

STATE OF MINNESOTA
IN SUPREME COURT

Cullen Sheehan, Norm Coleman, Cara
Beth Lindell, and John Doe,

Court File No. A08-2169

Petitioners,

vs.

**MOTION FOR
EMERGENCY ORDER**

Mark Ritchie, Minnesota Secretary of
State, the Minnesota State Canvassing
Board, Isanti County Canvassing Board
and Terry Treichel, Isanti County Auditor-
Treasurer, individually and on behalf of all
County and Local Election Officers and
County Canvassing Boards,

Respondents.

Al Franken for Senate and Al Franken,

Intervenor-Respondents.

INTRODUCTION

In response to the Amended Petition, this Court ordered the parties to participate in a process designed to alleviate equal protection concerns and to ensure the counting of improperly rejected absentee ballots. Despite the parties' good faith efforts, there is evidence demonstrating that similar ballots are being treated differently in the various counties. Local election officials are still applying different standards to determine which rejected absentee ballots should be reviewed by the candidates for possible agreement on

counting them: some election officials, urged on by Intervenor-Respondents and confusing direction from the Secretary of State's Office, have refused even to consider rejected absentee ballots identified by the candidates for further review; others have privately considered such additional ballots; still others have added any additional ballots any party requested. The result is patchwork application of standards, different applications from county to county—precisely what the Court indicated should be avoided.

In order to remedy the defects in the process, Petitioners request that this Court enter an order requiring that local election officials convey all absentee ballots identified by any party as having been wrongly rejected to the Secretary of State's Office for a uniform review by the parties.

RELEVANT FACTUAL BACKGROUND

Pursuant to this Court's December 24, 2008 Order modifying the process by which improperly rejected absentee ballots were to be identified and counted, the parties negotiated a protocol for the conduct of that process (the "Protocol"). The Protocol reflected the parties' good faith negotiation and agreement regarding the appropriate means to accomplish the Court's mandate. *See* Affidavit of Tony P. Trimble, Exs. A ("Protocol") and B (December 24, 2008 email from Deputy Secretary of State Jim Gelbmann). Among other things, it contemplated that in addition to the 1,342 ballots identified by local election officials as being wrongly rejected, either candidate could suggest other rejected absentee ballots to be reviewed by all parties to determine whether they too had been improperly rejected. *See* Trimble Aff., Ex. A (Protocol ¶¶ 11(b), (d)).

Based on the envelopes earlier provided by the counties, the Coleman campaign was able to identify approximately 650 such additional ballots that appear on their face to raise a question as to whether the ballots were properly rejected. *Id.* at ¶ 4. Many involve signature mismatches that cannot be reconciled without reviewing the application materials.¹ Among the 1,342 ballots identified for review by local election officials are numerous ballots that similarly have mismatched signatures. The inconsistent treatment by local officials—and Intervenor-Respondents—has kept similarly situated ballots on the Coleman campaign list, however, out of the universe of ballots to be reviewed. If signature mismatches are allowed in one group, they should be allowed in the other.

As circumstances have unfolded, some local election officials have declined to allow inspection of supporting materials related to such additional ballots while others have allowed such inspection, thus creating the potential for substantial equal protection problems, prejudicing Petitioners and jeopardizing the integrity of the process. *See generally* Trimble Aff. at ¶¶ 4-9 and Exs. E - J, together with Affidavits of Frederic Knaak, Chris Tiedeman and Kristen Fuzer. Stearns County officials, for example, have sent any ballot envelopes and related documentation identified by its election officials or either candidate to the Secretary of State's Office. *See* Trimble Aff., Ex. G. Hennepin

¹ Prior to the hearing on Petitioners' Amended Petition and pursuant to Data Practices Act requests, the counties had provided Petitioners and Intervenor-Respondents with copies of rejected absentee ballot envelopes; however, most counties did not provide copies of absentee ballot applications. The Protocol contemplated local election officials providing the campaigns with copies of absentee ballot applications to enable the campaigns to verify whether absentee ballots rejected due to discrepancies between the envelope and the corresponding application were properly rejected. Trimble Aff., Ex. A (Protocol at ¶ 10).

County will allow the candidates to review all requested additional ballot envelopes, together with related documents, at an upcoming meeting. *See id.*, Ex. E. Sherburne County reviewed the additional absentee ballots identified by Petitioners by itself, without either candidate having access to the related applications and other materials, and declined to include any additional ballots identified by Petitioners in the group it intends to send to the Secretary of State. *Fuzer Aff.* at ¶ 4. St. Louis County declined to consider any additional rejected absentee ballots in large part because it deemed the request untimely. *See Knaak Aff.* at ¶ 3. In Anoka County, the Franken campaign opposed consideration of any ballots beyond those earlier identified by officials. *See Trimble Aff.*, Ex. I. In summary, as a result of the disparate treatment of Petitioners' request that additional rejected absentee ballots be considered for full review, it appears likely that similarly situated rejected absentee ballots will be treated differently: some will be counted—and others will not.

Petitioners have brought their concerns to the attention of the Secretary of State and Intervenor-Respondents and suggested that all additional ballots identified by either campaign (Intervenor-Respondents themselves having identified 85 such ballots) be reviewed by all parties. *See Trimble Aff.*, Exs. D and K. Both have declined to do so: Mr. Gelbmann of the Secretary of State's Office took the position that additional ballots were identified too late in the process; counsel for Intervenor-Respondents has objected to the inclusion of any ballots identified by the Coleman campaign, even as they have sought the inclusion of those they claim to have identified. *Id.*, Exs. D, G and I; *Knaak Aff.* at ¶ 3.

ARGUMENT

This Court's December 18, 2008 Order, as modified by the December 24, 2008 Order, clearly contemplated that all absentee ballots which the parties agree were wrongly rejected should be counted without awaiting an election contest. December 18, 2008 Slip Op. at 2. In order to ensure that such ballots are counted, all three parties—Petitioners, Intervenor-Respondents and the responsible local election officials—should be given the opportunity to review all relevant materials and decide whether they agree that the absentee ballots were in fact wrongly rejected. Although the Protocol contemplates precisely such a process, it has not occurred. Instead, some local officials have unilaterally decided which absentee ballots will be reviewed to determine whether they have been improperly rejected. As a result, the potential for disenfranchisement—that is, the counting of one ballot but not of another similarly situated—has become enormous.

Having ordered that purportedly improperly rejected absentee ballots are to be reviewed and, if all agree the rejection was improper, be counted during the recount and before an election contest, the Court should ensure that the review process complies with the dictates of fundamental fairness and the Equal Protection Clause of the Fourteenth Amendment. Indeed, pursuant to Minn. R. Civ. P. 65 and its inherent power to effectuate its own orders, this Court should enter an order ensuring that the parties have a fair opportunity to guarantee that improperly rejected ballots are indeed counted.

Doing so would be neither burdensome to local election officials nor prejudicial to any party. Local election officials need do no more than gather the requested envelopes

and related documentation (including applications) and either send them to the Secretary of State's Office or make them available at a regional or local location for review by the parties. The relief also furthers the Court's goal of having all obviously improperly rejected absentee ballots counted during the recount instead of waiting until an election contest, a goal that is precisely what all parties want.

If the Court does not act, the record demonstrates that local election officials have treated similarly situated absentee ballot envelopes differently, a circumstance which raises the same substantial equal protection concerns that Petitioners noted in their Amended Petition. As the examples set forth in the accompanying Affidavits demonstrate, where one county uses "a more forgiving standard" to determine when an absentee ballot was improperly rejected, that county will likely find many more new votes than a county applying a less forgiving standard. *See Bush v. Gore*, 531 U.S. 98, 107 (2000). Unless the candidates are allowed a realistic opportunity to supplement this by identifying additional ballots that should be reviewed, and unless those additional ballots are reviewed, "this is not a process with sufficient guarantees of equal treatment." *Id.* It must therefore be remedied by the relief requested by Petitioners.

Finally, it is no response to say, as Intervenor-Respondents undoubtedly will, that the failure to adhere to the Protocol requires the Court to deny the requested relief. The fact is that delays are fairly laid at the doorstep of all parties. *See Trimble Aff.*, Ex. J. Moreover, to apply the Protocol as written would mean no rejected absentee votes would be counted because the dictates of Section 15 of the Protocol were not followed. This would be an absurd result and one clearly at odds with the Court's December 24, 2008

Order. In any event, to elevate the Protocol over the reality that similarly situated ballots would be treated differently—some would be opened and counted while others would not—is to ignore the dictates of the constitutional right to equal protection.

RELIEF REQUESTED

The Court accordingly should enter an order:

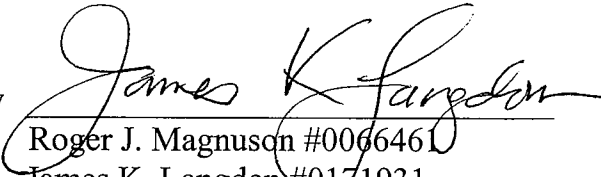
(a) directing local election officials to segregate and convey to the Secretary of State's Office each and every rejected absentee ballot envelope, together with the related application and any other relevant documentation, that has been identified—by Petitioners, Intervenor-Respondents or the responsible local election officials—as potentially having been improperly rejected; and

(b) directing the Secretary of State, together with representatives of the Petitioners and the Intervenor-Respondents, to review such envelopes and other relevant documentation to enable them to determine whether they agree that such ballots were in fact wrongly rejected.

For the reasons set forth above, and based on the accompanying Affidavits as well as the Amended Petition and previous briefing in this matter, Petitioners respectfully request that the Court grant the requested relief.

Dated: December 31, 2008

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