

November 19, 2010

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REPLY TO MINNEAPOLIS

Frederick K. Grittner, Administrator
mjcappellateclerkofcourt@courts.state.mn.us
Minnesota Supreme Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

RE: *In re Petition Regarding 2010 Gubernatorial Election -*
Case No. A10-2022

Dear Mr. Grittner:

Enclosed for filing on behalf of Respondent Mark Dayton in the above-referenced matter are the originals of the following:

1. Respondent Mark Dayton's Notice of Representation;
2. Respondent Mark Dayton's Motion to Admit Attorneys Pro Hac Vice;
3. Affidavit to Admit Attorney Marc E. Elias Pro Hac Vice;
4. Affidavit to Admit Attorney Kevin J. Hamilton Pro Hac Vice;
5. Proposed Order for Admission Pro Hac Vice;
6. Respondent Mark Dayton's Brief in Opposition to Petitioner's "Petition to Correct Errors and Omissions Regarding Determination of Proper Number of Ballots Counted" (original and eight copies are enclosed); and
7. Affidavit of Service.

The Affidavits of Messrs. Elias and Hamilton are copies; we will provide the originals to the Clerk for the file when we receive them.

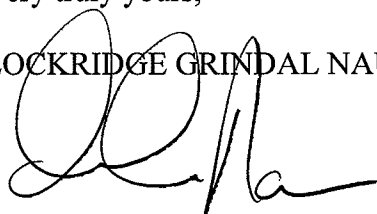
Frederick K. Grittner, Court Administrator
RE: Case No. A10-2022
November 19, 2010
Page 2

We have also provided copies by e-mail of the documents listed above to the county attorneys for all of Minnesota's counties.

Please feel free to contact me if you have any questions regarding this matter. Thank you.

Very truly yours,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

A handwritten signature in black ink, appearing to read 'C. Nauen', written over the printed name of the signatory.

Charles N. Nauen

Enclosures

c: Mark Dayton
Parties on Service List
Marc E. Elias
Kevin J. Hamilton
David L. Lillehaug
William A. Gengler

No. A10-2022

STATE OF MINNESOTA
IN SUPREME COURT

In re Petition Regarding
2010 Gubernatorial Election

**RESPONDENT MARK DAYTON'S
NOTICE OF REPRESENTATION**

Date Case Filed: 11/17/10

This notification is provided pursuant to this Court's Order dated November 18, 2010, which states: "Each party shall notify opposing counsel of a facsimile number or e-mail address, if any, to which documents may be transmitted for service upon the notifying party. Each party shall notify the Clerk of Appellate Courts of a facsimile number or e-mail address to which documents may be transmitted." Please transmit documents to Respondent Mark Dayton to:

MElias@perkinscoie.com

cnnauen@locklaw.com

KHamilton@perkinscoie.com

wagengler@locklaw.com

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Dated: November 19, 2010

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Counsel for Mark Dayton

No. A10-2022

STATE OF MINNESOTA
IN SUPREME COURT

In re Petition Regarding 2010
Gubernatorial Election

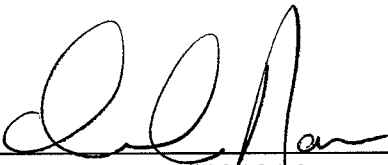
**RESPONDENT MARK DAYTON'S
MOTION TO ADMIT ATTORNEYS
PRO HAC VICE**

Respondent Mark Dayton, by his undersigned counsel, hereby moves the Court, pursuant to Minn. R. Civ. App. P. 127 and 143.05, subd. 1, for the admission of Marc E. Elias and Kevin J. Hamilton as attorneys *pro hac vice* to appear before this honorable Court on behalf of Respondent Mark Dayton in the above-captioned matter. This motion is based upon all files, records and proceedings herein, as well as the attached Affidavits of Marc E. Elias and Kevin J. Hamilton.

This motion is submitted on the papers, and oral argument is expressly waived.

Dated: November 19, 2010

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

By:  _____

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COUNSEL FOR MARK DAYTON

No. A10-2022

STATE OF MINNESOTA
IN SUPREME COURT

In re Petition Regarding 2010
Gubernatorial Election

**AFFIDAVIT TO ADMIT ATTORNEY
KEVIN J. HAMILTON
PRO HAC VICE**

Kevin J. Hamilton, being duly sworn upon oath, deposes and states:

1. I make this affidavit to allow me to appear as counsel pro hac vice representing Mark Dayton in the above-captioned matter.

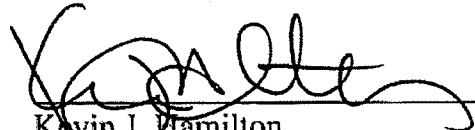
2. I am a partner with Perkins Coie, LLP. My office address is 1201 Third Avenue, Suite 4800, Seattle, Washington 98101-3099; my telephone number is 206-359-8000.

3. I graduated from the Georgetown University Law Center in 1985.

4. I am admitted to practice in the State of Washington. My attorney registration number for the Washington Bar is 15648.

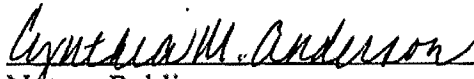
5. I am a member in good standing of the above-named bar, and I have not resigned, been denied admission, been reprimanded, suspended or disbarred from the practice of law by this or any other court, nor do I have any grievances pending against me. I agree to be familiar with and subject to the disciplinary rules and regulations governing Minnesota lawyers and the jurisdiction of the Minnesota Courts.

6. During the course of this matter, I will be associated with the law firm of Lockridge Grindal Nauen P.L.L.P., 100 Washington Avenue, Suite 2200, Minneapolis, MN 55401.

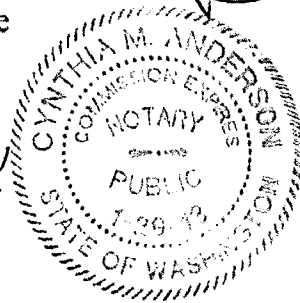


Kevin J. Hamilton

Subscribed and sworn to before me
this 10th day of November, 2010



Notary Public



No. A10-2022

**STATE OF MINNESOTA
IN SUPREME COURT**

In re Petition Regarding 2010
Gubernatorial Election

**AFFIDAVIT TO ADMIT ATTORNEY
MARC E. ELIAS PRO HAC VICE**

Marc E. Elias, being duly sworn upon oath, deposes and states:

1. I make this affidavit to allow me to appear as counsel pro hac vice representing Mark Dayton in the above-captioned matter.


2. I am a partner with Perkins Coie, LLP. My office address is 607 Fourteenth Street, NW, Suite 800, Washington, D.C., 20005-2011, and my telephone number: 202-628-6600.

3. I graduated from the Duke University School of Law in 1993.

4. I am admitted to practice in the District of Columbia. My attorney registration number for the District of Columbia Bar is 442007.

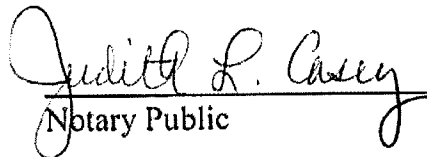
5. I am a member in good standing of the above-named bar, and I have not resigned, been denied admission, been reprimanded, suspended or disbarred from the practice of law by this or any other court, nor do I have any grievances pending against me. I agree to be familiar with and subject to the disciplinary rules and regulations governing Minnesota lawyers and the jurisdiction of the Minnesota Courts.

6. During the course of this action, I will be associated with the law firm of Lockridge Grindal Nauen P.L.L.P., 100 Washington Avenue, Suite 2200, Minneapolis, MN 55401.



Marc E. Elias

Subscribed and sworn to before me
this 19th day of November, 2010



Notary Public

JUDITH LEIGH CASEY
Notary Public, District of Columbia
My Commission Expires December 14, 2014

No. A10-2022

STATE OF MINNESOTA
IN SUPREME COURT

In re Petition Regarding 2010
Gubernatorial Election

**ORDER FOR ADMISSION
PRO HAC VICE**

Based upon the motion of Respondent Mark Dayton for permission for Marc E. Elias and Kevin J. Hamilton to practice before this Court *pro hac vice*, the affidavits submitted therewith, and based upon Minn. R. Civ. App. P. 143.05, subd. 1, and upon all of the files, records and proceedings herein, **IT IS HEREBY ORDERED THAT** Marc E. Elias and Kevin J. Hamilton be admitted *pro hac vice* to appear on behalf of Respondent Mark Dayton in the above-captioned matter.

BY THE COURT

Dated: November ___, 2010

Justice, Minnesota Supreme Court

No. A10-2022

State of Minnesota
In Supreme Court

In re Petition regarding 2010 Gubernatorial Election

**RESPONDENT MARK DAYTON'S BRIEF IN OPPOSITION TO PETITIONER
EMMER'S "PETITION TO CORRECT ERRORS AND OMISSIONS REGARDING
DETERMINATION OF PROPER NUMBER OF BALLOTS COUNTED"**

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Counsel for Mark Dayton

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I. INTRODUCTION

Relying on flawed arguments that could and should have been raised well in advance of the election, Candidate Tom Emmer now petitions this Court in an eleventh-hour effort to disrupt and delay the State Canvassing Board certification process through the unwarranted disenfranchisement of voters. These efforts should be denied. At the outset, his petition contains no allegation of error, as the practice he criticizes is both permitted by statute and expressly authorized by regulation. Certainly, the petition contains no allegation of the sort of error that would permit votes to be removed from the count or that would authorize the State Canvassing Board and county canvassing boards to engage in the supposed correction he seeks. Even if Petitioner had identified an error, moreover, he was required to bring challenges of this sort prior to the election, and his unjustified delay permanently bars the claim. The petition fails for myriad additional reasons, including because the relief sought is impossible to grant; because the relief sought would impose an unprecedented and extraordinary disruption on the certification process, election officials, and this Court; and because the relief, even if granted, would not affect the outcome. In short, Petitioner has filed a meritless and untimely petition in an apparent attempt to interfere with what has been, and what should continue to be, an orderly and entirely legal election and certification process. This effort is both misguided and unjust: Minnesota voters are entitled have their votes counted and to timely representation by the officials they have elected. Minnesota law is clear that the new Governor shall begin his Term on January 3, 2011, and this Court should reject Petitioner's efforts to defeat this constitutional mandate at the expense of Minnesota voters.

II. STATEMENT OF THE CASE

Petitioner ran for Governor in the November 2, 2010 election. According to the unofficial results published by the Secretary of State, a deficit of 8,755 votes separates his vote total from that of Respondent Mark Dayton. The process for certifying these results has proceeded in a timely and legally proper manner. In four days, the State Canvassing Board will meet to certify the initial election results.

Petitioner belatedly alleges that certain election officials may have complied with Minn. Stat. § 204C.20 by relying on official voter receipts to determine the “number of names entered in the election register.” By statute, these receipts are equal in number to the number of names entered in the election register. Minn. Stat. § 204C.10. By regulation, moreover, reliance on receipts is expressly set forth as a permissible means of complying with the applicable statutes. *See* Minn. R. 8200.9300, subp. 10. (Petitioner, in his voluminous petition asking this Court for extraordinary relief, fails *even to cite* this controlling authority.) As Petitioner acknowledges, this practice of relying on voter receipts is clearly identified in publicly available manuals, such as the Ramsey County Elections 2010 Polling Place Reference Guide, that were accessible to Petitioner and to the public well in advance of the election. *See* Emmer Petition at Bratvold Aff. Ex. 3; *see also, e.g.*, Ramsey County, Election Judge Training Information website, available at http://www.co.ramsey.mn.us/elections/election_judge_training_info.htm. Petitioner nevertheless failed to raise any objection to, much less a formal challenge against, these practices prior to Election Day. Instead, Petitioner waited until Election Day had come and gone. Then he waited over two weeks more. While thousands of election officials from over 4,000 precincts and other jurisdictions across the state expended an enormous amount

of time and energy fulfilling their statutory duties in a diligent and timely manner, Petitioner delayed voicing any objection and finally, on the eve of the State Canvassing Board's certification, filed the instant petition.

Respondent Dayton became a party to the litigation pursuant to this Court's order of November 18, 2010. This brief in opposition is submitted pursuant to that same order.

III. ARGUMENT

A. **Petitioner Has Alleged No Error Because the Practice In Question Is a Perfectly Legal Method To Ensure Compliance with the Statutory Standard.**

Petitioner has alleged no violation of Minn. Stat. § 204C.20. The practice he identifies is both consistent with statute and expressly authorized by regulation. Certainly, Petitioner has alleged no violation that would overcome the “presumption [that official returns] correctly state the result of an accurate count of the ballots.” *Sheehan v. Franken*, 767 N.W.2d 453, 471 (Minn. 2009) (quoting *Moon v. Harris*, 122 Minn. 138, 141 (1913)).

1. **The Practice in Question Is Authorized by Statute and Regulation.**

At the very outset, Petitioner bases his claim for extraordinary relief on allegations that election officials engaged in conduct that is both perfectly legal and expressly authorized by Rules promulgated by the Secretary of State. The first sentence of Minn. Stat. § 204C.20 states as follows:

The election judges shall determine the number of ballots to be counted by adding the number of return envelopes from accepted absentee ballots to the number of signed voter's certificates, or to the number of names entered in the election register.

Minn. Stat. § 204C.20, subdivision 1. The Rules go on to state:

The election judges shall determine the number of ballots to be counted by adding the number of return envelopes from accepted absentee ballots to the number of voter's receipts issued pursuant to Minnesota Statutes, section 204C.10, subdivision 2, or to the number of names signed on the polling place roster. The election

jurisdiction may require that the election judges number or initial each voter's receipt as it is issued.

Minn. R. 8200.9300, subp. 10. This interpretation of the statute by the Secretary of State is entitled to deference. *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (“[A]n agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature.”).

Minn. R. 8200.9300, subp. 10, which authorizes the very practice Petitioner criticizes, is consistent not only with Minn. Stat. § 204C.20 (which Petitioner does cite), but also with Minn. Stat. § 204C.10, subd. 3 (which ensures that the number of official voter's receipts equals the number of names entered in the election register). *See also* Minn. R. 8260.0650 (“The election judge shall not deliver a ballot to a voter until the judge has received a voter receipt.”). In short, Minnesota's statutes and regulations authorize election judges to rely on voter's receipts in determining the number of ballots to be counted, and it is this perfectly legal practice that Petitioner alleges occurred on Election Day. Petitioner's extraordinary petition therefore fails even to allege simple error, much less to overcome the heavy burden imposed on litigants seeking to attack the validity of Minnesota's elections. *See, e.g., In re Lannon*, 107 Minn. 453, 456 (1909) (acknowledging the “presumption that election officers do their full duty and that their returns are conclusive”).

2. Petitioner's Attempt To Ignore These Authorities Is Unavailing.

Petitioner cannot avoid the effect of Minn. Stat. § 204C.20 and Minn. R. 8200.9300, subp. 10, which unambiguously authorize the practice he criticizes. Petitioner nevertheless construes the broad language used in Minn. Stat. § 204C.20 as requiring that election officials

not only determine the “number of names entered in the election register,” as stated in the statutory text, but that they do so in a particular fashion: apparently by reviewing the physical register itself and counting each signature listed thereon. Petitioner likewise concludes that election judges may not use voter’s receipts to determine the number of names entered in the election register. He identifies no authority for this conclusion and fails even to cite—much less to explain or reconcile—Minn. R. 8200.9300, subp. 10.

The level of instruction implied by Petitioner’s argument is, of course, nowhere to be found in the statute. Instead, the statute sets forth a specific uniform standard (reliance on “the number of names entered in the election register”) with which election officials must comply, and then it permits election officials discretion in how best to meet that standard. This approach is consistent with Minn. R. 8200.9300, subp. 10, which permits judges to “determine the number of ballots to be counted” through several means, including through the method identified by Petitioner. It is also consistent with the discretion that must be accorded to election officials. *See Sheehan v. Franken*, No. 62-CV-09-56, 2009 WL 981934 (District Ct. of Minn., 2d Judicial District, April 13, 2009) (“[E]lection officials at the local level must have some discretion to operate elections in a manner that best harmonizes with the unique circumstances present in their jurisdiction.”); *see also Sheehan*, 767 N.W.2d at 466 (finding no clear error in trial court’s finding that “the disparities in application of the statutory standards . . . are the product of local jurisdictions’ use of different methods to ensure compliance with the same statutory standards . . .”). The flexible statutory approach is, moreover, consistent with the presumption of correctness accorded to official returns. *See, e.g., Sheehan*, 767 N.W.2d at 471; *Moon*, 122 Minn. at 141; *Lannon*, 107 Minn. at 456.

In short, Petitioner alleges that certain election officials, exercising the discretion that necessarily is accorded to them under the law, relied on a method of calculation that was both authorized by regulation and required by statute to result in the “number” identified in Minn. Stat. § 204C.20. This practice, if it occurred, was perfectly legal, and in no sense can be considered “error.” The claim thus fails at the outset.

B. Petitioner Has Alleged No Error That Would Permit the Disenfranchisement He Seeks.

Even if election officials somehow exceeded their discretion under Minn. Stat. § 204C.20, that “error” would be an error by an election official, not an error by a voter, and, under settled Minnesota law, official error does not warrant the disenfranchisement of innocent voters. To the contrary, this Court could not have more clearly, or recently, emphasized that “if a voter complies with the law, his vote should not be rejected because of ‘irregularities, ignorance, inadvertence, or mistake, or even intentional wrong on the part of the election officers.’” *Sheehan*, 767 N.W.2d at 462 (quoting *Fitzgerald v. Morlock*, 264 Minn. 520, 524 (1963)); *see also id.* at 461 n.10 (“[A]s long as there is substantial compliance with our laws and no showing of fraud or bad faith, the true result of an election, once ascertained, ought not be defeated by an innocent failure to comply strictly with the statute” (quoting *In re Andersen*, 264 Minn. 257, 267 (1962)); *id.* (noting that the “reference to substantial compliance in *Andersen* . . . addressed the failure of local election officials to follow proper procedures in correcting election returns”). In other words, “the right of the elector to have his vote cast and counted is protected from fraud or mistake of the election officers by every possible safeguard, where it appears that his untrammelled right to this high

privilege of citizenship has not been denied or abridged.” *State v. Falk*, 89 Minn. 269, 275-276 (1903). The proposition is neither surprising, nor subject to reasonable dispute.

Indeed, given how important and longstanding this principle has been to Minnesota’s voting-rights laws, it comes as little surprise that the Legislature has codified the principle with respect to the specific matter at issue here:

An officer to whom election returns are required to be made shall not refuse to receive them because they are delivered in any manner other than that prescribed by law, except that the returns must be sealed. No canvassing board shall refuse to include any returns in its canvass of votes because of any informality in holding the election or making returns. All returns shall be received and the votes canvassed by the canvassing board and included in its statements when there is substantial compliance with the provisions of the Minnesota election law.

Minn. Stat. § 204C.29, subd. 2.

It is, therefore, in disregard of *both* statute *and* well-established principles of voter enfranchisement that Petitioner brings his ill-founded claim. His ultimate goal is not in doubt: Petitioner is requesting relief that, he hopes, will “withdraw from the box a number of ballots.” Minn. Stat. § 204C.20. *See, e.g.*, Emmer Petition at 20 (“If vote dilution is to be detected and prevented, then the signed polling roster must be the cornerstone for determining whether excess ballots have been cast, how the vote will be reconciled if excess ballots have been cast, and what is the number of votes received by each candidate.”).

In short, Petitioner is attempting to remove votes cast by innocent voters—the votes of Minnesota citizens, fully qualified to vote, who did everything that was required of them. He engages in this astonishing effort weeks after voters have gone to the polls and expressed these preferences without even an allegation of voter error. Yet “[p]rocedural statutes

governing elections are intended to safeguard the right of the people to express their preference in a free election by secret ballot and to have the results of the election governed by the votes so cast.” *Application of Andersen*, 119 N.W.2d 1 (Minn. 1962). Petitioner’s efforts to twist these procedural statutes to achieve disenfranchisement are both wrongheaded and contrary to well-established law.

C. Petitioner Certainly Has Not Alleged the Sort of Error That Is Necessary for Correction by a Canvassing Board.

Ignoring this Court’s recent decisions, Petitioner demands that the State Canvassing Board and the county canvassing boards engage in practices that, by statute, they are not authorized to do. Contrary to Petitioner’s assertions, it does not make the request any more lawful if the request is directed at this Court, rather than at the boards themselves.

As Petitioner acknowledges, “[c]ounty canvassing boards undertake a narrow process that is ‘limited to compilation and reporting of numbers contained in the precinct summary statements,’” and “[t]he State Canvassing Board is similarly limited.” Emmer Petition at 16, 17 (quoting *Coleman v. Ritchie*, 762 N.W.2d 218, 233 (2009)). These boards are, under certain circumstances, statutorily authorized to correct certain “obvious errors.” Minn. Stat. §§ 204C.38; 204C.39. The predicates for such correction do not exist in this case. *See* Minn. Stat. § 204C.38 (discussing circumstance when “the candidates for an office unanimously agree” with respect to an obvious error); § 204C.39 (discussing circumstance when a “county canvassing board may determine by majority vote” that an obvious error has occurred); *see also* *Coleman*, 762 N.W.2d at 227 (acknowledging that “the scope of errors subject to correction by county canvassing boards [is limited] to those ‘evident from an examination of the returns made by the various precincts’ (*quoting Andersen*, 119 N.W.2d at 5)). Petitioner

appears to concede that the boards are not authorized to take the actions he demands of them. *Id.*

Petitioner's attempt to make an end-run around these restrictions through Minn. Stat. § 204B.44 is unavailing. The cases upon which he relies are illustrative. This Court refused to order the correction of certain alleged errors in *Coleman v. Ritchie*, for example, because "the unilateral correction by county canvassing boards of errors that may have been made in the rejection of absentee ballots is not provided for by section 204C.39." *Coleman v. Ritchie*, 762 N.W.2d 218, 230 (Minn. 2009). The Court was, however, willing to permit correction "in the specific and limited circumstances where all parties—the two candidates and the relevant local election officials—agree that an absentee ballot return envelope was erroneously rejected." *Id.* at 231. In the other cases relied upon by Petitioner, this Court has ordered the correction of errors only when the errors were obvious. See *Application of Andersen*, 119 N.W.2d 1, 8 (Minn. 1962) (errors obvious, and voluntarily identified and corrected by county canvassing boards); *Haroldson v. Norman*, 178 N.W. 1003, 1004 (Minn. 1920) (errors obvious on face of summary statement and clearly a result of clerical error); *Hunt v. Hoffman*, 146 N.W. 733, 733-34 (Minn. 1914) (errors obvious on face of summary statement and clearly a result of clerical error). The "errors" alleged by Petitioner certainly are not obvious; indeed, it would be impossible to identify them from the face of the returns. See *Coleman*, 762 N.W.2d at 227 ("The term "obvious error" as used in our statute is one that defies exact definition. About the only definition that can be given to it is that some error appears evident from an examination of the returns made by the various precincts." (*quoting Andersen*, 119 N.W.2d at 5)). As a result, none of the cases Petitioner cites supports his

unjustified attempt to circumvent the statutory restrictions on the authority of the canvassing boards.

D. Even If Petitioner’s Allegations of Error Were Valid, He Is Permanently Barred from Raising Them Because He Failed To Do So Prior to the Election.

Petitioner’s claim must be dismissed not only because it is meritless, but also because his delay in filing violates well-settled principles of election law, offends public policy, and threatens to prejudice all interested parties, including Minnesota voters statewide.

For petitions challenging election proceedings, an untimely delay will result in dismissal. *See Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008). Far from a technical requirement, this is a crucial component of the effective administration of an election. “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.” *Id.* at 300 (internal quotation marks omitted). As a result, this Court has “examined applications for relief not only on their merits, but also from the perspective of whether the applicant acted promptly in initiating proceedings,” and it seeks to balance “petitioners’ delay in raising these issues” against “prejudice that would result to respondents, other election officials, other candidates, and the Minnesota electorate in general” were the requested relief to be granted. *Id.* at 300, 301 (internal quotation marks omitted). *See also Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (“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”); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952) (declining to

consider the merits of a ballot challenge because “the petitioner ha[d] not proceeded with diligence and expedition in asserting his claim”).

In the instant case, Petitioner’s delay in filing the petition is extreme and inexcusable. As even he acknowledges, “[s]tate law has *long recognized* that it is possible that more ballots may be cast than number of voters signed in and legally registered to vote,” as “[t]his is *an anticipated event* that state law requires local election judges to address on election day.” Emmer Petition at 3 (emphasis added). The specific practice by which election judges address this event, moreover, is specifically identified and authorized by regulation that has been in effect long before the election. *See* Minn. R. 8200.9300, subp. 10. Petitioner even attaches, as Exhibit 3 to the Bratvold affidavit, a 2010 Polling Place Reference Guide for Ramsey County that sets forth the same alleged error. *See* Emmer Petition at 12. These materials all were available not only to Petitioner but to the entire voting population well before the election, and there is utterly no justification for his failure to bring his challenge at that time. It is not hyperbole to say that the Petitioner wants to change the rules after the game has been played. His petition should be dismissed on that ground alone.

Now that Petitioner has waited until after the election to file his petition, the relief he requests will result in profound prejudice to respondents, other election officials, other candidates, and the Minnesota electorate in general. All these parties participated in the November 2 election, and, since the close of the polls, thousands of individuals have expended tremendous time, energy, and taxpayer dollars in their efforts to ensure a proper counting of the ballots and to meet the statutory deadlines. The request Petitioner seeks

would undo much of this work and make it close to impossible to comply with impending deadlines.¹ *See generally* Section V, below.

In any event, Petitioner assuredly cannot raise his claim during the certification process, which is ministerial in function and which does not permit the sort of fact-finding and evidentiary analysis that adjudication of Petitioner's claim would require. *See* Minn. Stat. § 204C.33 ("Canvass of State General Elections"); *see also* *Coleman v. Ritchie*, 762 N.W.2d 218, 228 (Minn. 2009).²

In short, the time Petitioner had to raise his § 204C.20 challenge has long passed, and this Court should confirm that he is now permanently barred from raising the claim.

E. The Relief Petitioner Seeks Would Be Impossible To Achieve and Would Cause Enormous Disruption.

Petitioner's untimely claim lacks merit not only with respect to the errors he alleges, but also with respect to the remedy he proposes. The order Petitioner demands likely would

¹ Indeed, Petitioner's after-the-fact challenge already has imposed significant burdens on election officials, who have had to respond to voluminous data practices requests (for copies of the rosters for every precinct in the entire state, among other things) that Petitioner has lodged in apparent anticipation of filing an election contest.

² To the extent Petitioner's claim is cognizable at all, moreover, Petitioner has failed to exhaust his administrative remedies. *See* *City of Richfield v. Local No. 1215*, 276 N.W.2d 42, 51 (Minn.1979) ("It is fundamental that before judicial review of administrative proceedings will be permitted, the appropriate channels of administrative appeal must be followed. Indeed, '[i]nherent judicial power may not be asserted unless . . . reasonable legislative-administrative procedures are first exhausted.'" (quoting *In re Clerk of Lyon County Courts' Compensation*, 241 N.W.2d 781, 786 (1976))); *see also* *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 71 (Minn.1984) (noting that a party generally must "first exhaust the administrative remedies available before bringing an action for judicial review"); *Uckun v. Minnesota State Bd. of Medical Practice*, 733 N.W.2d 778, 786 (Minn. App. 2007) ("This requirement has several purposes, including to protect the autonomy of administrative agencies created by the legislature to resolve particular problems, to promote judicial efficiency, to produce a record during the administrative process that facilitates judicial review, and to potentially reduce the need to resort to judicial review."). Petitioner had ample notice of the various § 204C.20 procedures,

be impossible to fulfill and, at best, would be extraordinarily complicated to administer and cause profound disruption to election officials and this Court.

Petitioner essentially asks this Court for a redo of the Election Day process contemplated by Minn. Stat. § 204C.20. That process occurs on one evening at 4,136 individual polling places scattered throughout the State, and it is now weeks after the election has occurred. To try to redo this process, weeks later, as Petitioner proposes, would cause enormous disruption and delay to both the election process and this Court. The remedy sought by Petitioner is comparable to a complicated mandatory injunction that a district court might issue only in the most extraordinary of circumstances. In deciding whether to order equitable relief, the administrative burden on the Court is certainly an important factor. *See Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965) (identifying factors for issuance of temporary injunction).

In this case, administering the relief requested would entangle this Court in an extreme, inappropriate, unnecessary level of detail. The burdens on elections officials would be similarly onerous. There is, moreover, no realistic chance that election officials would be able to comply with the requested order—which would require re-opening 4,136 precincts and recounting more than two million ballots, all prior to an administrative recount, which would count the ballots again—and also be able to comply with other statutorily imposed deadlines. *See, e.g.*, Minn. Stat. § 204C.33 (deadlines for State Canvassing Board); Minn. Stat. § 204D.02 (Governor is to begin term on first Monday in January).³ Tellingly, Petitioner

as he admits, and plainly could and should have raised his challenge before the Secretary of State or other elections officials on or prior to Election Day.

³ Emmer makes the breathtaking claim that the “process may take a few additional hours or days to complete—perhaps two or three hours per precinct on average” and offers two

himself has failed to comply with basic procedural requirements that are implicated by his request for relief: though a petitioner seeking relief pursuant to Minn. Stat. § 204B.44 must “serve a copy of the petition on the officer, board or individual charged with the error, omission, or wrongful act,” Petitioner appears to have no intention of providing service upon the numerous (and in many cases unidentified) “local election officials” who he claims committed error on Election Day and now should be “required to participate and assist in the determination of the proper number of ballots to be counted and any reconciliation as requested by the State Canvassing Board.” Emmer Petition at 2. This error, which is itself an independent ground upon which to dismiss the petition, confirms the difficulty of administering the relief he seeks.

Petitioner, in an effort to correct an “error” that is nothing of the sort and to resolve discrepancies that may or may not exist, seeks relief that is impossible to achieve, that will cause massive disruption to this Court and to election officials across the State, and that all but ensures non-compliance with a host of critical statutes, all at the expense of Minnesota voters. The cure Petitioner requests is far worse than the alleged disease. The petition should be denied.

F. The Relief Petitioner Seeks Would Not Affect the Outcome.

Though Petitioner asks this Court for extraordinary relief, he does so based on a woefully inadequate record and a deficient set of allegations. To overcome the presumption that an election was conducted with regularity, Petitioner must show not only a violation of a statute, but “proof that the alleged irregularity affected the outcome or was the product of

citations in support. Emmer Petition at 5. Both citations refer to the time it might take officials to follow Minn. Stat. § 204C.20 procedures *on Election Day*, and, as such, neither is

fraud or bad faith.” *Hahn v. Graham*, 225 N.W.2d 385, 386 (1975). This petition does not include so much as the assertion that the relief Petitioner requests, if granted, would affect the outcome of the election, the need for a recount, or any other relevant factor. Indeed, he fails to allege that the relief he requests would change anything at all: “Without a proper determination of the number of ballots to be counted,” he states, “there is no basis for determining if reconciliation is required.” Emmer Petition at 4.

Instead, Petitioner concedes that “[n]o one knows which candidate, *if any*, will benefit from [the requested relief.]” *Id.* at 5 (emphasis added). He relies on testimony by election officials that, among other things, indicates that even if there appear to be “more ballots than signatures,” that “doesn’t mean that in reality there were more votes than voters.” Emmer Petition at Bratvold Aff. Ex. 2, p.00018.⁴

Petitioner’s timid allegations have an obvious explanation: it belies belief to claim that the requested order, if granted, will change the outcome of the election. At the outset, there is no evidence to suggest a different method of determining the “number of names entered in the election register” would result in different totals. Even if it did, there is no evidence to suggest that the different totals would result in different relative vote totals for the

on point.

⁴ Petitioner does cite a figure—40,000 votes—in a manner that, at best, reveals confusion. *See* Emmer Petition at 14. Contrary to his assertion, the 40,000 vote “disparity” he identifies has nothing to do with “the number of voters and the number of ballots.” *Id.* Rather, it refers to the difference, in early 2009, between the number of registered voters that had been entered into the Statewide Voter Registration System (an electronic database) and the number of *total* registered voters, including those who had recently registered and whose names were therefore still being in the process of being added to the database. Petitioner’s reliance on this inapposite figure is particularly ironic given that the 2009 backlog was in large part due to the time and resources that state and local officials were forced to expend responding to an election contest that had been brought by the losing candidate in the 2008 U.S. Senate election.

candidates. Even if *that* were true, it is simply impossible to think that the difference would change the applicability of Minn. Stat. § 204C.35 or that Petitioner somehow would overcome the deficit he faces: he currently trails in the unofficial count by 8,755 votes. Petitioner is bereft of evidence suggesting an error occurred that could even potentially affect the outcome of this election.

Petitioner does offer a small, cherry-picked collection of affidavits, from just a handful of the thousands of election officials working on Election Day. Not one of the affidavits submitted alleges—even on information and belief—that there were more votes than voters in the 10 precincts represented, much less in a substantial number of the 4,136 precincts across the state. These sketchy affidavits cannot support investigation into the few precincts to which they relate, much less support the sweeping, statewide relief that Petitioner demands.

Petitioner requests an extraordinary remedy but has identified nothing that possibly could justify it; indeed, his petition fails even to “describe the error, omission, or wrongful act and the correction” as required by Minn. Stat. § 204B.44. Weighed against the strong presumption of regularity oft recognized by this Court, the Petition falls dramatically short and should be summarily dismissed.

G. Petitioner Relies on Inapposite Authority.

Petitioner relies heavily on assertions about the 2008 election. *See, e.g.,* Emmer Petition at 12-14. It is not clear why this information is relevant. At the risk of stating the obvious, allegations about an entirely separate election cannot support challenges to *this* election.⁵

⁵ Moreover, the cited testimony relates to alleged discrepancies regarding a relative handful of original and duplicate ballots, not to issues Petitioner now raises.

Regardless, Petitioner's reliance on the precedent set in 2008 in fact *undermines* his claim. After extensive fact-finding by a trial court, the election in 2008 was determined, by the "overwhelming weight of the evidence," to have been "conducted fairly, impartially, and accurately." *Sheehan v. Franken*, No. 62-CV-09-56, 2009 WL 981934 (District Ct. of Minn., 2d Judicial District, April 13, 2009), *aff'd by Sheehan*, 767 N.W.2d at 466; *see also id.* ("[T]he general election resulted in a 'fair expression' of the voters of Minnesota."). Petitioner's apparent attempt to relitigate the 2008 election is inexplicable and certainly serves as no basis for relief.

H. Even if Petitioner's Factual Allegations Are Simply Accepted As True, He Has Stated No Ground for Relief.

This Court's Order of November 18, 2010, directed the parties to indicate whether any material issues of fact existed with respect to this Petition. Respondent Dayton respectfully submits that there are no *material* issues of fact.

As an initial matter, the Petition and the record submitted in support of the Petition fall markedly short of any sort of showing that would justify the sweeping and remarkable relief he seeks. Because Petitioner bears the burden of proof, this failure is fatal and renders all factual disputes irrelevant and immaterial. Petitioner's claims fail even if his allegations are accepted as true.

Moreover, there are strong reasons to believe that development of a factual record would show that many of Petitioner's allegations are, in fact, not true. Minnesota's election officials have a strong record of fair, impartial, and accurate election administration, and Minnesota law accords those officials with a strong presumption of regularity in the performance of their duties. Each copy of the summary statements, moreover, includes "the

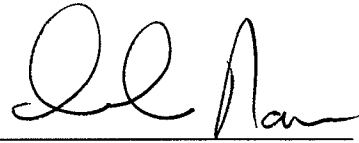
signatures of the election judges who counted the ballots certifying that all of the ballots cast were properly piled, checked, and counted; and that the numbers entered by the election judges on the summary statements correctly show the number of votes cast for each candidate and for and against each question.” Minn. Stat. § 204C.24, subd. 1(f). There is no reason to believe, and certainly no competent evidence proffered by Petitioner, to suggest that this election was tainted by error, much less material error. Instead, Petitioner stands before this Court advancing a remarkable argument, seeking sweeping and extraordinary relief, almost entirely bereft of evidence. On this record, Petitioner’s claims fail and should be dismissed.

IV. CONCLUSION

For these reasons, Respondent Dayton respectfully requests that this Court issue an Order dismissing Tom Emmer’s Petition and denying his request for relief.

Dated: November 19, 2010

Respectfully Submitted,



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