

STATE OF MINNESOTA

IN SUPREME COURT

A06-1871

Tim Breza, Larry Buboltz,
Dan Dorman, Morrie Lanning,
Michael Lang, Keith Langseth,
Jerry Miller, H. Dan Ness,
Tom Rukavina, Kathy Serva,
Eric Sorensen, Mark Voxland,
Lauri Winterfeldt-Shanks,

Petitioners,

vs.

Mary Kiffmeyer, Minnesota
Secretary of State,

Respondent.

OFFICE OF
APPELLATE COURTS

OCT 17 2006

FILED

**PETITIONERS'
REPLY MEMORANDUM**

Douglas Peine
Atty. Reg. No. 84979
2460 Beverly Road
St. Paul, Minnesota 55104
612.308.0014

ATTORNEY FOR PETITIONERS

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REPLY POINTS

Petitioners respond as follows to selected arguments in the Response of the Secretary of State and in the Amicus Curiae Brief of Rep. Ron Erhardt et al.:

1.

Laches Does Not Apply in Public Interest Cases.

This Court has held that, in contrast to a proceeding in which "purely private interests [are] involved," where "a constitutional principle is invoked . . . in the public interest," "[t]he doctrine of laches is not properly applicable." Fugina v. Donovan, 259 Minn. 35, 104 N.W.2d 911, 913 (1960).

2.

Even if Laches Did Apply, the Petitioners' Timing Was Not Only Reasonable, It Was Obligatory.

The Secretary of State says our reasons for not commencing this action earlier are "unpersuasive." At 6. She suggests that we were required to file suit at least at the end of the 2006 legislative session when it became clear the legislature was not going to make any changes to the 2005 amendment and ballot question. At 5-6.

Her position is inconsistent with the doctrine of laches, the fundamental question of which is: When did the plaintiff or petitioner have knowledge "of the facts which should have prompted action"? Bausman v. Kelley, 38 Minn. 197, 36 N.W. 333 (1886).

Had we filed the petition before the Attorney General's 3.21 letter was released, her counsel no doubt would have come before this Court, Knapp v. O'Brien¹ in hand, and insisted we were jumping the gun, that under Knapp there was no justiciable controversy until the 3.21 letter was made public.

Had we commenced this action before the Secretary of State formulated and made public her heading to the ballot question, counsel would have come before this Court, Knapp v. O'Brien in hand, and insisted that the Knapp principle applied in spades in that situation.

And when was that heading released? By her own admission, not until September 20th. At 3. Consistent with that is the Affidavit of Rep. Connie Bernardy, attached hereto at A.8, in which she details attempts to learn the wording of the heading prior to September 20.

¹288 Minn. 103, 179 N.W.2d 88 (1970); see, Petition at 16 and Petitioners' Laches Memorandum at 7; see also, Elbers v. Grove, 502 N.W.2d 810, 814 (Minn.App. 1993).

Here's the point: The Secretary of State and the Amicus take it upon themselves, now, to argue that our evidence of confusion surrounding the ballot question is weak. To the contrary, that evidence is overwhelming and uncontradicted. But imagine what they would have said had Petitioners not waited until it became clear that efforts by the Attorney General and the Secretary of State - not to mention the media and the advocacy groups - were adding to rather than clearing up the confusion?

3.

An Unclear Ballot Question Is a Constitutional Problem.

The Secretary of State says that although she "neither supports nor opposes adoption of the constitutional amendment," she does

have an interest in assuring the orderly conduct of elections and protecting the rights of Minnesota citizens to vote. . .

Response of Sec. of State at 1.

What could be more fundamental to that purpose than that the ballot questions she submits to those citizens are clear in their effect?

The issue is not one of mere procedural nicety. As this Court has recognized, a "misleading" ballot question is

"a palpable evasion of the constitutional requirement to submit the law to a popular vote." State v. Stearns, 72 Minn. 200, 75 N.W. 210, 214 (Minn. 1898), reversed on other grounds, 21 S.Ct. 73, 179 U.S. 223, 45 L.Ed. 162.

If the people don't understand what they're voting on, it is no better than denying them the vote in the first place.

4.

A Confused Voter Is Not an Informed Voter.

Counsel for the Secretary of State says the ballot question is "essentially a question of subjective fact upon which each individual voter has an interest in making an independent judgment." At 5.

But the crux of State v. Stearns is that, where the ballot question is misleading, the voter is essentially denied the opportunity to make an independent judgment.

The proper choice for the voter is between "yes" and "no", not between "yes I understand this" and "no I do not."

5.

The Secretary of State Has Herself Gone on Record Saying the Ballot Question Is Confusing.

In the Appendix at page A.2 is a verbatim transcript of

the Secretary of State's remarks made on August 2nd this year at the Coalition of Greater Minnesota Cities Conference in Red Wing. She appeared on stage with a moderator and her election opponent, Mark Ritchie.

The transcript in the Appendix includes the entirety of her remarks. Here are the important excerpts:

MODERATOR: Your thoughts on the wording of the Minnesota Vehicle Sales Tax Constitutional Amendment. Do you think it's clear, do you think it is misleading?

SEC. KIFFMEYER: There is no doubt that - there were two, actually, constitutional amendments - the first one I think is a little more confusing, especially the language that says, you know, that at least 40 percent and no more than 60 - and what does that mean and how much does really go for roads? And I think the second constitutional amendment authored by Mary Liz Holberg was written a lot more clearly and a lot better, however that one did not get through the conference committee so the one we're stuck with on the ballot this year, the actual statutory language is written in statute, it's the language that goes on the ballot. . . . But the real fact of the matter is that, I don't like it very much either. I would have much preferred a more clear and well-written constitutional amendment. But it's my job as Secretary of State, whatever I feel personally, to put it on the ballot, and work together in that regard, and then leave the legislative process, and hopefully we may be able to make some changes either legislatively or maybe a better constitutional amendment in the future.

6.

The Secretary of State Is the Appropriate Respondent.

Counsel for the Secretary of State argues that because the Secretary herself has done nothing wrong, therefore she should not be a party hereto. However, by both statute (i.e., **Minn.Stat. 204B.44**) and established practice, the Secretary of State is the proper respondent in such actions involving state-wide ballot issues. E.g., Elbers v. Growe, 502 N.W.2d 810 (Minn.App. 1993); Fugina v. Donovan, 259 Minn. 35, 104 N.W.2d 911 (Minn. 1960); Williams v. Donovan, 253 Minn. 493, 92 N.W.2d 915 (1958); Marsh v. Holm, 238 Minn. 25, 55 N.W.2d 302 (1952); Winget v. Holm, 244 N.W. 331, 332 (Minn. 1932).

7.

Evidence of the Confusing Nature of the Ballot Question Is Not "Anecdotal"; It Is Overwhelming and Uncontradicted.

Instead of refuting the extensive evidence of the confusing nature of the ballot question, the Amicus characterizes that evidence as "little more than anecdotes." At 3.

Anecdotes? That would be a couple of citizens stopped

and quizzed on the street and left scratching their heads.

But where you have the media repeatedly, the Secretary of State frankly, and a goodly number of legislators confessedly saying it is confusing, then what you have is not anecdote but consistent and overwhelming evidence of the fact.

And it continues. On October 9, 11 and 12 WCCO television broadcast pieces on the MVST amendment. The recaps from WCCO's website are attached hereto at A.1 - A.5.

The first story does not mention the 40/60 issue. It simply quotes a trucking association representative as saying the MVST revenue will "'go to roads, bridges, transit.'" A.1.

The second story, which ironically is intended as a "Reality Check" - that is, an assessment of the accuracy of the television ad campaign that urges a "yes" vote - is more troublesome. "This amendment," it says, "would require *all* that money to go to roads, phasing it in over five years." (Emphasis theirs) A.3.

The truth is just the opposite: Under the amendment *none* of the money is required to go to roads.

Finally - and a vivid example of the persistence of the confusion surrounding the Amendment - is the October 12 story entitled "Update" to the "Reality Check":

A number of viewers contacted us expressing concern we did not spend enough time explaining the distribution of funds if the Transportation Amendment to the Constitution is adopted. We agree.

A promising start. But then the ballot question is interpreted:

Up to 60 percent of the funds can be spent on road-related matters, and 40 percent on transit.

The first clause is technically correct (although "can" should more accurately be "could"): Yes, the maximum that can be spent on roads is 60 percent. But the second clause is dead wrong: the maximum that can be spent on transit is not 40 percent but 100 percent.

Again the crucial fact - that roads may get 0 percent - is not simply lost in the confusion but actually contradicted.

8.

The Proper Governing Principle of This Case Is Not "Separation of Powers" but "Checks and Balances".

The Amicus invokes the Separation of Powers as a reason why the Court should not enjoin the ballot question.

But the essential partner of the doctrine of Separation of Powers - the doctrine of Checks and Balances - is more apt:

It must be conceded settled by McConaughy v. Secretary of State, 106 Minn. 392, 119 N.W. 408, 411, that courts have jurisdiction to determine whether an amendment to the Constitution proposed by the Legislature and submitted to the electors was proposed, submitted, and ratified conformably to the mandate of the Constitution, so as to become a part thereof.

Winget v. Holm, 187 Minn. 78, 244 N.W. 331, 332 (Minn. 1932).

9.

The Ballot Question Is Not Ambiguous, It Is Confusing.

The Amicus characterizes the ballot question as "ambiguous." At 8. The Amicus is too kind. The problem with the ballot question is not that it has more than one meaning but that the true meaning - that transit may get 100% and roads 0% - is hidden away.

10.

The Legislature Had an Obligation to Present to Voters a Clear Ballot Question.

The Amicus says that "Petitioners' complaint is not with the ballot question, but with the text of the Transportation Amendment itself." At 7.

The point is irrelevant. It makes no difference what

the source was that infected the ballot question. The end result is still the same - an uninformed electorate.

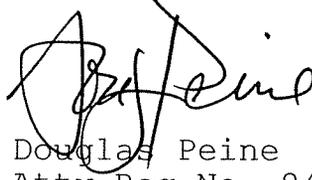
The legislature had an obligation to create a ballot question that offered the electorate a clear choice. If the amendment language itself was confusing - which it obviously is - it was their duty to choose other language that would clear up that confusion.²

Really, all they had to say was that the allocation under the amendment was 40 to 100 percent for transit and from 0 to 60 percent for roads. That would have been an easy and honest presentation of the question.

The fact that such alternative language was readily and obviously available raises once more the prospect that the ballot question was the result less of poor draftsmanship and more of calculation.

²A confusing amendment is bad enough. But at least it can be studied and interpreted in the normal, unhurried legislative and judicial processes. Not so the ballot question, which many voters will be reading for the first time in the voting booth.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Douglas Peine", written over a circular stamp or mark.

Douglas Peine
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2460 Beverly Road
St. Paul, Minnesota 55104
612-308-0014

DATED: 10/17/06

ATTORNEY FOR PETITIONERS

APPENDIX

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Affidavit of Connie Bernardy with attachments	A.8

AFFIDAVIT OF DOUG PEINE

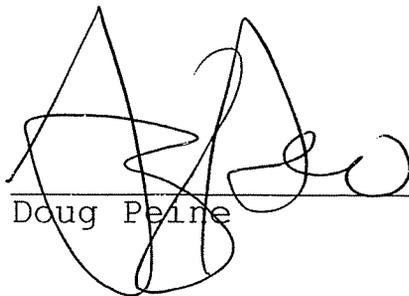
Doug Peine, being first sworn on oath, states as follows:

1. I am attorney for the Petitioners in Breza et al. v. Kiffmeyer.

2. On October 16, 2006, I watched and listened to a DVD recording of a question and answer session which included a moderator and the Honorable Mary Kiffmeyer, Minnesota Secretary of State, as well as her election opponent Mark Ritchie, and which took place on August 2, 2006 at the Coalition of Greater Minnesota Cities Conference in Red Wing.

3. Attached to this Affidavit is a verbatim transcript, made by me, of Secretary Kiffmeyer's complete answer when asked about the MVST constitutional amendment.

DATED: 10/17/06



Doug Peine

Subscribed and sworn to by me,
this 17th day of October, 2006.

Michelle Walsh



**Transcript of DVD Recording of Question Posed to and Answer Given
by Mary Kiffmeyer, Minn. Sec. of State,
Regarding the MVST Sale Tax Constitutional Amendment.**

2006 Coalition of Greater Minnesota Cities Conference
Red Wing, Minnesota
August 2, 2006

Q: Your thoughts on the wording of the Minnesota Vehicle Sales Tax Constitutional Amendment. Do you think it's clear, do you think it is misleading?

A: Oh I love that question, I was waiting for that one. There is no doubt that - there were two, actually, constitutional amendments - the first one I think is a little more confusing, especially the language that says, you know, that at least 40 percent and no more than 60 - and what does that mean and how much does really go for roads? And I know in rural Minnesota the real critical issue for you is roads. And they're desperate. I travel those 87 counties every year. I know very well the tremendous needs and the neglect over the past two years. And I think the second constitutional amendment authored by Mary Liz Holberg was written a lot more clearly and a lot better, however that one did not get through the conference committee so the one we're stuck with on the ballot this year, the actual statutory language is written in statute, it's the language that goes on the ballot. The title - the Attorney General and I will be working on the title to maybe help give some understanding or clarification But the real fact of the matter is that, I don't like it very much either. I would have much preferred a more clear and well-written constitutional amendment. But it's my job as Secretary of State, whatever I feel personally, to put it on the ballot, and work together in that regard, and then leave the legislative process, and hopefully we may be able to make some changes either legislatively or maybe a better constitutional amendment in the future.

Transportation Amendment Spurs Support, Criticism



Pat Kessler

Reporting

(WCCO) St. Paul In an election year filled with campaign ads, you've probably seen the spots pushing to put transportation funding into the state Constitution. But critics say reserving money for roads could mean taking it away from other programs.

Minnesota is towards the peak of a top ten list on which drivers would probably rather not be. A national report ranks the Twin Cities as the fifth worst in the country for congestion among similar sized metro areas.

This congestion is a big reason for an election year push to pass a constitutional amendment forcing the state to spend more money on transportation.

"It'll go to roads, bridges, transit. Frankly, anyone who has spent anytime stuck in traffic knows that we need more money to move people faster and safer," said John Hausladen of the Minnesota Trucking Association.

The tax Minnesotans pay on motor vehicles now is split between transportation and the general fund. If the constitutional amendment's approved, *all* the money goes for transportation. And supporters have launched a major campaign blitz to make sure it happens.

So says the ad from Minnesotans for Better Roads and Transit: "Doesn't it make sense to dedicate the sales tax we currently pay on cars and trucks to improve roads and transit all across Minnesota? That will provide \$300 million a year without raising taxes."

But opponents of the amendment say it's not free money. They say there's a danger other important programs such as health care or education could get less money in a tough budget year.

"That's not magic money. That's a \$300 million pothole in that general fund," said Mark Steffer of Education Minnesota. "That's the fund that pays for health and human services, education and every other state expense."

Part of the reason there's not enough money for roads is because lawmakers haven't raised the gas tax -- a major road funding source -- since 1989.

And opponents of the amendment say it's a cop-out because Minnesota lawmakers could spend all the money they want on roads. They just haven't done so. This takes them off the hook.

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http://wcco.com/topstories/local_story_282200218.html

Oct 11, 2006 10:15 pm US/Central

Reality Check: Transportation Amendment



Pat Kessler
Reporting

(WCCO) The transportation amendment is careening down the election highway. And the ad we're seeing on television promoting it is mostly accurate. But it hits a big pothole along the way and doesn't tell the whole story.

"Can our roads handle another 1,000,000 people? Twin Cities traffic is already crawling," said the ad.

This is TRUE. The Twin Cities has the third-worst congestion in the country for similar-sized metro areas. (Seattle was deemed the worst, with San Diego next in line.) And Minnesota's population is projected to grow by a million people by 2025.

"Crumbling rural roads take a deadly toll. And everywhere construction is stalled for lack of money," the ad said.

This is also true, but it doesn't tell the reason. HERE'S WHY. There's not enough money because lawmakers spend it on other important programs in addition to roads. And one of the biggest sources of road funds -- the 20-cent per gallon gas tax -- hasn't gone up since 1988.

"So doesn't it make sense to dedicate the sales tax we currently pay on cars and trucks to improve roads and transit all across Minnesota?" asked the ad.

IN FACT, we all pay a sales tax on motor vehicles we buy. Half the money goes to roads, the other half for state programs. This amendment would require *all* that money to go to roads, phasing it in over five years.

"That will provide \$300 million a year without raising taxes," said the ad.

Well, NOT EXACTLY. That \$300 million now pays for everything from high schools to health care to highways. And it will leave a hole in the budget.

If the constitutional amendment passes, road funding will be guaranteed. All other programs will compete for the rest of the money.

That's Reality Check.

Update: Transportation Amendment Reality Check.

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http://wcco.com/realitycheck/local_story_284220750.html

Oct 12, 2006 5:23 pm US/Central

Update: Transportation Amendment Reality Check



Pat Kessler

Reporting

(WCCO) A number of viewers contacted us expressing concern we did not spend enough time explaining the distribution of funds if the Transportation Amendment to the Constitution is adopted.

We agree.

Currently half of motor vehicle sales taxes (MVST) are transferred to the general fund, and half to transportation budgets.

If passed, the amendment will require all MVST transferred to transportation budgets.

Up to 60 percent of the funds can be spent on road-related matters, and 40 percent on transit.

Here is the constitutional amendment in its entirety:

Do you approve amending the state constitution to allow no more than 60 percent of MVST revenue to go to roads and bridges and no less than 40 percent to transit?

Thanks for watching WCCO-TV,
Pat Kessler, Reporter

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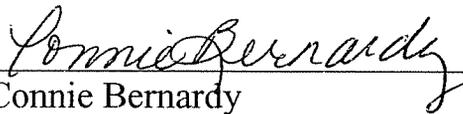
http://wcco.com/realitycheck/local_story_285182620.html

AFFIDAVIT OF CONNIE BERNARDY

Connie Bernardy, being first sworn on oath, states as follows:

1. I was a Member of the Minnesota House of Representatives from 2000 to 2006.
2. I am currently employed with Education Minnesota as an organizing specialist.
3. Part of my responsibilities with Education Minnesota is to coordinate activities regarding the MSVT ballot question and to inform the public and our members about the organization's position on the question.
4. To that end, on September 10, 2006, I requested that my assistant, Kathy Kriz, contact the Secretary of State's office to learn the name the Secretary had given to the MVST Ballot Question which would appear with the Ballot Question.
5. Sometime between September 10th and 14th, Ms. Kriz told me that the Secretary's office had advised her that the Amendment had not yet been named, and that it would be ready in about a week and would be released when they send it out to election officials.
6. On September 18th or 19th, I asked Ms. Kriz to again contact the Secretary of State's office to see if the name had been released yet.
7. On September 20th at 9:27 am, Brad Anderson from the Secretary's office at 651-201-1395 returned my assistant's call and left the name of the amendment on her voice mail.
8. I have attached hereto true and correct copies of 9/10/06 correspondence from Connie Bernardy to Kathy Kriz, 9/10/06 – 9/13/06 correspondence from Kathy Kriz to Connie Bernardy and 9/18/06 - 9/19/06 correspondence from Connie Bernardy to Kathy Kriz and 9/20/06 record of receipt of voice mail from Secretary of State's office with the name of the amendment (actual audio message is available.)

Dated: 10/16/06



Connie Bernardy

Subscribed and sworn to before me
this 16th day of October, 2006.



Sharon K. Giel



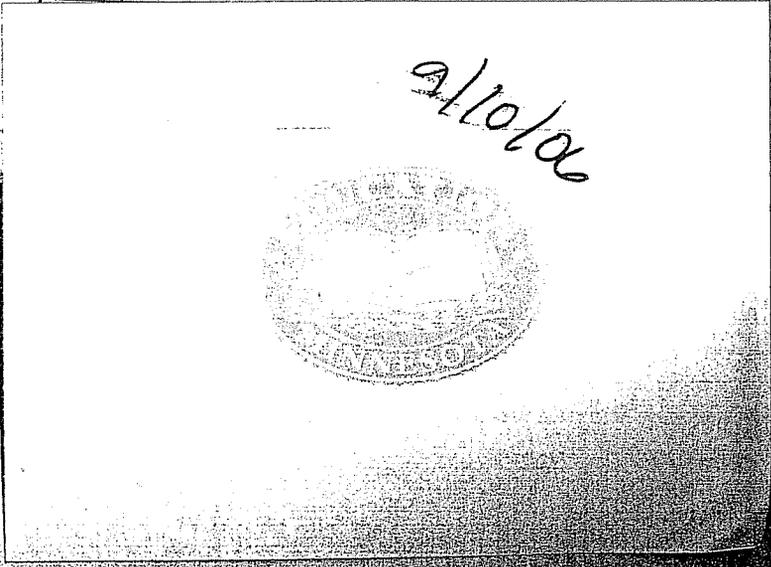
Date 9/10 Hour _____
 To Kathy
WHILE YOU WERE OUT
 M Yimmie
 Of _____
 Phone () _____
 Pager
 Fax
 Cell

E-Mail

Telephoned	Returned Call	Left Package
Please Call	Was in	Please see me
Will Call Again	Will Return	Important

Message

*Pls call Sec of State
 & ask what the
 official name
 of the ballot
 question is*



Date 9/11/06 Hour _____

To Wanda
WHILE YOU WERE OUT

M Kathy

Of _____

Phone () _____

Pager
Fax
Cell

E-Mail _____

Telephoned	Returned Call	Left Package	
Please Call	Was in	Please see me	
Will Call Again	Will Return	Important	

Message
They will be sending that info out w/ the certification of candidates for the general elec. to all the election officials within the next week.

Between 9/10 - 9/13/06



REDIRECT *Business*

Date _____ Hour _____

To *Kathy*

WHILE YOU WERE OUT

M _____

of *Pleo*

Phone () _____

Pager
Fax
Cell

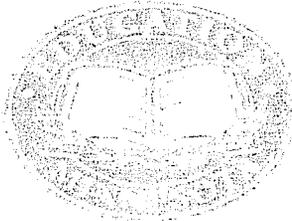
E-Mail _____

Telephoned	Returned Call	Left Package
Please Call	Was in	Please see me
Will Call Again	Will Return	Important

Message *Sec. of State*

*Please call to see
if the MVST Amend
name is ready
I need to know right
away*

9/18/06 or 9/19/06



Bernardy, Connie [MN]

From: Kriz, Kathleen [MN]
Sent: Wednesday, September 20, 2006 9:37 AM
To: Bernardy, Connie [MN]
Subject: FW: Message from 6512011394 - MVST Title
Attachments: VoiceMessage

Kathy Kriz
Education Minnesota
Government Relations Dept.
41 Sherburne Avenue
St. Paul, MN 55103
651-292-4841
800-652-9073
kathleen.kriz@educationminnesota.org

From: Unity Messaging System - MN-UNITY
Sent: Wednesday, September 20, 2006 9:27 AM
To: Kriz, Kathleen [MN]
Subject: Message from 6512011394