petition states: “Upon information and belief, Defendant [Respondent] intends to utilize an Electronic Voting System in the November 8, 2022 election that has hardware, software or features that are not properly approved, certified, or secure.”<sup>1</sup> That is the extent of allegations set forth in the Petition. There are no allegations in the Petition as to what specific “hardware,” “software,” or “features” are at issue. There are no allegations as to the degree or type of approval, certification, or security at issue. The suggestion that there is some “feature” that is not “properly approved” is plainly insufficient even under relaxed pleading requirements.

Apparently recognizing the inadequate petition, Petitioners have now filed a “Notice of Motion and Motion for an Order to Correct Errors and Omissions -- Count III” (“Motion” hereinafter). Petitioners fail to provide the legal basis for this motion and ignore that motion practice for an order to correct is outside the scope of section 204B.44.

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<sup>1</sup> The Petition is included as Count III of the “Complaint and Petition for Correction of Errors and Omissions Under Minn. Stat. 204B.44” filed by Petitioners on August 23, 2022. *See* Index No. 2.

Still, even with this supplemental filing, Petitioners are not clear what specific error or omission is attributable to Respondent Anderson. For example, the documents filed purportedly supporting the Motion point the finger at ES&S and the Minnesota Secretary of State.

The vague pleading is a detriment to all involved, but particularly detrimental to the Court. Upon receipt and review of the Petition, the Court is called to “immediately set a time for hearing on the matter” and “order the officer, board or individual charged with the error, omission or wrongful act to correct the error or wrongful act or perform the duty or show cause for not doing so.” Minn. Stat. § 204B.44(b). Without a description of the error, omission or wrongful act, there is no factual basis for the Court to order anyone to show cause. Moreover, the individual charged with the error is without a clear allegation to which she is to respond. All this is to detriment of an efficient and orderly hearing.

In sum, the Petitioners have the burden to prove that Ms. Anderson made an error that requires correction. Petitioners failed to even describe the error much less carry the burden.

## **II. The Petition Suffers Procedural and Jurisdictional Defects.**

### ***A. Insufficient Service of Process***

Section 204B.44 provides: “The petitioner shall serve a copy of the petition on the officer, board or *individual charged with the error*, omission, or wrongful act, *on all candidates for the office* in the case of an election for state, federal, county, municipal, or

school district office, *and on any other party as required by the court.*” Minn. Stat. § 204B.44(b) (emphasis added).

Petitioners served the Petition on Respondent. *See* Index No. 3. There is no evidence that the Petition was served on any other party. Another consequence of Petitioners’ vague allegation that election “features” are not “approved” is that the Court cannot readily determine whether the appropriate parties have been served. It is unclear if the conduct of another party is implicated or if candidates should have been alerted and served with the Petition. Further, the statute specifically gives the Court discretion as to whether any other party should be served with the Petition. *See* Minn. Stat. § 204B.44(b) (“The petitioner *shall* serve a copy of the petition on the officer, board or individual charged with the error ... on all candidates ... and on *any other party as required by the court*”) (emphasis added). Again, the inadequate Petition is detrimental to the Court, detrimental to potentially necessary parties, and detrimental to the Court’s orderly and efficient handling of this matter.

***B. Jurisdictional Defects***

Given the inadequacy of the Petition, it is even unclear if this Court has jurisdiction over the alleged error. Pursuant to section 204B.44(b), “[t]he petition shall be filed with any *judge of the supreme court* in the case of an election for state or federal office or any judge of the district court in that county in the case of an election for county, municipal, or school district office” (emphasis added).

The election on November 8, 2022 is a general election. Voters will have the following races on their general election ballots: U.S. Representative; Governor and Lt.

Governor; Secretary of State; State Auditor; Attorney General; State Senator; State Representative; Judicial seats; County Officials; City Officers; School Board members; Township Officers; and local ballot questions. Because Petitioners have filed this action with the district court, the alleged error presumably relates to an issue with the election for a county, municipal, or school district office as opposed to the election for state or federal office. But again, the alleged error has not been described in the Petition, and it is therefore unclear whether the Petition is appropriately before this Court, if the matter should be before the Supreme Court, or if the allegations are outside the scope of section 204B.44. Based on the Petition it is simply unclear where the alleged error rests, whether the appropriate parties have been served, and whether this Court even has jurisdiction.

Upon reviewing Petitioner's Motion it becomes apparent that Petitioners' allegations are well outside the scope of an election for county, municipal, or school district office. This Court only has jurisdiction to hear petitions relating to errors, omissions, or wrongful acts "in the case of an election for county, municipal, or school district office." Minn. Stat. § 204B.44. If the petition goes beyond elections for county, municipal, or school district off, this Court is without jurisdiction. The overarching allegation that voting machines have not been adequately approved by the Secretary of State is not something that should be before this Court.

Moreover, while ultimately an issue for the Minnesota Supreme Court, Petitioners' request goes beyond the scope of Minn. Stat. § 204B.44. As the Supreme Court observed in *Begin v. Ritchie*, "[t]he 'principal purpose' of this statutory remedy 'is to provide a mechanism for correcting errors alleged to have occurred before the election, such as ...

in preparing or printing the official ballot.” *Begin v. Ritchie*, 836 N.W.2d 545 (Minn. 2013) (quoting *Coleman v. Ritchie*, 762 N.W.2d 218, 231 n. 13 (Minn. 2009)). Section 204B.44 “is not a broad vehicle through which any conduct with any relationship to an election, however tangential, can be challenged.” *Carlson v. Ritchie*, 830 N.W.2d 887, 894 (Minn. 2013); *see also Minn. Majority v. Ritchie*, No. A09–0950, Order at 5 (Minn. filed July 22, 2009) (stating that section 204B.44 does not “establish original jurisdiction in this court for any and all disputes ... relate[d] to ... elections in general”).

The instant Petition is apparently a challenge to the certification process implemented by the Secretary of State regarding the machines used by counties, including Rice County. Suffice to say, this issue is well beyond the purview of this Court.

### **III. The Petition Should be Dismissed on the Basis of Laches**

The Minnesota Supreme Court has applied laches to election petitions brought under section 204B.44, and dismissed petitions when the petitioner does not proceed “with diligence and expedition in asserting his claim.” *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008) (quoting *Marsh v. Holm*, 238 Minn. 25, 55 N.W.2d 302, 304 (1952)). “[T]he practical question in each case is whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.” *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (citation omitted) (internal quotation marks omitted).

“The first step in a laches analysis is to determine if petitioner unreasonably delayed asserting a known right.” *Monaghan v. Simon*, 888 N.W.2d 324, 329 (Minn.

2016). In addition to unreasonable delay, the court is required to assess whether that delay “result[s] in prejudice to others, as would make it inequitable to grant the relief.” *Fetsch v. Holm*, 236 Minn. 158, 52 N.W.2d 113, 115 (Minn. 1952). The prejudice analysis considers the impact on “election officials, other candidates, and the Minnesota electorate in general.” *Pawlenty*, 755 N.W.2d at 301.

The claims brought by Petitioners in the overarching action show that Petitioners have had suspicions relating to election systems dating back to the 2020 general election. For example, the “Benda Request” as it is described in the Complaint, was made on April 18, 2022 “[l]eading up to the May 24, 2022, Special Election Primary for Minnesota’s 1<sup>st</sup> Congressional District” and “was related to the election procedures and election voting system utilized by Rice County in their election process starting January 1, 2019.” Further, Petitioner Hagen made a request for data on October 23, 2021 referred to in the Complaint as the “Hagen Hardware and Software Request.” *Id.*

In response to these data requests, and others made by Petitioners, Rice County has produced hundreds of pages of letters, emails, election questionnaires, polling data, ballot box procedures, election drop box information and logs, election personnel and training information, election audit materials, and copies of various other responsive public data. *Aff. Sean McCarthy*.<sup>2</sup> Despite the suspicions, which were not quelled by the

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<sup>2</sup> The Affidavit of Sean R. McCarthy was previously filed on September 6, 2022, in connection with Respondent’s Memorandum of Law in Opposition to Plaintiff’s Ex Parte Motion



production of responsive public data, Petitioner's filed their Petition and related Complaint at the eleventh hour and now seek a "correction" days before the election.

Moreover, rather than seek to expedite the allegedly necessary correction ahead of the November 8 election, Petitioners have actually sought to delay the hearing in this matter. Petitioner objected to Respondent's request to address the Petition sooner and requested that the hearing be held on October 26, 2022, which is over two months after the filing of the Petition and a mere eight business days before the November 8, 2022 election. *See* Exhibit A to the Declaration of Ann Goering. Even if Petitioners could identify an error or omission worthy of correction under section 204B.44, that would give the Court just days to issue an order and leave Ms. Anderson or another official responsible for administration of the elections only a matter of days to correct the alleged issue and address any issues created therefrom.

In *Kieffer v. Rosemount*, the Minnesota Supreme Court recently dismissed a petition brought under Minn. Stat. § 204B.44 on the basis of laches because, inter alia, late change to voting technology permitted in polling places "would create severe pragmatic problems and increased costs in requiring election officials to identify and implement a new voting procedure on the eve of the election" and "potential[ly] prejudice ... the electorate in general." 978 N.W.2d 442, 444 (Minn. 2022). That case is instructive in light of the timing of the instant Petition and the requested relief therein. The prospect of modifying voting machines and technologies would clearly disrupt Rice County's plans for the upcoming election.

In sum, Petitioners have not diligently pursued a petition to correct an alleged error or omission leading into the 2022 general election. Beyond the fact that Petitioners have failed to articulate any error or omission warranting relief, Petitioners' delay is prejudicial and the requested relief to modify some "features" or "hardware" or "software" used to administer the election would create severe pragmatic problems and increased costs in requiring officials to modify voting systems or procedures on the eve of the election.

### **CONCLUSION**

The Petition provides no factual basis for the requested relief. However, even before considering the substance of the Petition, the Petition suffers procedural and jurisdictional defects that are fatal to the Petition. Because Petitioners failed to follow the basic requirements of Minn. Stat. § 204B.44 or the Minnesota Rules of Civil Procedure, much less carry the burden of proof, Respondent respectfully requests that this Court dismiss the Petition in its entirety.

**RATWIK, ROSZAK & MALONEY, P.A.**

Dated: September 29, 2022

By: /s/ Ann R. Goering

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