

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RICE

THIRD JUDICIAL DISTRICT

Case Type: Civil-Other

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

Court File No. 66-CV-22-2022

Plaintiffs,

v.

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

**INTERVENOR-DEFENDANT  
SECRETARY OF STATE'S RESPONSE  
TO MINN. STAT. § 204B.44 PETITION**

Defendant,

Steve Simon, in his official capacity as  
Minnesota Secretary of State,

Intervenor-Defendant.

Intervenor-Defendant Minnesota Secretary of State Steve Simon tests and certifies every piece of electronic hardware and computer software used in elections in Minnesota. Plaintiffs<sup>1</sup> Benda for Common-sense and Kathleen Hagen nonetheless theorize that some portion of an electronic voting system used in Rice County “has hardware, software or features that are not properly approved, certified or secure.” (Pet. ¶ 53.) They filed a petition under Minn. Stat. § 204B.44 seeking an order forbidding the county from using any such system.

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<sup>1</sup> Parties that originate petitions pursuant to Minn. Stat. § 204B.44 are typically referred to as “petitioners.” *E.g.*, Minn. Stat. § 204B.44(b) (2020). The initiating parties in this matter, however, call themselves “plaintiffs” and the respondent to their petition a “defendant.” This memorandum adopts their usage.

Moreover, Plaintiffs combined their petition under section 204B.44 with other claims against Defendant Anderson. The Secretary did not intervene in this proceeding as to these other claims and does not address them in this response.

The Court should deny the petition for four reasons. First, this court lacks subject-matter jurisdiction over the petition both because (a) it pertains to elections for numerous *state* offices, while section 204B.44 grants this Court jurisdiction only over claims pertaining to county, municipal, and school-district elections, and (b) it pertains to election administration in general, rather than a specific election for office. Second, Plaintiffs disregarded the statutory requirement to serve their petition on all candidates for office whose races the petition could fundamentally alter. Third, laches bars the petition because Plaintiffs waited for months after Rice County announced the electronic voting systems it is using in the 2022 elections to file a petition that seeks drastic alterations to election procedures at the eleventh hour. Finally, the foundational theory of the petition is factually wrong: every hardware and software product that Rice County is using in the 2022 general election has been properly tested and certified.

### FACTS

Each county in Minnesota contracts with a private vendor to provide critical services pertaining to elections. (Maeda Decl. ¶ 4.) Election Systems & Software (ES&S) is one such vendor; it prints ballots and manufactures, markets, and maintains computer hardware and software products that permit local governments to conduct elections. (*Id.*) ES&S is the current contracted ballot vendor for Rice County and the majority of the other counties in Minnesota. (*Id.*)

Minnesota election law requires multiple levels of testing to ensure that electronic voting systems used in this state accurately and properly administer our elections. Among these requirements is the mandate that electronic voting systems must be examined and approved by the Secretary before being used in Minnesota elections. Minn. Stat. § 206.57, subd. 1 (2020); *see also id.* § 206.56, subd. 8 (defining “electronic voting system” for the purpose of state law); Minn. R. 8220.0325-.0700 (2021) (governing Secretary’s examination, initial certification, reexamination, and recertification of electronic voting systems hardware and software). The

Secretary's review includes all system functions pertaining to ballot programming, electronic ballot marking, vote counting, and vote accumulation. Minn. Stat. § 206.57, subd. 1. After conducting the review, the Secretary examines and reports on the system's compliance with the state law and its "accuracy, durability, efficiency, and capacity to register the will of voters." *Id.* § 206.57, subd. 1.

ES&S applied to the Office of Secretary of State (OSS) to certify one of its software products, ElectionWare Voting System (EVS) Version 5.3.4.1, in September 2019. (Maeda Decl. ¶ 5.) Central to the application was a testing report from Pro V&V, a testing laboratory that has been accredited as an independent testing authority by the United States Election Assistance Commission (EAC). (*Id.*; Ex. A.) Pro V&V found that the software successfully met the EAC's requirements for voting systems. (Ex. A § 4.0.)

The Secretary's staff tested the EVS Version 5.3.4.1 software on computer hardware made by ES&S, including the company's DS200 precinct tabulators and a DS450 central-count machine. (Maeda Decl. ¶ 6; Ex. C.) After the software and hardware passed all tests required by Minnesota law, in May 2020 the Secretary certified them for use in Minnesota elections. (*Id.* ¶ 6; Exs. B, C.)

County election officials must notify the Secretary of each electronic voting system that will be used in elections within the county. Minn. Stat. § 206.82, subd. 2 (2020). In April 2022, Rice County notified the Secretary that it would be using ES&S's DS200 precinct tabulators and a DS450 central-count machine during the statewide primary and general elections in 2022. (Maeda Decl. ¶¶ 7-8; Ex. D (2022 Rice County Equipment Plan).) In July, Rice County provided the additional information that its ES&S hardware was running the same software that the Secretary had tested and certified for use with DS200 and DS450 hardware. (*See* Exs. B, C.)

## ARGUMENT

As an initial matter, the jurisdictional statute governing this proceeding, Minn. Stat. § 204B.44, does not provide for a civil-litigation process that involves dispositive motions under such procedural provisions as Minn. R. Civ. P. 12 or 56. To the contrary, the statute provides that a court adjudicating a petition under section 204B.44 “shall immediately set a time for a hearing on the matter” and then “issue its findings and a final order for appropriate relief as soon as possible after the hearing.” Minn. Stat. § 204B.44(b) (2020). For this reason, the Secretary submits this memorandum as a response to Plaintiffs’ petition rather than as a dispositive motion.<sup>2</sup>

In substantive terms, Plaintiffs’ petition fails on both jurisdictional and factual grounds. First, this Court lacks subject-matter jurisdiction to hear the petition. The jurisdictional basis Plaintiffs cite, Minn. Stat. § 204B.44, (a) grants this Court jurisdiction only over petitions pertaining to county, municipal, and school-district elections, while the current petition attacks the conduct of every race on the ballot in Rice County, including those for state office, and (b) grants any court jurisdiction only over claims pertaining to a particular election, rather than the administration of elections in general. Second, the petition is void on the basis of laches, because Plaintiffs waited more than four months after Rice County issued its 2022 Equipment Plan to file. Finally, Plaintiffs’ petition fails on its merits, because no election official committed an unlawful

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<sup>2</sup> If the Court addresses the petition under the processes provided by the Minnesota Rules of Civil Procedure, the Secretary requests that it consider this response a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(a) and (e) for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted, or in the alternative as a motion for summary judgment under Minn. R. Civ. P. 56. The grounds for the summary judgment motion in the alternative are that, as this memorandum and the accompanying declaration and exhibits demonstrate, (1) there is no genuine issue of material fact as to the claims stated in the section 204B.44 petition and (2) Defendants are entitled to judgment on those claims as a matter of law.

error or omission that will result in Rice County conducting elections with one or more electronic systems “that are not properly approved, certified or secure.” (Compl. ¶ 53.)

**I. THIS COURT LACKS SUBJECT-MATTER JURISDICTION OVER THE SECTION 204B.44 PETITION.**

The goal of all statutory interpretation is to ascertain legislative intent. Minn. Stat. § 645.16 (2020). Courts apply a statute’s plain meaning when the legislature’s intent is clear from plain and unambiguous statutory language. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001).

Minnesota Statutes section 204B.44 grants this Court jurisdiction over petitions asserting that one or more individuals have committed errors or omissions (1) pertaining to a specific election (2) for a county, municipal, or school-district office. Because the petition facially attacks the general administration of elections for every race on a Rice County ballot in the 2022 general election, it falls outside this Court’s jurisdiction and must be dismissed.

**A. Section 204B.44 Only Grants This Court Jurisdiction Over Elections for Local Offices.**

Under the jurisdictional statute Plaintiffs invoke, a petition pertaining to an election for state or federal office must be filed in the state supreme court. Minn. Stat. § 204B.44(b). Only a petition that pertains to an election for county, municipal, or school district office can be filed in a district court. *Id.*

Plaintiffs did not specify a single race to which their petition pertains. On its face, it is directed at the entire administration of elections in Rice County. In this cycle alone, Rice County voters will be presented with ballots listing candidates for thirty-two state and federal offices. (*See, e.g.*, Faribault sample ballot, available at <https://tinyurl.com/yzbtejzu>.) Petitions pertaining to any of these races fall into the exclusive jurisdiction of the state supreme court, not this Court. As a result, the petition must be dismissed.

**B. Section 204B.44 Does Not Grant Jurisdiction Over Claims Pertaining to Election Administration in General.**

Even if Plaintiffs had filed their petition in the state supreme court, however, it would still merit dismissal on jurisdictional grounds because it pertains to election administration generally rather than to a particular race for an electoral office.

Section 204B.44 does not authorize claims or establish court jurisdiction for “any and all disputes concerning official conduct that relates to or may affect elections in general. At a minimum, the plain language of the statute requires that the claim relate to a duty concerning a specific election.” *Minn. Majority v. Ritchie*, No. A09-950, at 5 (Minn. Jul. 22, 2009); *see also Minn. Voters Alliance v. Simon*, 885 N.W.2d 660, 664-66 (Minn. 2016) (citing *id.* in context of petition challenging Secretary’s alleged failure to prevent ineligible individuals from voting and holding that *Minnesota Majority* “suggests the conclusion that our original jurisdiction under section 204B.44 does not cover such broad-ranging challenges to the election process”).

The provision within section 204B.44 that most clearly requires petitions filed under the statute to pertain only to a single electoral race is the same provision cited above: the passage in paragraph (b) of the statute designating the court in which the petition must be filed. “[I]n the case of *an election for* state or federal office,” the statute requires the petition to be filed in the supreme court; meanwhile, “in the case of *an election for* county, municipal, or school district office,” it must be filed in district court. Minn. Stat. § 204B.44(b) (emphasis added). For this provision to make any functional sense, each “case” meriting a petition must involve “a” single “election for” a particular, identifiable office. *See id.* As a result, claims like Plaintiffs’ fall outside of the jurisdiction that section 204B.44 grants to any Minnesota court. *Cf. Minn. Voters Alliance*, 885 N.W.2d at 665-66 (rejecting petitioners’ contention that their petition pertained to “a specific

election”—i.e., the 2016 ballot question on a proposed constitutional amendment—because their claims related to all matters on the ballot, not just the constitutional-amendment question).

Plaintiffs attempt to use section 204B.44 to acquire court jurisdiction for claims that are directed at the general administration of elections rather than at a specific election for a single office. Any such use of the statute is facially improper, and their petition must therefore be dismissed.

## **II. THE PETITION SHOULD BE DISMISSED FOR FAILURE TO SERVE REQUIRED PARTIES.**

Petitioners must serve a copy of their petition on “all candidates for the office” to which the petition pertains. Minn. Stat. § 204B.44(b). On its face, this provision provides additional textual evidence that section 204B.44 requires each petition to be directed at a single election for a single (“the”) office. In addition, the passage also provides a further basis for dismissing the petition: Plaintiffs have not filed proof that they served the petition on any candidate running in any of the more than forty federal, state, and local races that currently appear on Rice County’s general-election ballots. Every candidate in each race could be prejudiced by the relief that Plaintiffs seek, but Plaintiffs have disregarded the explicit statutory requirement that they serve all impacted candidates. The petition should therefore be dismissed.

## **III. THE PETITION IS BARRED BY LACHES.**

Even if Plaintiffs had complied with the jurisdictional restrictions and service requirements provided by section 204B.44, the Court still should deny the petition based on laches. By sitting on their rights for months, Plaintiffs forfeited their ability to challenge Rice County’s use of ES&S election hardware and software.

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, 328–29 (Minn. 2016). Minnesota courts have repeatedly

denied election challenges due to laches. *E.g.*, *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 requires 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). This includes claims regarding electronic voting equipment. For example, the supreme court recently held that laches barred a section 204B.44 petition regarding voting equipment when the petitioners waited 34 days to file their petition. *Kieffer v. Rosemount*, 978 N.W.2d 442, 443 (Minn. 2022).

A petition filed under Minn. Stat. § 204B.44 is barred by laches when (1) the petitioner unreasonably delays in filing their petition and (2) the relief the petitioner requests would prejudice election officials, candidates, and the electorate in general. *Pawlenty*, 755 N.W.2d at 299-303. Both elements are met in this case.

Here, Plaintiffs sat on their rights for a minimum of 46 days, longer than the period the supreme court held was too long in *Kieffer*. The latest date on which Plaintiffs can plausibly claim they were capable of learning of the violations they allege is July 8, the day Rice County published the final amendment to its 2022 Equipment Plan. (*See* Maeda Decl. ¶¶ 7-8; Ex. D.) That plan announced that Rice County would be running ES&S’s EVS Version 5.3.4.1 software on the company’s DS200 and DS450 hardware products during elections in 2022. (*Id.*) Rather than bring claims directed at those hardware and software products then, they waited 46 days—until August 23—to file their petition in this Court. If they had sued in July (or, indeed, in April, when Rice County transmitted the initial version of its equipment plan, announcing the ES&S hardware it would be using), the issues Plaintiffs now press could conceivably have been resolved long



before the November general election, rather than within the dwindling number of days that remain before election day. Plaintiffs offer no excuse for their delay.

Moreover, granting Plaintiffs' requested relief—which the Secretary takes to be conducting the November general election in Rice County by hand rather than with the certified ES&S optical ballot scanners—would inflict severe prejudice on state and county election officials. Barred at the eleventh hour from using the optical scanners that have been a central element of polling-place procedure for many years, election officials in Rice County and the Office of Secretary of State would be afforded just a few days to devise and promulgate alternate processes for accepting, collecting, interpreting, and tallying the votes cast within the county.

Finally, in addressing laches, the court must consider the potential prejudice to the electorate in general. *Clark*, 755 N.W.2d at 303. Here, the harm is very unlikely to be confined to Rice County. As noted above, ES&S is the ballot vendor for the majority of counties in Minnesota. A vast number of local election jurisdictions in Minnesota intend to use ES&S hardware and software that are functionally identical, insofar as Plaintiffs' claims are concerned, to Rice County's in the 2022 general election. A last-minute injunction directed at Rice County could therefore have severe consequences for the conduct of the election across the state. (*See Maeda Decl.* ¶ 14.)

Because Plaintiffs have provided no excuse for waiting to file until at least 46 days after the claims they allege could have arisen, their petition should be dismissed. *Cf. Kieffer*, 978 N.W.2d at 443 (“[W]e conclude that it would be inequitable to grant the relief sought by petitioners with respect to the primary ballot even if we were to conclude that their arguments had merit.”).

**IV. THE PETITION FAILS ON ITS MERITS BECAUSE ALL ELECTRONIC VOTING SYSTEMS IN USE IN RICE COUNTY ARE PROPERLY APPROVED AND CERTIFIED.**

Even if the petition did not suffer from any of the jurisdictional defects detailed above, the Court should still deny it on its merits. Plaintiffs' conclusory assertion that one or more of the election systems being used in Rice County "has hardware, software or features that are not properly approved, certified or secure" is entirely unfounded. Moreover, insofar as such an assertion could be the basis for an errors-and-omissions petition, the assertion is demonstrably false.

State law presumes that county and local election officials comply with Minnesota laws. *Freeborn Cty. v. Helle*, 117 N.W. 153, 95 (Minn. 1908). Petitioners therefore bear the burden of proving laws have been violated.

All hardware and software that make up electronic voting systems must be tested and certified by the Secretary before being used in Minnesota elections. Minn. Stat. § 206.57, subd. 1; *see also* Minn. R. 8220.0325-.0700. The undisputed record in this matter demonstrates that the hardware and software products Rice County is using in the 2022 general election—that is, ES&S's DS200 precinct tabulators, DS450 central-count machine, and EVS Version 5.3.4.1 software—have been tested, approved, and certified by the Secretary. They have also been tested and approved by Pro V&V, a laboratory accredited by the EAC. Because the Secretary's testing and certification of Rice County's election systems meets all requirements provided by Minnesota law, Plaintiffs' conclusory assertion that some such system remains unapproved or uncertified is indisputably false.<sup>3</sup> Under the terms of section 204B.44, no "wrongful act, omission, or error" of

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<sup>3</sup> Plaintiffs' unexplained assertion that some hardware, software, or "feature" Rice County is using is not "secure," meanwhile, has no basis in any Minnesota law (or, for that matter, in any evidence in the record), and as a result it cannot be the foundation of a claim of a wrongful act, error, or omission filed under section 204B.44.

any individual “charged with any duty concerning an election” has taken place, and as a result the petition should be denied.

Though they did not do so in their petition, Plaintiffs subsequently raised speculative concerns about the modem<sup>4</sup> technology that is a part of some of ES&S’s products. All such concerns, however, are irrelevant to any election conducted in Minnesota, because state law prohibits connecting electronic voting systems to the internet, by modem or any other means, before hard-copy election results have been printed. Minn. Stat. § 206.845. The Secretary’s testing found that the ES&S system that is in use in Rice County operates within these restrictions. (*See* Maeda Decl. ¶ 12 & Ex. C § 3.5 (noting that Secretary’s testing of ES&S system demonstrated that when polls are closed on DS200 tabulator, hard-copy results tape is printed before system presenting option to transmit results via modem).) In any case, the official record of election results that Minnesota’s vote tabulating machines provide to county and state canvassing boards is a simple hard-copy print-out, not an electronic transmission—and thus modems are not involved in the process. Minn. Stat. § 206.845, subd. 2 (2020).

Because telecommunications equipment such as modems have no role in communicating official election results in Minnesota, such equipment is not included in the definition of “electronic voting system” provided by state law. *Id.* § 206.56, subd. 8 (stating that “[a]n electronic voting system includes automatic tabulating equipment; nonelectronic ballot markers; electronic ballot markers, including electronic ballot display, audio ballot reader, and devices by which the voter will register the voter’s voting intent; software used to program automatic

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<sup>4</sup> A modem is “a device that converts signals produced by one type of device (such as a computer) to a form compatible with another (such as a telephone) and that is used especially to transmit and receive information between computers via landlines.” *Modem*, Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/modem>.

tabulators and layout ballots; computer programs used to accumulate precinct results; ballots; secrecy folders; system documentation; and system testing results”). As a result, the Secretary is neither required nor even authorized to examine telecommunications equipment such as modems as part of his testing and certification of electronic voting systems. *See id.* § 206.57, subd. 1 (authorizing Secretary to test electronic voting systems and their functions pertaining to ballot programming, electronic ballot marking, vote counting, and vote accumulation, but not transmission of election results). In sum, there is no provision in Minnesota law for a modem in any election system to be tested, approved, or certified—and as a result it cannot be a wrongful act, error, or omission for any election official to fail to test, approve, or certify it.

Finally, while the Secretary has not tested a modem in an ES&S (or any other) electronic voting system, Pro V&V has. As the laboratory report that ES&S submitted to the Secretary in 2019 explains:

Telecommunications testing was conducted [by Pro V&V] on the EVS 5.3.4.1 to determine the capability of the system to transmit and receive data electronically using hardware and software components over distances both within and external to a polling place.

(Ex. A § 1.4; *see also id.* Table 2-2 (listing two Verizon modems among hardware components tested), §§ 2.2 (noting test results were transmitted “either manually or by telecommunication via modem”), 3.3.4 (stating that Pro V&V’s Functional Configuration Audit of ES&S system “focused on telecommunications capabilities (modeming) and write-in support”).) The ES&S system, including its modems, passed all of the laboratory’s tests. (*Id.* § 4.0.)

Because all of the electronic voting systems that Rice County is using in the 2022 general election have indisputably been tested and certified in the manner required by Minnesota law, Plaintiffs’ petition fails on its merits and should be denied.

## CONCLUSION

For these reasons, the petition suffers from fundamental and fatal legal flaws. The Court should dismiss the petition for lack of jurisdiction, for lack of service, on the basis of laches, and because Plaintiffs' claim that any individual charged with a duty relating to elections in Rice County has committed a wrongful act, omission, or error is false as a matter of law.

Dated: October 13, 2022

Respectfully submitted,

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