STATE OF MINNESOTA

IN SUPREME COURT

A06-1871

OFFICE OF
APPELLATE COURTS

OCT 10 2006

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Tom Rukavina, Kathy Serva,
Eric Sorensen, Mark Voxland,
Lauri Winterfeldt-Shanks,

Petitioners,

vs.

Mary Kiffmeyer, Minnesota
Secretary of State,

Respondent.

**PETITIONERS'
LACHES MEMORANDUM**

Douglas Peine
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ATTORNEY FOR PETITIONERS

TABLE OF CONTENTS

	Page
The Equitable Doctrine of Laches.	3
Why Laches Does Not Apply in this Case.	4
1. There Has Been No "Unreasonable Delay".	4
2. Petitioners Were Required to Wait (a) for the Attorney General's Letter Explaining the Ballot Question, and (b) the Secretary of State's Entitling of the Ballot Question.	4
3. Petitioners Had to Wait to See How the Press Handled the Issue.	5
4. The Campaigns of Disinformation by Certain Advocacy Groups Were Slow to Develop.	6
5. A Remedy Is Readily Available.	8
6. That Remedy Will Save Time and Money.	9
7. Noone Has Been or Will Be Prejudiced.	10
APPENDIX	12

This Memorandum is submitted in response to the Order of the Court, dated October 6, 2006, requesting that Petitioners address "why [their] petition could not have been filed at an earlier time and whether laches should apply."

The Equitable Doctrine of Laches

The application of laches in the context of election challenges is set forth in **Piepho v. Bruns, 652 N.W.2d 40 (Minn. 2002):**

> With respect to the timeliness of the petition, in the election context we especially consider the application of laches, 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. **Aronovitch v. Levy, 238 Minn. 237, 242, 56 N.W.2d 570, 574 (1953).** The doctrine has particular application in challenges to ballot preparation and election proceedings. **Peterson v. Stafford, 490 N.W.2d 418, 419 (Minn. 1992).** "In considering laches, we have held that the practical 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." **Fetsch v. Holm, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952).**

At 43.

Why Laches Does Not Apply in this Case

There are a number of reasons:

1.
There Has Been No "Unreasonable Delay".

It takes time for a disparate group of people to coalesce, to talk, to brainstorm, to seek a preliminary legal opinion, to raise money, to commit.

The Petitioners hereto represent no established organization, no ready-made advocacy group. They come from both political parties, from various corners of the state, from diverse roles in the public and private spheres. They had no staff attorney to charge with the task.

2.
Petitioners Were Required to Wait (a) for the Attorney General's Letter Explaining the Ballot Question, and (b) the Secretary of State's Entitling of the Ballot Question.

In our Petition (at p. 16) we reference **Minnesota Statutes section 3.21** and its requirement that the attorney general "furnish to the secretary of state a statement of the purpose and effect of all amendments proposed" along

with "the portions of the context that the attorney general deems necessary to understand the amendment."

We also cited the case of **Knapp v. O'Brien, 288 Minn. 103, 179 N.W.2d 88 (1970)**, where this Court held that just such an AG's statement saved an otherwise confusing ballot question.

Given this precedent, Petitioners had no choice but wait to see whether the 3.21 statement clarified the MVST ballot question. The statement was not issued by the Attorney General's office until July 3, 2006.

The same principle applies but with greater force to the title affixed by the Secretary of State's office to the ballot question. That title was not released until July 5th and not posted on the Secretary of State's website until September 21. (A.1)

As with the Attorney General's letter, had that title actually clarified the amendment, this Petition would have been unnecessary.

3.
Petitioners Had to Wait to See How the Press Handled the Issue

It was not until the accumulation of press stories in late summer and early fall that it became clear a real problem existed, that the electorate was not being properly

informed.

Not only has the press not succeeded at clarifying the ballot question for voters, it has largely admitted its own bewilderment. We detail this at pages 14-15 of our Petition. Not one of the articles attached to our Petition clearly spells out the crucial fact of this case, namely that the proposed amendment does not, as it would appear, allocate a firm 40/60 split between transit and roads of the MVST revenues but in fact authorizes the legislature to direct 100 percent of that revenue toward transit with 0 percent going to roads.

The confusion persists. We have attached at pages A.2 - A.6 of the Appendix two additional news stories filed since the Petition was submitted to the Court. We note especially the story of October 9th from Minnesota Public Radio entitled "Confusion in the driver's seat on transportation initiative." (A.2). And we note, as well, that the story of October 5th from the Minnesota Daily does not even mention the 40/60 issue. (A.4).

4.
The Campaigns of Disinformation by Certain Advocacy Groups Were Slow to Develop.

It was not until the past month that lawn signs with "VOTE YES" inside a Minnesota license plate began appearing

in such abundance around the state. Those signs, along with the other efforts of the advocacy group that created them, have perpetuated the misinformation of the ballot question in at least three significant ways:

1. The use of an official-looking Minnesota license plate as the medium for its message (A.4) creates the impression that it is the State of Minnesota itself that wants you to vote "yes" on the issue.

2. That misimpression is furthered at the Secretary of State's website's "Ballot Questions - List of Individuals and Groups . . . providing information - for, against, or neutral." (A.7). The only individual or group listed is this same advocacy group.

3. A voter who then follows the link provided by the Secretary of State to that advocacy group's website is greeted with another of the official-looking "VOTE YES" license plates plus photos of the two major party candidates for governor - Governor Pawlenty and Attorney General Hatch - both urging a "yes" vote. (A.8)

Under these circumstances, even informed and attentive voters would be excused for assuming the proposed amendment promises nothing but sweetness and light and that all good and ethical citizens are in favor of it.

This advocacy group could have used its ample resources

to educate the public and help untangle the 60/40 issue. It could have taken it upon itself to make it clear to voters what is cloaked in the verbiage of the ballot question.

Instead, it has chosen to hitch a ride on the confusion, a tactic which has not until the last month become fully apparent.

5.
A Remedy Is Readily Available

If the remedy to the confusing ballot question required that language be added to the ballot, this Petition likely would not have been filed. Obviously such relief would have been problematic in light of the expense and logistics involved with printing ballots, absentee ballots, etc.

But what we ask for - namely, that the ballot question at issue be removed from voters' consideration - can be effectuated readily and inexpensively:

If it is too late to remove the printed language from the ballots, it can be stricken by the ballpoint pens of election officials at the polling places; or those officials can simply tell voters to ignore the ballot question; or the votes can simply not be counted.

No doubt the remedy of striking language can be knotty when the contest is between candidates. A change to one

candidate's presentation on the ballot can have an impact, beneficial or adverse, to his or her opponent.

But that is not a problem here. The ballot question stands alone.

Bottom line, there is available in this case a remedy that "can be made in an acceptable way within the time available, at a cost which is reasonable considering the danger of unfairness to be apprehended." **Mattson v. McKenna, 301 Minn. 103, 222 N.W.2d 273 (1974).**

6.
That Remedy Will Save Time and Money.

A simple cost/benefit analysis reveals that the "drastic" course of action in this case would be to **not** order the remedy requested by Petitioners. **Moe v. Alsop, 288 Minn. 323, 331, 180 N.W.2d 255, 260 (1970).**

It must not be forgotten what is at stake here: The electorate is about to vote, not on some transitory referendum issue, but on an alteration to the State Constitution. A serious matter, indeed, itself involving a "drastic" change to the core document of the state.

If we can agree that this proposed constitutional amendment has been confusingly - perhaps deceptively -

presented so that the vote will likely not be an informed one, all of the practical considerations say, correct it now.

Make the legislature go back and do it right. Sooner the better. It will save time and trouble and expense and a long period of uncertainty. It will preserve the integrity of the election process. And it will send a message to the legislature that it, too, like the rest of us, cannot get away with slapdash work.

7.
No One Has Been or Will Be Prejudiced.

An essential element of laches is such "prejudice to others, as would make it inequitable to grant the relief prayed for." **Fetsch v. Holm, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952).**

Again, in contrast to a race between candidates, there is no opposing party to be impacted upon when it is a single amendment question that is stricken from the ballot.

The only one who might claim prejudice arising from the Petition in this case is the advocacy group that has spent such considerable resources on placing its "VOTE YES" license-plate signs throughout the state.

But they are not a party to this action.

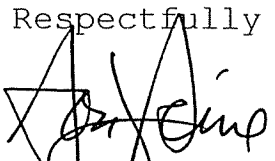
And even if they were, they would be hard-pressed to claim laches when they themselves do not have the "clean hands" required.

The equitable doctrine of "clean hands" arises from the notion that "he who seeks equity must do equity." **Gully v. Gully, 599 NW2d 814, 825 (Minn. 1999).** Stated simply, the party claiming laches cannot have contributed to the very problem sought to be remedied.

In this light, the "VOTE YES" advocacy group most definitely does **not** have clean hands, because it is precisely they who have done so much to perpetuate the confusion on the ballot question.

And so they cannot be heard now to complain of Petitioners' efforts to correct the situation.

Respectfully submitted,



DATED: 10/10/06

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APPENDIX

	Page
Minnesota Secretary of State's website, "News and Current Initiatives"	A.1
"Confusion in the driver's seat on transportation initiative," by Anne Baxter, Minnesota Public Radio, Oct. 9, 2006	A.2
"Voters to decide on funding issue," by Courtney Blanchard, The Minnesota Daily, Oct. 5, 2006	A.4
Minnesota Secretary of State's website, "Ballot Questions - List of Individuals and Groups"	A.7
http://www.voteyesmn.org/	A.8

Minnesota State Seal

News and Current Initiatives

P

Secretary of State Mary Kiffmeyer Reports Amendment Question to Appear on B

Posted Date: 9/21/2006 9:29:23 AM

For Release: 5 July 2006

Contact: Kent Kaiser
651-297-8919

Voters Will Decide Among More than Just Candidates This Year

SAINT PAUL—Secretary of State Mary Kiffmeyer today reported that this November 7t general election ballot will include a question asking voters to decide whether to amer state constitution.

The question, passed by the Legislature in 2005, will appear as follows on the ballot:

> **PHASED IN DEDICATION OF THE MOTOR VEHICLE SALES TAX TO HIGH AND PUBLIC TRANSIT**
>
> Shall the Minnesota Constitution be amended to dedicate revenue from a tax o sale of new and used motor vehicles over a five-year period, so that after June 2011, all of the revenue is dedicated at least 40 percent for public transit assis and not more than 60 percent for highway purposes?

Consequently, voters will decide among more than just candidates in the November 7 general election.

Note: With constitutional amendment questions, a majority of "yes" votes, of the tota cast, is required for adoption; blank votes and "no" votes count against the question.

Candidates for state elected offices and many local offices began filing for office today filing period runs through July 18. For more information, see www.sos.state.mn.us.

Mary Kiffmeyer (R-Big Lake Township) is Minnesota's 20th Secretary of State. Downl press photo available at ../home/index.asp?page=49.

Confusion in the driver's seat on transportation initiative

by Annie Baxter, Minnesota Public Radio
October 9, 2006

Election day is less than a month away, which means you still have time to crack the books on some of the issues you'll be voting on. If you doubt you need to do research, you might not have seen the ballot question about transportation funding. Some voters found the wording of the question is as complicated as the issues it addresses.

St. Paul, Minn. — When you walk into the voting booth next month, you might have already made the decision as to whether you're for or against more funding for roads and public transit. But your firm convictions might turn to confusion when you behold the following question:

"Shall the Minnesota Constitution be amended to dedicate revenue from a tax on the sale of new and used motor vehicles over a five-year period, so that after June 30, 2011, all of the revenue is dedicated at least 40 percent for public transit assistance and not more than 60 percent for highway purposes?"

If you find this hard to digest on the first take, you're not alone. When a number of voters were shown the question during the course of their activities on a Sunday afternoon in St. Paul, they were pretty perplexed.

"I feel like an idiot, but {I have} no clue," said one.

"It's a long sentence," said another.

"Am I supposed to understand it?"

"Only legislators and lawyers could possibly come up with that kind of wording, which would make it impossible to figure out what this means."

"Especially at the end, it's like a trick at the end."

The transportation ballot question seems dense. But it can be broken down into parts. First of all, it's not asking voters to agree to a new tax. Instead, it deals with an already existing vehicle sales tax. The money generated by that tax is split between the state's general fund and transportation. A vote in favor of the ballot initiative would change the state's constitution, so it would direct all the money from the motor vehicle tax to transit needs. At least 40 percent of those funds would help pay for public transit. And no more than 60 percent of that funding stream would pay for roads and bridges.

When provided with this additional information, many voters, like Andrea and Robert Messenger, still had a lot of questions about the policy issues at stake.

APPENDIX PAGE 2

"Why should I have to pay for somebody else's transportation? Because that's basically what

you'd be doing," Andrea Messenger asked.

"You're going to pay for somebody else's something or other," Robert Messenger said.

"If they're going to do that, why wouldn't they put it towards education?" Andrea volleyed back.

"As a former bus taker, I'm with it. I'm for it," her husband said.

The Messengers' conflicting views on the transportation funding proposal are common. Opponents say it will draw important dollars out of the general fund, dollars that could subsidize anything from education to lawmakers' salaries. A coalition of petitioners is actually trying to kill the ballot initiative before the election; they're worried it will divert money away from other important needs.

But supporters of the transportation funding proposal say transit needs its own dedicated funding source, which it's never had.

"If they're going to this, I'd probably vote yes, because they're actually taking care of the roads, which we need right now, especially on my commute," said voter Crystal Bauer.

She likes the ballot initiative because she favors more money for roads. She said her commute from her home in South St. Paul to her job at a hospital in downtown St. Paul takes way too long because of traffic.

But her coworker, Kristin Schifsky, who only commutes a mile each way-- has a much different view.

"It seems like the transit has enough money at the moment. They're building new construction everywhere. You never hear 'Oh, we don't have enough money for a new road.'"

The ballot initiative was originally part of a larger transportation bill that would have raised the gas tax. A bipartisan coalition of legislators had voted for the bill, but Gov. Pawlenty vetoed it. Because the governor can't veto a constitutional amendment, that part of the bill survived.

Voter Mac Baird, a physician, said he's disappointed that the legislature hasn't managed to push transportation funding through the legislative process.

"If we were doing that on a balanced basis, year by year, this wouldn't need to be on the ballot at all," he said. "But since we haven't been able to agree on that publicly, it seems like this is some way to make sure we have some money for public transit and highways."

But Baird said he's concerned the funding formula developed in the current transportation proposal won't match the state's needs down the road. He said, if the ballot initiative does go through, he hopes there will be a chance to revisit-- and adapt-- the transportation vision it lays out.

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October 5, 2006

Voters to decide on funding issue

By Courtney Blanchard

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This year's Election Day won't just be about candidates fighting; voters will decide whether to amend the Minnesota Constitution.

The proposed change, dubbed the transportation amendment, would require taxes from new and used vehicle sales to fund transportation and transit.

If the measure passes, Minnesota roads and transit always will have a dedicated source of money, but some lawmakers and policy experts are concerned that it's being done the wrong way.

Megan McHattie

Ian Ritz, a Macalester College graduate, holds a sign for the Vote Yes Minnesota campaign outside the Metrodome on Tuesday. Ritz and others with the campaign gather before Twins and Vikings games to hold signs and pass out fliers promoting the amendment.

The amendment needs 60 percent of the vote to be adopted. However, blank ballots count the same as "no" votes. The amendment faces another obstacle: confusion over the way the measure is posed on the ballot.

State Rep. Ron Erhardt, R-Edina, chairman of the House Transportation Committee, said the issue is important to Minnesotans, especially students.

"Anybody that drives knows how bad congestion is," he said. "And it's only getting worse."

Erhardt said lawmakers are unable to adequately fund transportation. The amendment would force the Legislature to use money from the vehicle tax only toward transportation, he said.

"This is so the legislators will keep their hands off (vehicle tax money)," he said.

John S. Adams, senior research associate at the University's Center for Transportation Studies, said an amendment might result in less transportation money.

"It's not going to supply the amount of resources that are needed," he said. "It may seem to the Legislature once it passes that they don't need to fund transportation."

Rep. Mary Liz Holberg, R-Lakeville, chairwoman of the House transportation finance committee, said that in theory the amendment could result in an uneven division between statewide transportation and metropolitan transit.

She said the amendment is not the solution to funding transportation.

"I think the Legislature should just do it on their own," Holberg said. "But historically that hasn't worked so well."

Rick Krueger, director of the Minnesota Transportation Alliance, said the amendment is needed because of the Legislature's ineffectiveness.

Krueger is also involved in Vote Yes Minnesota, an advertising campaign attempting to get the amendment passed.

Vote Yes volunteers and staff members have been at the State Fair, art fairs and Vikings and Twins games. Funded by private donations, the campaign is endorsed by more than 1,000 organizations and businesses, according to its Web site.

Krueger said the large campaign is necessary to educate the public.

"The transportation issue just doesn't capture the hearts and souls of people," he said.

Irna Landrum, a graduate student in advocacy and public policy at the University's Duluth campus, passed out fliers outside the Metrodome before the Twins game Tuesday. She said passing the amendment makes sense for Minnesota.

Landrum said it's an easy choice to promote the amendment, because candidates always make promises but don't deliver.

"I'm a little jaded about candidates," she said. "But this is something people can change."

Frank Douma, assistant director of state and local policy at the Humphrey Institute of Public Affairs, said the amendment has positive and negative sides.

Transportation needs new forms of revenue because Gov. Tim Pawlenty hasn't created new taxes, Douma said. If the amendment doesn't pass, Douma said, policymakers warn it might be difficult to fund transit projects like the Central Corridor light rail that would run through the University.

The flip side, Douma said, is vehicle tax money could be dedicated to transportation, ignoring transit projects, or vice versa.

"Who should be in charge of making that choice? Should the citizens write it into the constitution ... or should it be part of the legislative process?" he said.

Marketing junior Eric Lippert said it takes him 25 minutes to get from Brooklyn Park to the University.

"(The roads) are pretty full of potholes, but I've never gotten a flat tire," he said.

Lippert said he will vote for the amendment, as long transportation funding doesn't take away from other areas, such as education.

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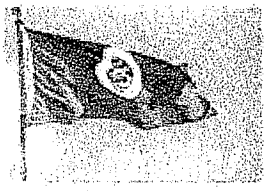
APPENDIX PAGE 6



Minnesota State Flag

Ballot Questions - List of Individuals and Groups

Ballot question language:

2006 proposed constitutional amendment regarding motor vehicle sales tax

Individuals and groups providing information -- for, against, or neutral:

- Minnesotans for Better Roads and Transit
  website - www.VoteYesMN.org
  email - info@VoteYesMN.org

Minnesota
VOTE YES
Transportation Amendment

FOR BETTER ROADS AND TRANSIT.

THE AMENDMENT | WHY YES | WHY NOW | GET INVOLVED | NEWS & UPDATES | ABOUT US

KEEP MINNESOTA MOVING

Pledge your support

Make sure your transportation taxes go to the right place...

Pledge to support better roads and transit

WHY YES

It's common sense – transportation taxes should go to transportation projects. A YES vote on Minnesota's Transportation Amendment will ensure that all of the existing sales tax Minnesotans pay on vehicles will be spent on our roads, bridges, highways and public transit.

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WHY NOW

Twenty-five years ago, the legislature decided that all revenue from the existing motor vehicle sales tax should be used for transportation, but every year all or some of the money gets diverted to other purposes. By voting YES on this amendment, you can increase funding for transportation by $300 million each year – a significant investment in roads and transit.

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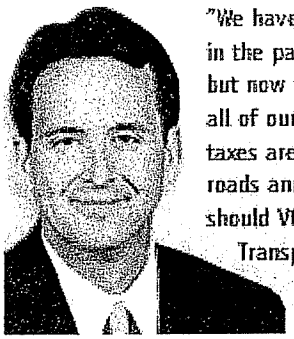
WHAT OTHERS ARE SAYING

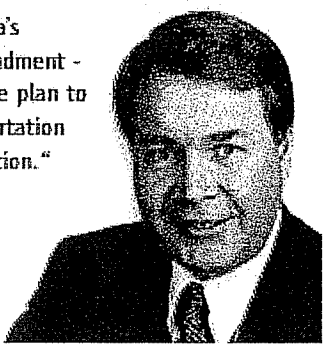
GOVERNOR TIM PAWLENTY



"We have made a lot of progress in the past three-and-a-half years, but now we need to make sure all of our current transportation taxes are being used to improve roads and transit. Minnesotans should VOTE YES on Minnesota's Transportation Amendment this fall."

ATTORNEY GENERAL MIKE HATCH

"I support Minnesota's Transportation Amendment - it is a common sense plan to use existing transportation taxes for transportation."



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APPENDIX PAGE 8