

STATE OF MINNESOTA
IN SUPREME COURT

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

Petitioners,

v.

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,

and

Al Franken for Senate and Al Franken,

Intervening Respondents.

REPLY MEMORANDUM IN SUPPORT OF AMENDED PETITION

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INTRODUCTION

With its decision on December 12, 2008 to request all 87 county canvassing boards to segregate, open and count all purportedly wrongly rejected absentee ballots, the Minnesota State Canvassing Board (the “Board”) has taken a false first step that if not corrected will impair this election’s credibility. By not providing uniform standards or instruction, the Board has created a situation in which different county canvassing boards will take different steps, using different standards, to reach different results regarding similarly situated ballots. The prospect—indeed, certainty—of disparate treatment in these circumstances will disenfranchise some Minnesota voters, dilute the votes of others, and potentially lead to a violation of the Equal Protection Clauses of the Minnesota and United States Constitutions.

This Court must step into the fray to rectify the missteps being taken and to preserve the credibility of the election’s results. Doing so need not impose any burden on the Court: it must merely apply Minnesota’s clear election statutes. Those statutes make plain that the question of whether any absentee ballot was incorrectly rejected by election officials must be addressed in an election contest, where one three-judge panel can resolve such questions in a consistent manner using one standard, rather than on an *ad hoc* basis by 87 county canvassing boards attempting to interpret and apply confusing, internally inconsistent, and improper guidance provided to them recently by the Secretary of State’s office. The Court accordingly can correct the errors and preclude future error simply by ordering Respondents to cease their actions and to leave the entire matter to an election contest.

The Franken campaign would have this Court believe all rejected absentee ballots in the so-called fifth pile indisputably are valid votes and that Petitioners are seeking to disenfranchise voters on mere technicalities. Nothing could be farther from the truth. There is no agreement that these ballots were wrongly rejected. Indeed, Petitioners believe many were properly rejected and that a contest proceeding, with decisions by one panel after recourse to the rules of civil procedure, would bear this out. In any event, the record does not reflect a vague possibility of disparate treatment or mere minor mistakes. Instead, it shows substantial and ongoing differences that implicate equal protection concerns: relying on the written guidance provided by the Secretary of State's Office, the canvassing boards of different counties are in fact reaching different results in determining whether similarly situated envelopes should go into the so-called fifth pile. As a result, this is not a circumstance capable of being addressed through the "obvious error" provisions of Minn. Stat. § 204C.39—for the simple reason that in many counties, for many ballots, officials are not dealing with obvious errors.

Even were the Court inclined to allow county canvassing boards to correct obvious errors made regarding rejected absentee ballots, it should articulate clear and meaningful standards by which the process should proceed uniformly in all counties. Those standards must ensure a public, transparent and fair process. They must also correct the Board's flawed first step which would not even ensure the evidentiary integrity of the process to enable either candidate, if he chooses, to raise the matter in an election contest.

Petitioners accordingly respectfully request that the Court exercise its authority pursuant to Minn. Stat. § 204B.44 to redress these errors.

RELEVANT FACTUAL BACKGROUND

I. Parties

Petitioners are Minnesota residents qualified to vote under Minnesota election laws who cast votes in the election for United States Senator. *See Sheehan Aff.* at ¶ 1.

Respondent Mark Ritchie is the Minnesota Secretary of State and is responsible for administration of Minnesota election law. Respondent Minnesota State Canvassing Board is granted, pursuant to Minnesota election law, limited responsibilities related to the state general election and administrative recounts. Nominal Respondents Isanti County Canvassing Board and Terry Treichel, Isanti County Auditor-Treasurer, represent all county and local election officials, including county canvassing boards, in each of Minnesota's 87 counties. Such county and local election officials are granted various election and recount responsibilities under Minnesota election law.

II. The Recount

The election for United States Senator from the State of Minnesota occurred on Tuesday, November 4, 2008 ("General Election"). Thousands of people voted absentee in this election. The close result of this election triggered an automatic statewide administrative recount under Minn. Stat. § 204C.35 (the "Recount"). The Recount has been conducted pursuant to Minn. Rules Ch. 8235, the Secretary of State Recount Plan, dated November 18, 2008, and the 2008 Recount Guide. *See Langdon Aff. Ex. 1* (Nov. 18, 2008 Recount Plan) and *Ex. 2* (2008 Recount Guide). County and local election officials have completed the manual recounting of the ballots. During the Recount, only

absentee ballots that had been accepted by local election officials were counted. The Board is scheduled to consider challenged ballots this week.

III. The Secretary of State's "Detailed Instructions" Related to Rejected Absentee Ballots

The Franken campaign began raising the potential issue of improperly rejected absentee ballots on or about November 11, 2008. *See* Sheehan Aff. Ex. 2. On Tuesday, December 2, 2008, Deputy Secretary of State Jim Gelbmann "asked for each county's assistance" in reviewing all previously-rejected absentee ballots. *See* Langdon Aff. Ex. 3. Mr. Gelbmann indicated that he was requesting the re-sorting because "the Board members expressed an interest in knowing the number of Absentee Ballots that may have been mistakenly rejected." *Id.* This December 2, 2008 email asks the counties to create a "fifth category"¹ while "reviewing all previously-rejected absentee ballots." *Id.*

On December 4, 2008, with the manual recount largely completed, Mr. Gelbmann emailed a document entitled "Detailed Instructions for Sorting All Currently-Rejected Absentee Ballots Cast in the U.S. Senate Race." *See* Langdon Aff. Ex. 4. These "Detailed Instructions," which we understand to be a new document encompassing guidance beyond that which was available pre-election to the election judges, state:

This task goes beyond a mere listing of the reasons for rejecting an absentee ballot that are listed on the envelope. **It requires the election workers to further document that the reasons listed are accurate.** The integrity of our election system, and the need to make sure every effort is made to count every vote that is legitimately cast by a qualified,

¹ Minn. Stat. §204B.12, subd. 2 provides four grounds for rejecting absentee ballots. This new idea of a fifth category is now popularly referred to as the "fifth pile."

registered voter, is dependent upon your voluntary participation in this process. **No voter should be required to rely on an election contest to ensure his or her vote is counted by the State Canvassing Board. If the Board lacks the authority to count absentee ballots that were mistakenly rejected, it is critical that the Board be able to document the number of mistakenly-rejected absentee ballots in its final certification of the election results.**

Id. (Detailed Instructions at p. 1) (emphasis added).

The Detailed Instructions invited local election officials to “conduct preliminary investigations relative to each rejected absentee ballot prior to the actual public sorting process.” *Id.* at p. 2. The Detailed Instructions for the non-mandatory re-sorting of rejected absentee ballots contain a further “optional” instruction. Under the heading “**Optional: Mail Ballots**,” the Secretary of State’s office stated: “**At the discretion of the local Election Official**, previously rejected ballots from **mail ballot precincts may also be reviewed** to determine whether any were rejected due to an administrative error, through no fault of the voter.” *Id.* at p. 6. (emphasis added).

The Detailed Instructions also requested county officials to move any absentee ballots from the second pile (for ballots rejected because the return envelope does not contain the voter’s genuine signature) to the fifth pile if the application and return envelope signatures “are similar, but not identical.” *Id.* at p. 3.

On December 7, 2008, the Secretary of State’s office sent an email under the subject line “Updated Information on Sorting of Rejected Absentee Ballots.” *See* Langdon Aff. Ex. 5. Here, Mr. Gelbmann stated that Houston County conducted “a public sort on Friday” and then provided the remaining counties who still planned to

conduct the voluntary re-sort with “additional clarifications and instructions.” *Id.* at p. 2. This December 7 email directs the counties to, for the first time, consider a rejected absentee ballot as improperly rejected if the signatures do not match or even if there is no signature, but the “transaction was actually handled at your in-person counter and was witnessed by a county or city official.” *Id.* at p. 3. On the other hand, neither the Detailed Instructions, nor the December 7 email, acknowledge that absentee ballots should be rejected if the instructions, which require in part that the absentee voter have a witness who is registered to vote in Minnesota, are not followed.

While the Secretary of State’s office indicated that candidate representatives may be present during these re-sortings in each county, candidate representatives have not been allowed to offer any objections or otherwise participate in the process other than mere observation. *See* Langdon Aff. Ex. 4 (Detailed Instructions at p. 2). Accordingly, the campaigns cannot verify that a supposedly “improperly rejected” absentee ballot was indeed improperly rejected. Additionally, a number of counties and Hennepin County cities have conducted their re-sortings apparently without giving public notice. These include: Cass, Chisago, Lac qui Parle, Washington, Hennepin-Long Lake, Hennepin-Minneapolis, Hennepin-Minnetonka, Hennepin-Rogers and Hennepin-Wayzata. *See* Langdon Aff. ¶ 10.f.

IV. Counties are Handling the Rejected Absentee Ballots Differently

Already, counties have adopted differing standards and some counties have refused to engage in the recommended process at all. Scott County has placed no ballots in the fifth pile. *See* Sheehan Aff. ¶ 3. At least five ballots were rejected (and have not

been put in the fifth pile) where the voter and the witness have the same street address and surname, but the witness did not include the city in his or her address. Similarly, some absentee voters used election judges as witnesses. These absentee voters' ballots were rejected where the election judge/witness did not include his or her complete address information. These have not been moved to the fifth pile. *Id.* In contrast, in Minneapolis, officials have now placed previously rejected absentee ballots in the fifth pile where a city official acted as the voter's witness and provided only name title without the witness's address." Still other counties are applying the Secretary of State's instructions inconsistently. For example, Clay County has placed at least one ballot in the fifth pile even though it has no witness information, while Lyon County has left a similarly situated ballot in a rejected pile. *See Sheehan Aff.*, Ex. 1.

The City of Minnetrista, in Hennepin County, has created its own categories in the re-sorting process, believing that the Secretary of State's instructions were incomplete. In an email dated December 12, 2008, Terri Haarstad, City Clerk for the City of Minnetrista, stated: "the on-line survey requested by the Canvassing Board, Minnetrista left Category 5 blank as Categories 1-4 do not address all legal and valid reasons why an absentee ballot may be properly rejected. As such, Minnetrista created their own categories for ballots rejected under MS§ 203B.08 subd. 4, MS§ 203B.08 subd. 1, MS§ 203B.07 subd. 3, MN Rules 8210.2200 and MN Rules 8210.2500." *Langdon Aff.* Ex. 6.

A number of counties have *declined* (some on the advice of county attorneys) to participate in this process, including St. Louis, Freeborn, Hubbard and Stearns. *Langdon Aff.* ¶ 10.6; Ex. 7, at p. 8 of 13. After Freeborn County stated that it did not intend to

participate in the re-sorting of rejected absentee ballots, Mr. Gelbman stated, “At a minimum, the Board wants to be able to quantify the number of mistakenly-rejected absentee ballots when it certifies the final numbers for the Senate race.” *Id.* at p. 7 of 13.

V. The Board Resolves to “Recommend” That Counties Re-Sort Rejected Absentee Ballots and Suggests the Counties Submit Amended Returns

At its December 12, 2008 meeting, the Board unanimously passed a resolution (“Resolution”) that “recommends” (but does not require) that county canvassing boards re-canvass to determine whether or not any absentee ballot envelopes were improperly rejected by local election officials.² *See* Langdon Aff. Ex. 8. A December 12, 2008 email from the Secretary of State’s office made the counties aware of the Board’s “recommendation” and suggested that the counties rely on Minn. Stat. § 204C.39 (related to “obvious errors”) to count the Senate votes from the ballots in the fifth pile and then submit amended returns. *See id.* This email also stated that the “Board expressed a desire that amended returns be made by Friday, December 19.” *Id.* Presumably those county canvassing boards that choose to follow the Board’s recommendation will seek to amend their returns this week. Such action, pursuant to Minn. Stat. § 204C.39, could

² The Board apparently passed the Resolution in reliance on the most recent letter it had received from the Attorney General’s office, which outlined a number of procedures for dealing with purportedly wrongly-rejected ballots, including a petition under Minn. Stat. §204B.44. Langdon Aff. Ex. 8 (Dec. 10, 2008 Ltr. from Alan Gilbert to Board.) This letter from the Attorney General’s office seemed to be at odds with earlier correspondence to the Board stating that “Courts that have reviewed this issue have opined that rejected absentee or provisional ballots are not cast in an election.” 2d Langdon Aff. Ex. B (Nov. 17, 2008 Ltr. from Kenneth E. Raschke, Jr.).

potentially trigger litigation in the district court for each county that seeks to correct so-called "obvious errors."

The Resolution failed to provide uniform guidance to Minnesota election officials on how to determine whether or not any absentee ballot envelopes in a county relating to the 2008 general election were improperly rejected by election judges and/or absentee ballot boards. Additionally, the Resolution failed to issue any direction to Minnesota election officials relative to permitting campaign representatives to challenge any ballots which are opened utilizing the evolving challenge procedures adopted during the Recount. Finally, the Resolution failed to issue direction to Minnesota election officials to segregate the envelopes and ballots from other ballots cast in local jurisdictions, thereby raising the distinct and real possibility that the ballots would be commingled with all other ballots. Such commingling would effectively destroy the utility of these ballots (or the corresponding envelopes) as evidence in a potential future election contest under Minn. Stat. Chapter 209.

ARGUMENT

The Board's recent request that counties segregate, open and count all purportedly wrongly rejected absentee ballots, without any authority to compel the counties' compliance, and without any uniform standards to govern the process, is improper and almost certainly will lead to disparate treatment of similarly situated ballots. This Court should prevent the counties from taking further action so that a contest court may consider the proper standard to apply to all of the rejected absentee ballots. A contest court is uniquely situated to handle the rejected absentee ballots because it can apply the

