

STATE OF MINNESOTA
IN SUPREME COURT
A22-1081



Bill Kieffer, et al.,

Petitioners,

vs.

The Governing Body of the Municipality
Rosemount, MN,

Respondents.

O R D E R

Late in the day on August 2, 2022, petitioners Bill Kieffer and Erik van Mechelen filed a petition pursuant to Minn. Stat. § 204B.44 (2020), challenging the electronic voting system (EVS) that will be used in the City of Rosemount in Dakota County for the August 9, 2022, primary. The City of Rosemount has used an EVS made by Dominion Voting Systems Corporation for several election cycles. Petitioners allege that in the prior elections, the City of Rosemount used version 4.14 of the Dominion Voting Systems Democracy Suite, the software that works with the electronic voting system. Rosemount plans to use a different version of the software, version 5.5-C (Dominion 5.5-C) for the upcoming primary. Petitioners claim that certifications issued by the Secretary of State and U.S. Election Assistance Commission regarding Dominion 5.5-C show that the City of Rosemount will be using a “new voting system” under Minn. Stat. § 206.58, subd. 1

(2020).¹ Petitioners claim that the use of a “new voting system” triggered Rosemount’s obligation under section 206.58 to “disseminate information to the public about the use of a new voting system at least 60 days prior to the election” and “provide for instruction of voters with a demonstration voting system in a public place for the six weeks immediately prior to the first election at which the new voting system will be used.” Petitioners allege that the new voting system may not be used in the August 9 primary in Rosemount because these requirements under section 206.58 have not been met.

Respondents are the governing body of the City of Rosemount, i.e., the mayor and the other members of the city council (collectively the “City of Rosemount”). We allowed the City of Rosemount and the Secretary of State to respond to the claims made by petitioners. We also ordered petitioners, and directed the City of Rosemount and the Secretary of State, to address whether laches applies to the petition.

The City of Rosemount and the Secretary of State both filed responses disputing the merits of petitioners’ claims and arguing that the petition should be dismissed based on laches. On the merits, the City of Rosemount and the Secretary of State argue that a “new voting system” for purposes of the public information and voter information provisions in section 206.58 does not turn upon how software upgrades are characterized in certification documents. They assert that the focus of the voter-instruction process set forth in section 206.58 is on instructing voters as to how they will submit their ballots under a new balloting process, not on allowing the public to inspect computer code for voting machines. In other

¹ It is undisputed that the Dominion 5.5-C system was certified by the Secretary of State on May 2, 2022, for use in Minnesota elections. *See* Minn. Stat. § 206.57 (addressing required approval of an EVS by the Secretary of State).

words, according to the Secretary of State, “a system . . . is ‘new’ when it requires voters to submit ballots through a process that was different than the one they were previously familiar with—a process, that is, that many voters would doubtlessly need ‘instruction’ on.” And as the City of Rosemount points out, the City (under a contract with Dakota County) has been using the same voting machines since the 2016 election (when the public information and voter instruction required under section 206.58 was given) and will be using the same voting machines again in the August 9, 2022 primary. The City of Rosemount and the Secretary of State maintain that although there have been software upgrades, the voting machines and the voter experience in casting a ballot remain the same. Thus, they contend that the use of Dominion 5.5-C does not constitute a “new voting system” requiring new public information and voter instruction to be provided under section 206.58.

We take no position on the merits of the parties’ substantive arguments regarding section 206.58 and its applicability here because we conclude that the petition should be dismissed based on laches grounds. We have applied laches to election petitions brought under section 204B.44, dismissing petitions when the petitioner does not proceed “ ‘with diligence and expedition in asserting his claim.’ ” *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008) (quoting *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952)). “[T]he 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.” *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (citation omitted) (internal quotation marks omitted).

“The first step in a laches analysis is to determine if petitioner unreasonably delayed asserting a known right.” *Monaghan v. Simon*, 888 N.W.2d 324, 329 (Minn. 2016). We have recognized the general principle that “a party is not guilty of laches until he discovers the mistake, or until he is chargeable with knowledge of facts from which, in the exercise of proper diligence, he ought to have discovered it.” *Clark v. Reddick*, 791 N.W.2d 292, 294 (Minn. 2010) (citation omitted) (internal quotation marks omitted). Here, petitioners had actual knowledge of their claims for more than a month before the petition was filed. The computer expert upon whom petitioners rely notified one of petitioners’ declarants on May 27, 2022, that Dakota County, where Rosemount is located, was upgrading to Dominion 5.5-C and about the requirements cities have under section 206.58 when they use a new voting system. And another declarant in support of petitioners, in turn, received a letter on June 29, 2022, from the Dakota County Attorney, making clear Dakota County’s position that its use of Dominion 5.5-C is not a “new electronic voting system,” and thus, “the municipalities are not obligated to disseminate information to the public about a ‘new electronic voting system’ under Minn. Stat. § 206.58, subd. 1.”

Petitioners can therefore be deemed to have had actual knowledge of all relevant facts needed to bring a claim by June 29, 2022: that Dominion 5.5-C would be used for the 2022 elections by the municipalities in Dakota County, which included Rosemount, and that the municipalities would not be providing the public the information and voter instruction referred to under section 206.58. Petitioners, however, waited over a month (34 days) after receiving actual knowledge of the information to file their petition. We have found comparable, and even shorter, delays to be unreasonable. *See, e.g., Trooien v.*

Simon, 918 N.W.2d 560, 561 (Minn. 2018) (finding waiting “almost 4 weeks” to file the petition was unreasonable).

Petitioners instead point to the relevant date as being July 12, 2022, when the Secretary of State’s Director of Elections told those at a meeting that their recourse about their concerns about Dominion 5.5-C’s implementation was with the courts. Assuming without deciding that those remarks are relevant to the laches issue before us, the 3 weeks it took petitioners to file their petition after the July 12, 2022, meeting is longer than other delays we have found to be unreasonable. *See Martin v. Simon*, No. A16-1436, Order at 5–6 (Minn. filed Sept. 12, 2016) (finding 2-week delay to be unreasonable); *Larkey v. Ritchie*, No. A12-1064, Order at 2–3 (Minn. filed June 28, 2012) (finding a 20-day delay unreasonable). The delay here was unreasonable.

In addition to unreasonable delay, we must assess whether that delay “result[s] in prejudice to others, as would make it inequitable to grant the relief.” *Fetsch v. Holm*, 52 N.W.2d 113, 115 (Minn. 1952). The prejudice analysis considers the impact on “election officials, other candidates, and the Minnesota electorate in general.” *Pawlenty*, 755 N.W.2d at 301. Here, petitioners claim that the City of Rosemount “may not utilize the voting system in the current election” because it has not complied with the requirements to provide to the public the information and voter instruction under section 206.58. But ordering such relief when it is requested at the eleventh hour would impose substantial prejudice. First, ordering such relief would create severe pragmatic problems and increased costs in requiring election officials to identify and implement a new voting procedure on the eve of the election. Furthermore, as the Secretary of State points out,

such an order would have impact beyond the City of Rosemount because numerous other cities and counties use Dominion 5.5-C. *See Pawlenty*, 755 N.W.2d at 302 (finding prejudice where accepting the petitioners’ argument would impact numerous other races beyond the race at issue in the petition). In addition, this case involves “potential prejudice to the electorate in general.” *Id.* at 303. Some voters have already completed in-person early voting, which began on August 2, the day the petition was filed, utilizing the same Dominion voting machines that will be used for the August 9 primary. Nor can we overlook the potential unforeseen consequences and “risk of creating additional error . . . by mandating last-minute changes.” *Id.* Ordering the relief sought by petitioners would impose substantial prejudice.

Accordingly, petitioners’ unreasonable delay in filing the petition and the substantial prejudice that would result if the relief sought were ordered, requires that the petition be dismissed based on laches.²

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition challenging the electronic voting system that will be used in the City of Rosemount for the August 9, 2022, primary election be, and the same is, dismissed.

Dated: August 9, 2022

BY THE COURT:

A handwritten signature in black ink, appearing to read "Lorie S. Gildea".

Lorie S. Gildea
Chief Justice

² A dismissal on the basis of laches is without prejudice.