

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

A.J. Kern, Congressional Candidate,
Plaintiff,

Court File No. 27-CV-22-7391
(Judge Bridget Sullivan)

vs.

Ilhan Omar and Don Samuels, Congressional
Candidates, Steve Simon, in his capacity as
Minnesota Secretary of State,

**DEFENDANT SIMON'S
MEMORANDUM SUPPORTING
DISMISSAL**

Defendants.

Plaintiff A.J. Kern filed an election contest under Minn. St. ch. 209, seeking to challenge the eligibility of other assumed candidates to be the U.S. Representative in Minnesota's Fifth Congressional District. Because the election will not be conducted for three months, this action falls outside of the subject-matter jurisdiction that chapter 209 grants to this Court. Moreover, even if the contest itself were within the Court's jurisdiction, contest claims against Minnesota's Secretary of State are not. As a result, the contest must be dismissed.

FACTS

Minnesota will conduct its biannual state primary election on August 9, 2022. *See* Minn. Stat. § 204D.03, subd. 1 (2020). A candidate wishing to run in the primary must file an affidavit of candidacy. *Id.* §§ 204B.03, .06 (2020). The candidate must file this affidavit "not more than 84 days nor less than 70 days before the state primary." *Id.* § 204B.09, subd. 1(a). In the current election cycle, this period runs from May 17 to May 31, 2022. As a result, as of the date of this motion no one has filed an affidavit of candidacy to run in the August 2022 primary election.

Kern alleges that she, incumbent U.S. Representative Ilhan Omar, and Don Samuels will all run in the Democratic-Farmer-Labor Party (“DFL”) primary for U.S. Representative for Minnesota’s Fifth Congressional District. (Compl.¹ ¶¶ 1-3.) She alleges that Rep. Omar and Mr. Samuels are required to provide documentation of their citizenship beyond attesting to it in any affidavit of candidacy they may file. (*Id.* ¶¶ 28-29.) She contends that this Court has jurisdiction over this matter pursuant to the contest statute, Minn. Stat. ch. 209. (*Id.* ¶¶ 8, 10-11.)

ARGUMENT

Minnesota courts’ subject-matter jurisdiction over election contests is strictly limited to the authority provided by the terms of chapter 209. Because the statute requires any contest of the state primary election to be served and filed in late August, this Court has no jurisdiction over this matter.² Moreover, even if Kern’s timing were not fatally flawed, the statute only authorizes court jurisdiction over an election contest against the Secretary of State if the contest pertains to his own re-election or to a proposed amendment to the state constitution. Because the contest falls outside the statutory limitations on the Court’s jurisdiction, it must be dismissed.

I. LEGAL STANDARD

On procedural questions, Minnesota courts hearing election contests “shall proceed in the manner provided for the trial of civil actions so far as practicable.” Minn. Stat. § 209.065 (2020). This includes motions to dismiss under Minn. R. Civ. P. 12.02. *Derus v. Higgins*, 555 N.W.2d 515, 516 n.4, 520 (Minn. 1996).

¹ In an election contest under Minn. Stat. ch. 209, the initial pleading is called a notice of contest, and the parties are known as contestants and contestees. Minn. Stat. §§ 209.02 - .03 (2022). Contestant Kern, however, titled her pleading “Civil Complaint” and identified the parties as “Plaintiff” and “Defendants.” This memorandum adopts Kern’s usage.

² The Secretary notes that Defendant’s legal claims are also entirely devoid of merit. Because of the fatal jurisdictional flaws detailed in this memorandum, however, the Court should not reach the merits of the contest.

Dismissal is appropriate here because the Court lacks subject-matter jurisdiction over the election contest. “Subject-matter jurisdiction is the court’s authority to hear the type of dispute at issue and to grant the type of relief sought.” *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). Whether subject-matter jurisdiction exists is a question of law. *Centra Homes, LLC v. City of Norwood Young Am.*, 834 N.W.2d 581, 585 (Minn. Ct. App. 2013). Subject-matter jurisdiction cannot be conferred by consent of the parties, nor can lack of such jurisdiction be waived. *Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 430 (Minn. 2005). While modern pleading rules are liberal, they are not “a substitute for substantive law.” *N. Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186, 188 (Minn. Ct. App. 1984). Dismissal under rule 12 is appropriate in cases that are fatally flawed in their legal premises and certain to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). On a rule 12 motion, factual allegations in the complaint are entitled to some deference. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Legal conclusions, however, are entitled to no deference. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

Minnesota courts’ jurisdiction over election contests is “solely statutory.” *Moulton v. Mewton*, 144 N.W.2d 706, 710 (Minn. 1966). As a result, state courts are “powerless to entertain such proceedings” except to the extent that the contestant brings them within the limitations provided by the contest statute. *Christenson v. Allen*, 119 N.W.2d 35, 38 (Minn. 1963).

II. THE CONTEST FALLS OUTSIDE OF THIS COURT’S SUBJECT-MATTER JURISDICTION AND MUST BE DISMISSED.

The current contest disregards the fundamental limitations on Minnesota courts’ jurisdiction over election contests. Because Kern filed an election contest months before such a

proceeding is permitted by law, and because she improperly named the Secretary as a contestee, the contest must be dismissed.

Minnesota Statutes chapter 209 governs election contests and strictly limits (a) the time when they can be filed and served and (b) the individuals who can be named as the contestee. *See* Minn. Stat. § 209.021. The instant contest violates both of these limitations.³

A. Contests of the State Primary Cannot Be Filed Until Mid-August.

To contest a primary election, the notice of contest must be served and filed within five days after the canvass is completed. Minn. Stat. § 209.021, subd. 1. The State Canvassing Board meets to complete the canvass of each state primary seven days after the election. *Id.* § 204C.32, subd. 2 (2020). In 2022, that meeting will take place on August 16. As a result, notice of any contest of the August 2022 state primary election must be served and filed between August 16 and 21.

Because the current contest was filed more than three months before the time permitted by chapter 209, it falls outside of the jurisdiction granted to this Court by the statute. *See Christenson*, 119 N.W.2d at 38. This action must therefore be dismissed in its entirety.

B. The Secretary is Not a Proper Contestee to the Contest of Any Election in Which He is Not a Candidate.

Even if the contest itself were within this Court’s subject-matter jurisdiction, claims against the Secretary are not. “In all contests relating to the nomination or election of a candidate,” it is only a “*candidate* who is the contestee.” Minn. Stat. § 209.021, subd. 3

³ Moreover, the current contest seeks injunctive relief requiring each contestee to take particular actions. (Compl. pp. 10-11, ¶¶ 1-4.) But the contest statute states that, in a contest of an election for U.S. House, “the only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election.” Minn. Stat. § 209.12 (2022). The relief Kern seeks is therefore not within a contest court’s subject-matter jurisdiction, no matter when the contest is filed or against whom.

(emphasis added). Presuming that the Secretary himself is not the candidate whose (re-)election is being contested, chapter 209 only permits the Secretary to be named as a contestee “[i]f the contest relates to a constitutional amendment.” *Id.* Any contest filed against the Secretary that does not fit within this limitation must be dismissed as to the Secretary. *Hahn v. Simon*, No. 14-CV-20-4033 (Clay Cty. Dist. Ct. Dec. 14, 2020); *appeal dismissed*, No. A20-1654 (Minn. Feb. 8, 2021).⁴

No constitutional amendment will be on the 2022 state primary ballot, and Kern does not assert otherwise. Moreover, the Secretary will not be a candidate for Congress in 2022. As a result, this Court lacks subject-matter jurisdiction over any contest claims stated against the Secretary and must dismiss the contest as to him.

Finally, the contest statute repeatedly states that each election contest has *one* contestee. Specifically, the statute refers to “the contestee” to a particular contest, both in the singular and with the definite article “the,” no fewer than seven times. *See* Minn. Stat. § 209.021, subds. 2-3. (In a contest “relating to the nomination or election of a candidate,” the single contestee is “the candidate” who has been declared the winner. *See id.*, subd. 3.) No provision in state law states or even suggests that an election contest can have more than one contestee. As a result, the statute grants state courts no jurisdiction over the Secretary (or anyone else) when a contestant attempts to name him as a co-contestee along with the individual who is identified by the statute.

⁴ *Hahn* was the first in a series of seven election contests filed in November and December 2020 in which the Secretary was improperly named as a contestant and then dismissed on the jurisdictional grounds explained here. *See also Quist v. Simon*, No. 62-CV-20-5598 (Ramsey Cty. Dist. Ct. Dec. 29, 2020); *Jensen v. Simon*, No. 62-CV-20-5599 (Ramsey Cty. Dist. Ct. Dec. 18, 2020); *Peterson v. Simon*, No. 62-CV-20-5600 (Ramsey Cty. Dist. Ct. Dec. 18, 2020); *Smith v. Simon*, No. 62-CV-20-5601 (Ramsey Cty. Dist. Ct. Dec. 18, 2020); *Smith v. Simon*, No. 62-CV-20-5602 (Ramsey Cty. Dist. Ct. Dec. 18, 2020); *Kistner v. Simon*, No. 19AV-CV-20-2183 (Dakota Cty. Dist. Ct. Dec. 15, 2020).

CONCLUSION

This Court’s jurisdiction over election contests is strictly limited to the matters specified in the contest statute. The statute, in turn, does not permit a contest of an election conducted in August to be filed in May. Nor does it permit a contest against the Secretary unless it pertains to a constitutional amendment or to his own re-election—conditions that indisputably are not met here. The Secretary therefore respectfully requests that the Court dismiss the contest in its entirety for lack of subject-matter jurisdiction.

Dated: May 12, 2022

Respectfully submitted,

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