

**STATE OF MINNESOTA
IN SUPREME COURT**

DONALD J. TRUMP FOR PRESIDENT,
INC., SENATE VICTORY FUND, HOUSE
REPUBLICAN CAMPAIGN COMMITTEE,
RYAN J. BEAM,

Petitioners,

v.

STEVE SIMON, in his official capacity as
Minnesota Secretary of State,

Respondent.

Supreme Court No. _____

**PETITION PURSUANT
TO MINNESOTA STATUTE § 204B.44**

The Donald J. Trump for President, Inc., Senate Victory Fund, House Republican Campaign Committee, and Ryan J. Beam (together, “Petitioners”) for their petition against Steve Simon, in his official capacity as the Secretary of State of Minnesota (“Respondent”), allege as follows:

INTRODUCTION

1. Pursuant to its constitutionally delegated authority and consistent with federal law, the Minnesota Legislature has enacted election laws establishing the “Time, Place and Manner” of federal elections.

2. Critically, Minnesota law requires any ballot received on Election Day “either (1) after 3:00 p.m., if delivered in person; or (2) after 8:00 p.m., if delivered by mail or package delivery service, [to] be marked as received late by the county auditor or municipal clerk” and

requires that any such late ballot “must not be delivered to the ballot board.” Minn. Stat. § 203B.08, subd. 3, *see also* §§ 204B.45–46.

3. This statutory deadline for mail-in ballots is established, in part, to comply with federal statutory requirements mandating that federal elections occur on Election Day.

4. The Secretary of State of Minnesota has unilaterally and without legal authority usurped the Minnesota Legislature’s—and Congress’s—power to establish rules regulating the manner and time of federal elections by deciding that he will not enforce Minnesota’s mail-in ballot deadlines. Instead, pursuant to a consent decree between the Secretary and private parties, the Secretary announced that election officials will accept and count mail-in ballots that are cast and postmarked on or before Election Day but received by 8 p.m. within 7 days of Election Day. Even worse, the Secretary announced that if a mail-in ballot does not bear a postmark, then the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.

5. The Secretary’s actions violate federal and state law and the U.S. Constitution and constitute a “wrongful act, omission, or error” pursuant to Minn. Stat. § 204B.44.

6. The Petitioners request this Court issue an order directing the Secretary of State to segregate all late-arriving mail-in ballots in order to preserve the Petitioners’ ability to challenge the legality of the Secretary’s actions and to ensure the fairness and integrity of the election.

PARTIES

7. The Donald J. Trump for President, Inc., is the principal campaign committee for President Trump who is running for reelection in this year’s general election.

8. The Senate Victory Fund (Regis. No. 20013), with a registered address of 161 St. Anthony Avenue, Suite 902, Saint Paul, MN 55113, is a Minnesota political party unit within a

house of the Minnesota Legislature, as defined by Minn. Stat. § 10A.01, subd. 30 . The Senate Victory Fund is organized by and serves as the political arm of the Senate Republican Caucus. The Senate Victory Fund supports the election of republican candidates for state senate offices in year’s general election.

9. The House Republican Campaign Committee (Regis. No. 20010), with a registered address of 525 Park Street, Suite 245, Saint Paul, MN 55117, is a Minnesota political party unit organization within a house of the Minnesota Legislature, as defined by Minn. Stat. § 10A.01, subd. 30. The House Republican Campaign Committee is organized by and serves as the political arm of the House Republican Caucus. The House Republican Campaign Committee supports the election of republican candidates for state house offices in year’s general election.

10. Ryan J. Beam is a Minnesota resident and registered voter. He resides at 21387 Queen Ct. NW, Elk River, MN 55330. Ryan J. Beam is unaffiliated with any political party and he intends to vote in compliance with federal and state law in the 2020 General Election. Under Minnesota law, any eligible voter may contest the election of any person for whom the voter had the right to vote if that person is declared elected to the Senate or the House of Representatives of the United States or to any statewide office, including the election of presidential electors and alternates. Minn. Stat. § 209.01.

11. Respondent Steve Simon (“the Secretary”) is the Secretary of State of Minnesota and is named as a Respondent in his official capacity. The Secretary is the State’s chief elections official, and, in that capacity, he enforces election laws in Minnesota, oversees the administration of all statewide elections, and “prepare[s] and transmit[s] to the county auditors and municipal clerks detailed written instructions for complying with election laws relating to the conduct of elections, conduct of voter registration and voting procedures.” Minn. Stat. § 204B.27.

JURISDICTION

12. The Minnesota Supreme Court is vested with original jurisdiction in this matter under the mandate of Minn. Stat. § 204B.44, which provides that a petition alleging any “wrongful act, omission, or error of . . . the secretary of state, or any other individual charged with any duty concerning an election . . . shall be filed with any judge of the supreme court in this case of an election for state or federal office”

13. Petitioners bring this action to ensure the fairness of elections occurring on November 3, 2020, but particularly the national and state elections, pursuant to Minn. Stat. § 204B.44.

FACTUAL BACKGROUND

14. This year’s general election contains, *inter alia*, elections for state and federal offices.

15. As noted above, the Secretary of State is tasked with enforcing the election laws and overseeing the administration of all elections. As applied to this election, the Secretary of State is required to enforce all elections laws applicable to federal offices, including mandates of state and federal law and the U.S. Constitution.

16. The U.S. Constitution establishes state and federal roles for the promulgation of the laws governing federal elections.

17. The role of Congress is governed by Article II, § 1, cl. 4, which provides that “Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”

18. Various statutes, taken together, “mandate[] holding all congressional and Presidential elections on a single November day.” *Foster v. Love*, 522 U.S. 67, 67 (1997). This

“immediate act of the people of America” protects the selection of the President from “cabal, intrigue, and corruption.” Federalist No. 68 (Hamilton).

19. Further, it is “without question [that] Congress has the authority to compel states to hold these elections on the dates it specifies.” *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1170 (9th Cir. 2001). And courts have long-rejected laws which “purport[] to extend beyond the election day the time within which voters’ ballots may be received by the election officials for the election of presidential electors” because such actions “conflict with the constitutional congressional Act which requires the electing be done on election day.” *Maddox v. Bd. of State Canvassers*, 149 P.2d 112, 114 (Mont. 1944).

20. With respect to the election of congressional offices, Congress provided that “[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.” 2 U.S.C. § 7.

21. With respect to the election of presidential electors, Congress similarly provided that “[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” 3 U.S.C. § 1.

22. As applied in the year 2020, federal law sets Tuesday, November 3rd as Election Day.

23. With respect to the states’ role, the Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by *the Legislature thereof*; but the Congress may at any time by Law make or alter

such Regulations, except as to the Places of choosing Senators.” U.S. Const. art. I, § 4, cl. 1 (emphasis added).

24. Additionally, the Electors Clause provides that “[e]ach State shall appoint, in such *Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” U.S. Const. art. II, § 1, cl. 2 (emphasis added).

25. The term “Legislature” in these provisions means what it says. Except as provided by Congress, the legislature of each state, not its executive actors or courts, has authority to determine the “Time, Place and Manner” of holding federal elections and to define the “Manner” of choosing presidential electors. *See, e.g., McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

26. For purposes of the Elections Clause and Electors Clause, the “Legislature” of Minnesota is the Minnesota Legislature.

27. Consistent with federal law setting the time for Election Day, the Minnesota Legislature has exercised its constitutional duty to establish rules governing the time, place, and manner of federal elections.

28. Minnesota statutes, like federal law, set the state general election as the first Tuesday after the first Monday of November in each even-numbered year. Minn. Stat. § 204d.03, subd. 2.

29. Voters may vote in person at polling places set up in each precinct. *Id.* § 204B.16. Minnesota law requires that polling places be interspersed through the population to ensure that “no voter is required to go to more than one polling place to vote” if elections for multiple offices are held on the same day. *Id.*; *see also id.* § 204B.14.

30. Voters who vote in person on Election Day must be in line at the polling place before 8:00 p.m. on voting day, when the polls close. *Id.* § 204C.05. “No individual who comes to the polling place or to a line outside the polling place after the time when voting is scheduled to end shall be allowed to vote.” *Id.*, subd. 2(a). In-person voting is not permitted after Election Day.

31. Minnesota law authorizes in-person absentee voting “during the 46 days before the election,” *id.* § 203b.081, and authorizes absentee voting by mail. Chapter 203B of the Minnesota Statutes permits Minnesota voters to vote absentee by mail and permits voters to either request an absentee ballot for a particular election or to request “permanent absentee voter status.” *Id.* § 203B.04 subd. 5. Minnesota law permits any “person who is qualified under United States Code, title 42, section 1973aa-1, to vote for the offices of president and vice-president” to cast that vote “by absentee ballot.” Minn. R. 8210.0100.

32. Minnesota law requires that county officials prepare absentee ballot applications, as well as print and distribute absentee ballots to those voters who have requested them by mail. Minn. Stat. §§ 203B.04, 203B.06.

33. No different from voters who elect to vote in person, those who elect to vote by mail must vote on or before Election Day, not after Election Day.

34. The law requires any ballot received on Election Day “either (1) after 3:00 p.m., if delivered in person; or (2) after 8:00 p.m., if delivered by mail or package delivery service, [to] be marked as received late by the county auditor or municipal clerk” and requires that any such late ballot “must not be delivered to the ballot board.” *Id.* § 203B.08 subd. 3, *see also* §§ 204B.45–46. Ballots that are not delivered to the ballot board are not counted. In this way, the

law enacted by the Minnesota Legislature does not permit the counting of votes contained in absentee ballots received after the 8:00 p.m. Election Day deadline.

35. The Secretary of State is required to “adopt rules establishing procedures to be followed by county auditors and municipal clerks to assure accurate and timely return of absentee ballots.” *Id.* § 203B.08 subd. 4. Those rules must be consistent with Minnesota and federal statutes

36. The Secretary has promulgated rules establishing election procedures, and they are consistent with Minnesota and federal statutes.

37. These regulations reinforce the Election Day receipt deadline, ordering municipal clerks to “communicate with the United States postal service facility serving the municipality with regard to the handling of absentee ballot return envelopes” and to “take all reasonable steps to ensure that all return envelopes received by the post office before 4 p.m. on election day are delivered before the closing of the polls to the ballot board.” Minn. R. 8210.2500. The regulations are clear and unambiguous: ballots “received after election day shall be marked as received late . . . and must not be delivered to the ballot board.” *Id.* In addition, any absentee ballot return envelopes “delivered in person by an absent voter or an agent must be received by the county auditor or municipal clerk by 3:00 p.m. on election day,” *id.* 8210.2200.

38. These regulations demonstrate that the Secretary understands Minnesota statutes to establish a non-negotiable deadline of receipt of ballots by 8:00 p.m. on Election Day.

39. In May 2020, a group of registered Minnesota voters and the Minnesota Alliance for Retired Americans Educational Fund (“the State Plaintiffs”) filed a complaint against the Secretary in Minnesota state court. *LaRose v. Simon*, No. 62-CV-20-3190, Minn. 2d Judicial Cir., County of Ramsey (May 13, 2020).

40. The complaint challenged, *inter alia*, the Election Day receipt requirements applicable to absentee votes. Minn. Stat. § 203B.08, Compl. ¶ 5.

41. Rather than contest the complaint, the Secretary entered into a consent decree (“the Consent Decree”) with the State Plaintiffs which provides that, “[f]or the November General Election [Secretary Simon] shall not enforce the Election Day Receipt Deadline for mail-in ballots, as set out in Minn. Stat. §§ 203B.08 subd. 3, 204B.45, and 204B.46 and Minn. R. 8210.2220 subp. 1, and 8210.3000, that ballots shall be received by 8:00 p.m. on Election Day” *LaRose v. Simon*, 62-CV-20-3149, Minn. 2d Judicial Cir., Consent Decree, VI.B, June 16, 2020.

42. Under the Consent Decree, the Secretary must “issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or before Election Day but received by 8 p.m. within 5 business days of Election Day (*i.e.*, seven calendar days, or one week.” *Id.* at VI.D.

43. Additionally, the Consent Decree provides that, when “a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.” *Id.*

44. The Court approved the Consent Decree on August 3, 2020. The Court made no findings concerning the Consent Decree; it did not determine on the merits that the 8:00 p.m. receipt deadline violates the U.S Constitution or any other law regulating elections. *LaRose v. Simon*, 62-CV-20-3149, Minn. 2d Judicial Cir., Order, August 3, 2020.

45. The Court’s August 3, 2020 order recognized that it “is undisputed” under Minnesota law that a consent decree is a private agreement, not a court judgment. *Id.* at 17

(“[T]he court does not, in a consent decree, judicially determine the rights of the parties.”) (quoting *Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967))).

46. The Consent Decree is nothing but a contract between the Secretary of State and certain voters prohibiting the Secretary of State from enforcing Minnesota law.

47. The Secretary has chosen to abandon the enforcement of statutes enacted by the Minnesota Legislature.

48. In accordance with the Consent Decree, the Secretary has issued guidance to voters explaining that “[f]or the November 3, 2020 General Election, [a voter’s] returned ballot must be postmarked on or before Election Day and received by your county within seven days after Election Day.” The guidance is posted on the Secretary’s website, included in voter outreach materials which may be distributed in the community, and included in the absentee ballot mailers sent to voters.

49. As noted above, the U.S. Constitution delegates the power to enact rules regulating the manner and time of elections to each state legislature and Congress, respectively.

50. The Secretary is neither Congress nor the legislature of Minnesota.

51. The State Plaintiffs with whom the Secretary contracted to change state law are neither Congress nor the legislature of Minnesota.

52. The court that entered the Consent Decree is neither Congress nor the Minnesota legislature. Nor did that court take any independent act in vetting the decree.

53. The Consent Decree, and the policy it enacts, is not promulgated by either Congress or the Minnesota Legislature and is *ultra vires*.

54. The law enacted by the Minnesota Legislature provides an 8:00 p.m. deadline on Election Day for mail-in ballots to arrive. This law is the constitutionally prescribed mandate for Minnesota.

55. The Secretary is barred from changing the receipt deadline by operation of Articles I and II of the U.S. Constitution.

56. The Secretary is also barred from changing the date of federal elections set by Congress.

57. But the consent decree alters the time of election by eliminating the requirement that voters vote on Election Day. This usurps the power of Congress to set the times of elections and conflicts with statutes Congress has enacted governing that question.

58. The consent decree also usurps the power of the Minnesota Legislature to set the manner of conducting elections. Among other things, it provides that ballots received up to eight days after Election Day without a post mark will be counted, at least when there is not clear evidence that the ballot was sent after Election Day.

59. This means that persons who vote after Election Day will have their votes counted if they manage to transfer their ballots to a polling place without clear evidence of the time the vote was cast.

60. Many ballots that arrive at polling places via the U.S. Postal Service or other delivery service arrive without a postmark date.

61. All of these votes, cast after Election Day, cannot be constitutionally counted, but the Secretary of State has agreed to count them.

62. The Secretary's actions are the subject to a pending federal court action in the United States District Court for the District of Minnesota. *See Carson v. Simon*, Case No. 0:20-

cv-02030 (D. Minn. Sept. 9, 2020). The matter is currently before the Eighth Circuit Court of Appeals on an emergency motion for injunction pending appeal of the District Court's denial of the plaintiffs' motion for preliminary injunction. It is unlikely that the merits of the litigation will be resolved prior to Election Day.¹

63. The Secretary's agreement to count ballots cast after Election Day harms Petitioners, and the Petitioners request that this Court issue an order directing the Secretary to segregate late-arriving mail-in ballots.

64. The Petitioners face the threat of severe and irreparable injury absent this relief.

65. First, counting votes invalidly cast in violation of federal and state law substantially increases the pool of total votes cast and dilutes the weight of validly cast votes. More votes will be counted than the law allows to be counted, resulting in paradigmatic vote dilution and severe harm to the Petitioners.

66. Second, if county election officials do not segregate the late-arriving mail-in ballots, the Petitioners and other affected parties would be left without an effective remedy (either in the ongoing *Carson* litigation or in action brought after Election Day) to challenge the Secretary's actions because once the late-arriving mail-in ballots are combined with the timely cast and received mail-in ballots, it would be practically impossible to differentiate those ballots. It could be impossible for a court to repair the election results tainted by illegally and untimely

¹ Indeed, at least three other states—Wisconsin, North Carolina, and Pennsylvania—are similarly engaged in federal court litigation addressing the same problems presented with extending mail-in ballot deadlines past Election Day. See *Democratic National Committee v. Wisconsin State Legislature*, 592 U.S. ___ (October 26, 2020) (order denying application to vacate stay resulting in Seventh Circuit's injunction pending appeal remaining in effect and meaning that the Wisconsin general election will go forward without the extended deadlines); *Wise v. Circosta*, No. 20-2104 (4th Cir.), *emergency application for injunction pending appeal filed* (U.S. October 22, 2020); *Republican Party of Pennsylvania v. Boockvar*, --- A.3d --- (Pa. 2020), *petition for cert. filed*, (U.S. Oct. 24, 2020) (No. 20-542).

cast or mailed ballots if the ballots are not segregated. This would cause irreparable harm to the Petitioners.

67. Third, in the event that extended deadline is held to be unconstitutional, contrary to state and/or federal law, or otherwise invalidated, the voters' candidates of choice may be denied certification as prevailing in their elections because ballots will have been counted that state and federal law hold to be ineligible. In such a scenario, without segregation, that injury could never be remedied.

68. The requested relief would not substantially harm any party.

69. Segregation of late-arriving ballots will not impose any meaningful administrative burden on election officials. Under current Minnesota law (and even the Consent Decree), election officials are already required to segregate—and not count—late-arriving mail-in ballots. Minn. Stat. § 203B.08 subd. 3, *see also* §§ 204B.45–46 (late-arriving mail-in ballots are marked as late by county elections officials and not delivered to the ballot boards). Segregation of the mail-in ballots received after the statutory deadline but before the Consent Decree deadline would likewise pose only a minimal burden compared the potential severe and irreparable harm caused without segregation.

70. Further, segregation of late-arriving ballots would not harm any candidates or voters. Segregation would only preserve affected parties' abilities to challenge the legality of the Secretary's actions and would not result in any validly cast and received ballot not being counted – regardless of whether the Minnesota law or the Consent Decree is applied.

COUNT I
Violation of Minnesota Election Laws
(203B.08, sub. 3)

71. Petitioners re-allege and incorporate by reference the allegations in paragraphs 1-70 above.

72. The Secretary intends to not enforce the state mail-in ballot deadline and thereby accept and count ballots that do not comply with state law and federal law and the U.S. Constitution.

73. Specifically, the Secretary's actions will violate the mail-in ballot deadline set by Minn. Stat. § 203B.08 subd. 3.

74. The Secretary's actions will result in "wrongful act[s], omission[s], or error[s]" committed by the Secretary and canvassing boards and county election officials carrying out the Secretary's directives.

COUNT II
Violation of Federal Election Laws
(2 U.S.C. § 7 & 3 U.S.C. § 1)

75. Petitioners re-allege and incorporate by reference the allegations in paragraphs 1-74 above.

76. The Secretary intends to not enforce the state mail-in ballot deadline and thereby accept and count ballots that do not comply with state law and federal law and the U.S. Constitution.

77. Federal law establishes a single elections day. 2 U.S.C. § 7; 3 U.S.C. § 1.

78. The Secretary's actions will violate the federal law establishing a single elections day by allowing the acceptance of mail-in ballots received—and potentially even ballots actually cast after—the federally-mandated election date.

79. The Secretary’s actions will result in “wrongful act[s], omission[s], or error[s]” committed by the Secretary and canvassing boards and county election officials carrying out the Secretary’s directives.

COUNT III
Violation of the U.S. Constitution
(U.S. Const. art. I, § 4, cl. 4 & U.S. Const. art. II, § 1, cl. 2)

80. Petitioners re-allege and incorporate by reference the allegations in paragraphs 1-79 above.

81. The Secretary intends to not enforce the state mail-in ballot deadline and thereby accept and count ballots that do not comply with state law and federal law and the U.S. Constitution.

82. The U.S. Constitution grants the Congress and state Legislature the power to establish rules regarding the administration of federal elections.

83. The Elections Clause and the Electors Clause of the U.S. Constitution authorize the Minnesota Legislature—not the Secretary of State—to determine the time and manner of holding federal elections.

84. The Minnesota Legislature has exercised that constitutional authority and has, *inter alia*, established by statute a deadline of 8 p.m. on Election Day to received absentee ballots returned by mail and a deadline of 3 p.m. on Election Day to receive absentee ballots returned by person.

85. The Secretary’s unliteral decision to depart from the plain text of Minnesota law will constitute a violation of the U.S. Constitution.

86. The Secretary's actions will result in "wrongful act[s], omission[s], or error[s]" committed by the Secretary and canvassing boards and county election officials carrying out the Secretary's directives.

RELIEF SOUGHT

WHEREFORE, Petitioners request that this Court enter judgment against Respondent as follows:

1. Order the Secretary of State to segregate all absentee ballots received by mail in the following groups: (1) Mail-in ballots received before the statutory deadline of 8 p.m. on November 3, 2020; (2) Mail-in ballots received after the statutory deadline of 8 p.m. on November 3, 2020, but before the deadline set by the Consent Decree (*i.e.*, received by 8 p.m. within 5 business days of Election Day); and (3) Mail-in ballots received after the deadline set by the Consent Decree.
2. Order the Secretary of State to issue guidance instructing all relevant local election officials to segregate late-arriving mail-in ballots in the November General Election.
3. Awarding any and all other relief the Court deems just and equitable.

Respectfully submitted,



Dated: October 28, 2020

R. Reid LeBeau II (#0347504)
Benjamin N. Pachito (#0398942)
THE JACOBSON LAW GROUP
Jacobson, Magnuson, Anderson
& Halloran, P.C.
180 East Fifth Street, Suite 940
Saint Paul, MN 55101

Telephone: (651) 644-4710
Facsimile: (651) 644-5904
rlebeau@thejacobsonlawgroup.com
bpachito@thejacobsonlawgroup.com

Matthew Z. Kirkpatrick (#390440)
KIRKPATRICK LAW OFFICE, LLC
PO Box 363
Menomonie, WI 54751
Telephone: (715) 418-3418
Facsimile: (715) 952-0932
mzkirkpatrick@gmail.com

Counsel for Petitioners