FILED

September 9, 2016

OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA
IN SUPREME COURT
A16-1436

Ken Martin,

Petitioner,

vs.

Steve Simon, Minnesota Secretary of State,

Respondent,

Republican Party of Minnesota,

Real Party in Interest.

REPUBLICAN PARTY OF MINNESOTA'S OPPOSITION TO KEN MARTIN'S PETITION

INTRODUCTION

This Court must deny the Petition filed by Ken Martin, chair of the Minnesota Democratic-Farmer-Labor Party ("DFL"), to challenge placement of Donald Trump and Michael Pence on the 2016 general election ballot. First, the Petition is untimely. Second, the Petition is factually baseless. Third, the Petition is counter to the well-established principle that removing candidates from the ballot and limiting voters' choices is an extreme remedy that should be avoided if at all possible. Fourth, the

Petition incorrectly assumes that certification of the presidential and vice presidential candidate names is contingent on the proper certification of the alternate electors. Accordingly, Real Party in Interest Republican Party of Minnesota ("RPM") requests that the Court deny the Petition.[1]

LAW AND ARGUMENT

I. The Petition must be denied because it is barred by laches.

The Court should deny the Petition because it is barred by laches. Petitioner unreasonably delayed filing the Petition until the eleventh hour, gravely prejudicing the Minnesota Secretary of State, the RPM, Messrs. Trump and Pence, and the people of Minnesota who wish to vote for the Republican nominees for President and Vice President.

"Laches is an equitable doctrine applied to prevent 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." *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002). As this Court has recognized, the "expeditious consideration and disposition" compelled by challenges to the content of a ballot "require that a challenger move without delay to assert known rights." *Martin v. Dicklich*, 823 N.W.2d 336, 340 (Minn. 2012) (quoting *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992)). It is thus not surprising that, time and again, this Court has applied laches in the context of election challenges and declined to

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[1] Petitioner has also failed to comply with the service requirements of Minnesota Statute § 204B.44(b).

consider the merits. *See, e.g.*, *Carlson v. Ritchie*, 830 N.W.2d 887, 893 (Minn. 2013) (applying laches to bar a claim that the Secretary of State wrongfully withheld voter email addresses); *Clark v. Pawlenty*, 755 N.W.2d 293, 297-98, 303 (Minn. 2008) ("*Pawlenty*"); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952). Other courts around the country follow a similar approach. *See Perry v. Judd*, 840 F. Supp. 2d 945, 953 (E.D. Va. 2012), *aff'd* 471 Fed. App'x 219 (4th Cir. 2012).

The central 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*, 650 N.W.2d at 170 (emphasis added). Thus, this Court examines "applications for relief [in election challenges] . . . from the perspective of whether the applicant acted promptly in initiating proceedings." *Peterson*, 490 N.W.2d at 419. The Court also considers the prejudice to others. *Winters*, 650 N.W.2d at 170. In this case, both delay and prejudice compel denying the Petition.

A. Petitioner's delay in filing the Petition is a sufficient basis for denying the Petition.

Even waiting a few days can bar a suit challenging election procedures. *See Martin*, 823 N.W.2d at 342. But in this case, Petitioner has delayed for months. The RPM held its convention over three months ago (May 20-21, 2016) to nominate presidential electors. Petitioner contends that alternate electors were not selected at the convention. Petition ¶¶ 5, 11. Petitioner also alleges that, on August 3, 2016, the Secretary of State informed the RPM that names of alternate electors had not been

submitted to the Secretary. *Id.* ¶ 6. Finally, Petitioner alleges that on August 25, 2016, the RPM submitted a list of electors and alternates. *Id.* ¶ 8.

At each of these junctures, Petitioner knew that—according to him—alternates had not been selected and that—again, according to him—Minnesota law requires those alternates to be selected by a convention. That convention happened in May. It is now September. If what Petitioner says is true, and no alternate electors were selected at the state convention, then it was known at that point that the Party was running afoul of the rule. This four-month delay warrants the imposition of the laches doctrine. *See Clark v. Reddick*, 791 N.W.2d 292, 294-95 (Minn. 2010) (concluding that a delay of more than two months in raising ballot challenge was unreasonable). Moreover, a "greater degree of diligence" is required when "the facts are a matter of public record." *Id.* (citation and quotations omitted)).

But even if Petitioner could credibly argue that May is not the right starting point, the latest possible date Petitioner can claim to have learned of the alleged flaw in the selection of alternates is August 3, when the Secretary of State notified the Republican Party that it had alternate slots to be filled. At that point, it was clear the alternates were not going to be selected by the convention because the convention was long over. Thus, Petitioner could have sought a declaratory judgment or an injunction prohibiting the Secretary from certifying Trump and Pence to the county auditors of the state.

Finally, even if the clock began running when the alternates' names were certified to the Secretary (August 25), Petitioner still waited too long to file his Petition. August

25 was nearly two weeks ago. And days matter in election challenges: "In light of the ballot preparation and availability deadlines, the expense associated with ballot preparation and election administration, and the need for voter certainty, petitioners must judge carefully whether they can afford to wait *even a few days* before acting upon a known right." *Martin*, 823 N.W.2d at 342 (emphasis added). In sum, no matter which date started the clock, Petitioner unduly delayed in filing his Petition.

B. The prejudice caused by Petitioner's delay in filing the Petition is a sufficient basis for denying the Petition.

Petitioner seeks an order removing Messrs. Trump and Pence from the November ballot. If issued, the order's effect will be irreparable.

According to state law, "[a]t least 71 days before the general election day the chair of the major political party shall certify to the secretary of state the names of the persons nominated as . . . alternate presidential electors, and the names of the party candidates for president and vice president." Minn. Stat. § 208.03. That date (August 29) has come and gone. Thus, if the Court orders Trump and Pence removed from the ballot, there will be no way to get back on. In other words, this Court's order would preclude them from ever appearing on the 2016 ballot in Minnesota. That would irreparably harm the electoral process, the candidates, the state party, and (most importantly) the people of Minnesota. That is why laches prevents the tardy litigant "from recovering at the expense of one who has been prejudiced by the delay." *Winters*, 650 N.W.2d at 169.

First, if the Court grants the petition, it will "disrupt the orderly administration of elections." *Carlson*, 830 N.W.2d at 893. The Secretary has already directed the county

auditors to include Trump and Pence on the ballot. Those ballots are presumably being prepared now for the election that is in fewer than two months. There are absentee ballots to be sent, paper ballots to be printed, and electronic voting machines to be programmed and certified. *Pawlenty*, 755 N.W.2d at 301-02. If any of this work has already been accomplished, it will have to be undone. More importantly, it may then be impossible to make the required changes and comply with state law deadlines. For example, under Minnesota Statute § 204B.35, subd. 4, absentee ballots must be available 30 days before the election. But state law is not the only time bomb ticking. Federal election law requires each of the more than 3,000 polling places in Minnesota to be equipped with a voting machine capable of assisting persons with disabilities to vote. *See* Help America Vote Act of 2002, 42 U.S.C. §§ 15301–545 (Supp. IV 2004). This includes video and audio ballot displays, which will presumably have to be reprogrammed if this Court grants Petitioner the injunction. *See* Minn. Stat. § 204B.18, subd. 1. All of these problems and expenses would severely disrupt the election machinery already put into gear.

Second, the candidates (Trump and Pence) would also suffer great prejudice. Removing a candidate from the ballot is irreparable and the death knell to any campaign. As this Court explained in *Pawlenty*, if the candidate's name is struck from the ballot, he is "denied the right to run for an office for which [he] has already expended time, energy, and resources to file for candidacy, form a campaign committee, prepare and print election materials, and mount an election campaign." 755 N.W.2d at 302-03. Trump and

Pence are the ones who will suffer the most direct and lasting injury if this Court grants the Petition. And in this matter, even if everything in the Petition about the state party and the Secretary are true, Trump and Pence are blameless. Thus, the Court should not reward Petitioner at the expense of the candidates who were duly selected to be the Republican Party's nominees for President and Vice President.

Third, much like the candidates themselves, if the Court grants the Petition, the RPM will be severely prejudiced. The RPM will lose the ability to have its preferred candidates on the ballot. And since the August 29 deadline to certify the candidates' names to the Secretary of State has passed, the Party will likely be unable to add their candidates' names back onto the ballot.

Fourth, the Court "cannot ignore the potential prejudice to the electorate in general." *Id.* Not only will removing one of the two major party's candidates from the ballot confuse and frustrate countless voters on election day, it will also disproportionately disenfranchise Republican voters, along with Democrat and Independent voters who wish to vote for Trump and Pence. Those people will not see the names of their preferred candidates on the ballot if the Court grants the Petition. And although those voters may be able to write in the candidates' names, it is not clear they will know that or even know why their candidates are not on the ballot.

Laches bars the Petition. Petitioner waited months to file the Petition, until the eve of ballots going out. That delay makes it impossible for the RPM to comply with what Petitioner thinks the law requires. If the Court grants the Petition, the Court will throw

the Minnesota election into chaos; remove Trump and Pence from the ballot, treading on their constitutional rights and offering them no path to be added to the ballot again; irreparably harm the RPM, which will have no candidate for president on the ballot; and disenfranchise countless voters, who wish to vote for the Republican nominees for President and Vice President.

II. Placement of candidates' names does not depend on the certification of alternate electors.

Petitioner incorrectly assumes that under Minnesota law, certification of the presidential and vice presidential candidate names is contingent on the proper certification of the associated electors and alternate electors. To the contrary, Minnesota law treats the certification of (a) the party candidates for president and vice president and (b) the ten presidential electors and ten alternate electors as independent requirements. Accordingly, the issue of whether the alternate electors were properly "certified" is distinct from the issue of whether Trump and Pence's names should appear on the general election ballot.

Minnesota law only provides the following two legal requirements for the proper certification of party candidates for president and vice president: (a) that the chair of the state party certify the names and (b) that the state party chair certify that "candidates for president and vice president have no affidavit on file as a candidate for any office in this state at the ensuing general election." Minn. Stat. § 208.03. The paperwork signed by RPM chair Keith Downey and filed with the Secretary of State on July 22, 2016, meets both of these requirements. Accordingly, the Secretary of State's office confirmed on

August 25, 2016 that the names of the Republican presidential and vice presidential candidates were properly certified—both in compliance with state law and prior to the deadline. Thus, regardless of whether or not the alternate electors were properly selected, the Secretary of State was required by law to certify the names of Trump and Pence to the county auditors, and those names should appear on the November general election ballot.

III. The petition must be denied because it is factually baseless.

The DFL admits that (1) RPM chair Keith Downey submitted a "Certificate of Nomination" to the Minnesota Secretary of State on August 25, 2016; (2) the certificate included the names of individuals who, according to the certificate, were "duly nominated and elected as Presidential Electors and Alternate Electors of the Republican Party of Minnesota"; and (3) the Minnesota Secretary of State "accepted the certification and agreed to list Trump and Pence on the ballot." Petition ¶ 8, at 3. The DFL's sole factual basis for its petition is that "the State Republican Party Executive Committee met to select and approve alternate presidential electors *itself*" rather than hold a convention where "delegates nominated alternate presidential electors." *Id.* ¶ 7. This, according to the DFL, failed to comply with Minnesota Statute § 208.03. *Id.*

The RPM Constitution provides that the state executive committee will choose alternate electors. Specifically, Article VI, Section 9(e) provides that "the state executive committee shall nominate a replacement" for any elector who is "unable or unwilling to serve after the state convention." The 2016 Republican State Convention in Duluth empowered the executive committee to make this determination by passing Convention

Rule 37, which states, "Article VI, Section 9 . . . of the Constitution set[s] forth the requirements for the nomination and election of Presidential Electors." Thus, the state convention incorporated the constitution's process for nominating alternate electors and referred the selection of alternates to the state executive committee.

Petitioner apparently contends that the RPM's process is inconsistent with Minnesota Statute § 208.03. But Petitioner overlooks the authority of the state convention—i.e., the "delegate convention"—which was entitled to delegate its authority to the state executive committee. In other words, the state convention actually did nominate alternate electors by empowering the state executive committee to make those nominations. Accordingly, the Petition is factually baseless.

IV. Countless decisions throughout the country make it clear that removing candidates from the ballot and limiting voters' choices is an extreme remedy that should be avoided.

A. State statutes should be construed in favor of voter choice.

Regardless of whether the RPM followed the correct procedures in selecting alternate electors, there is no serious question that removing Trump and Pence from the general election ballot—thereby denying Minnesotans a real choice in November—would be a grossly inappropriate and excessive remedy. In decision after decision for over a century, state courts have recognized that statutes governing elections should be interpreted in favor of the voters and their right to a ballot that gives them real choices—not an artificially constrained ballot like the one petitioner is asking this Court to judicially create. As the Texas Supreme Court explained over a century ago, "[a]ll

statutes tending to limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor." *Owens v. State ex rel. Jennett*, 64 Tex. 500, 1885 WL 7221, at *7 (1885). Similar decisions are legion. *See generally* Richard L. Hasen, *The Democracy Canon*, 62 Stanford L. Rev. 69 (2009) (gathering authorities); *id.* at 71 ("This 'Democracy Canon' of statutory construction, as I call it, has long and broad support in state courts, from cases in the 1800s through those decided in the 2008 election season.").

Here, the remedy Petitioner requests—throwing the candidates of one of the two major parties off the ballot—would fly in the face of this bedrock canon. This Court should thus construe Minnesota law to withhold that remedy if at all possible. Even if such a construction were not the most correct one—which it is, for the reasons explained *supra*—it would clearly be a possible one. This canon and the commonsense principle that in a democracy the voters have the right to choose their elected representatives require adopting this construction.

B. The United States Constitution forbids removing Trump and Pence from the ballot based on alleged technical defects in the RPM's method of choosing alternate electors.

"The impact of candidate eligibility requirements on voters implicates basic constitutional rights." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983). That is because "voters can assert their preferences only through candidates or parties or both." *Id.* at 787. "These rights rank among our most precious freedoms," *Libertarian Party v. Bond*, 764 F.2d 538, 541 (8th Cir. 1985), "and are thus protected against federal

encroachment by the First Amendment and state infringement by the Fourteenth Amendment." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 694 (8th Cir. 2011).

The Supreme Court has emphasized the fundamental nature of these rights: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

Under well-established constitutional principles, a "court considering a challenge to a state election law must" therefore "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Where, as here, the state law would limit the access of fully qualified candidates to the ballot, such a "severe restriction" must "be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992); *see also Williams*, 393 U.S. at 31 ("[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.").

Here, if Minnesota law actually required the drastic remedy Petitioner seeks—which it does not, *see supra*—then that state law would undoubtedly violate the United

States Constitution. Petitioner has not identified the State's interest in ensuring that state parties select their alternate electors in a particular way, but it is clear that whatever interest the State might have in such regulations in no way "warrant[s] the drastic remedy" of removing a Presidential candidate and a Vice Presidential candidate from the general election ballot. *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008). That is clear at both stages of the applicable inquiry.

First, the state's interest in an orderly process for choosing alternate electors is not the sort of "state interest of compelling importance" that can *ever* justify "severe" restrictions like banning qualified candidates from the general election ballot. *Norman*, 502 U.S. at 289. Indeed, it is difficult to understand why Minnesota has *any* interest in how the RPM chooses alternate electors. The voters of Minnesota will be voting for the candidates for President and Vice President—Trump and Pence—making it entirely beside the point how the RPM chooses its understudies for the electoral college. States certainly have an interest in "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself," *Anderson*, 460 U.S. at 788 n.9, and in rules that prevent "frivolous or fraudulent candidacies," *Libertarian Party*, 764 F.2d at 540-41, but that interest is not furthered by meddling in the method for the state party choosing candidates who (1) it clearly has the power to select under both state law and its constitutional freedom of association, and (2) are relevant *solely* as double-back-up proxy votes for the presidential and vice presidential candidates. (The Petition is about the *back-ups* for electors, who are themselves just proxies for Trump and Pence.)

The state thus appears to have *no* interest in the law at issue. But whatever interest it does have is, at most, the sort of administrative interest that can justify only minor burdens on the voters' right to choose.

Second, even if the state had an actual interest and even if that interest were somehow of "compelling importance," there is no question that removing Trump and Pence from the ballot would not be "narrowly drawn" to protecting that interest. *Norman*, 502 U.S. at 289. Not even Petitioner has the audacity to claim that *Trump and Pence* are not qualified to appear on the Minnesota ballot; removing Trump and Pence from the ballot would thus eliminate the otherwise-qualified candidates of one of the nation's two major political parties and would, in doing so, effectively disenfranchise half the registered voters in Minnesota. It is difficult to imagine a *more* extraordinary, broad, and unjustified remedy than turning Minnesota into a one party state for the presidential election because of alleged errors in the state republican party's method for choosing its alternate electors.

Nor would Petitioner's requested remedy make any sense in light of Petitioner's asserted error. If there actually was an error in how the state republican party selected its alternate delegates (which there was not) and if that errors actually does warrant a remedy (which it does not), *at most* the appropriate remedy would be to require the Republican Party of Minnesota to re-select its alternate delegates according to the proper procedures. There is no rational connection—much less a narrowly tailored one—between errors in how alternate delegates are chosen and eliminating from the ballot candidates for

President and Vice President whom all agree were properly selected and are fully entitled to stand for election before the people of Minnesota. Rather than disqualifying properly chosen candidates—thereby "penalizing not only the candidate, but the voters" who participated in selecting that candidate, *Richards v. Lavelle*, 620 F.2d 144, 148 (7th Cir. 1980)—the state must find a "rational way" to protect whatever minor interest it has in how alternate electors are selected. The method Petitioner proposes plainly is not that.

Petitioner's inability to satisfy the demanding constitutional standard for evicting a major party candidate from the presidential ballot is unsurprising given the utterly extraordinary nature of such a step. It would be an incredible intrusion into the democratic process for this Court to accept Petitioner's invitation to convert what was—at most—a technical defect in the method of choosing otherwise-unknown alternate electors into a basis for effectively awarding the State of Minnesota to Hillary Clinton. Such a measure would hardly be the sort of pedestrian, "eminently reasonable" step the Supreme Court has blessed. *Burdick*, 504 U.S. at 440 n.10. This Court should refuse to take it.

CONCLUSION

For all of these reasons, this Court should deny the Petition.

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