

STATE OF MINNESOTA
IN SUPREME COURT

Norm Coleman,

Court File No. A08-2206

Petitioner,

v.

**MOTION FOR EMERGENCY
TEMPORARY RESTRAINING ORDER**

The Minnesota State Canvassing Board,

Respondent.

MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER

Pursuant to Minn. R. Civ. P. 65, Plaintiff Norm Coleman (“Petitioner”) moves this Court for a temporary restraining order preventing the Minnesota State Canvassing Board (“Board”) from (a) rejecting any challenges to ballots that have been segregated by the Board as being challenged as original ballots for which no duplicate could be located during the recount (“Challenged Ballots”); and (b) including in any recount totals certified or announced by the Board any votes resulting from the Challenged Ballots.

This Motion is supported by the Petitioner’s Petition for and Order to Show Cause Pursuant to Minn. Stat. § 204B.44 (“Petition”), the Affidavit of Amy Walstien filed concurrently therewith, the Affidavit of Patrick Shortridge filed concurrently therewith, and the attached Memorandum.

Because Petitioner seeks the requested relief to prevent the Board from causing Petitioner substantial, immediate, and irreparable harm by double-counting votes in its process, Petitioner respectfully requests expedited consideration of this motion.

MEMORANDUM IN SUPPORT

INTRODUCTION

On December 19, 2008, the Board erroneously decided to consider certain defective ballots during the recount of the election for United States Senator for the State of Minnesota (“Recount”), so that original ballots and duplicate ballots representing the same voter may both be counted. As a result, the Board may certify an inaccurate vote in contravention of its duties under Minn. Stat. § 204C.33, subd. 3. This will result in double-counting of votes because both unmarked duplicate ballots, which were counted on election night, and marked original ballots, which were located in envelopes containing original ballots for which duplicates were made by local election officials on election night, but for which duplicates were not found during the Recount (“Non-Matching Original Ballots”), will be counted in this Recount.

STATEMENT OF FACTS

The facts set forth in the Petition and the Affidavits are incorporated by reference.

CONTROLLING LEGAL AUTHORITY

A temporary restraining order is available under Minn. R. Civ. P. 65.01 when “immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition.” A court is to weigh five factors when determining whether it should issue a temporary restraining order:

1. The nature and background of the relationship between the parties preexisting the dispute.
2. The harm to be suffered by plaintiff if relief is denied as compared to that inflicted on defendant if it is granted pending trial.

3. The likelihood that one party or the other will prevail on the merits.
4. The aspects of the fact situation, if any, which permit or require consideration of public policy.
5. The administrative burdens involved in judicial supervision and enforcement.

Metro. Sports Facilities Comm'n v. Minn. Twins P'ship, 638 N.W.2d 214, 221 (Minn. Ct. App. 2002), *rev. denied* (Feb. 4, 2002) (citing *Dahlberg Bros v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965)).

ARGUMENT

Petitioner seeks the requested relief because it appears that if the Board includes the Challenged Ballots in the vote totals produced by the Board for the precincts in which the Challenged Ballots originated (by denying challenges to the Challenged Ballots), the number of votes certified and announced by the Board in such precincts will exceed the number of persons voting in these precincts on election night (either in-person or by absentee). Such double-counting will violate the principle of "one person, one vote" and will result in vote dilution, and hence, disenfranchisement, of persons whose votes were counted only once on Election Day. In addition, there is a very real possibility that the Board would "declare the loser to have won the election," and thus shifted the burden of proof during an election contest. *See Andersen v. Donovan*, 119 N.W.2d 1, 10-11 (1962).

I. The Relationship Between The Parties Favors Issuance Of A Restraining Order

The preexisting relationship between the parties to be preserved is the application of mandatory statutory standards for the creation and counting of duplicate ballots.

Minn. Stat. § 206.86, subd. 5. To maintain this standard, the Board must be compelled to certify and announce an accurate Recount result. Allowing the Board to deny challenges to the Challenged Ballots, or include votes resulting from those Challenged Ballots in the Board's certified Recount total, will impermissibly alter the circumstances of the U.S.

Senate election to the great detriment of Petitioner, and in violation of the deeply engrained American principle that each citizen is entitled to one (but not more than one) vote. *See Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (stating that “[t]he conception of political equality . . . can only mean one thing—*one person, one vote*” (internal quotation omitted) (emphasis added)).

II Irreparable Harm Will Result If The Emergency Temporary Restraining Order Is Not Granted

An inaccurate Recount report threatens imminent irreparable harm to Petitioner, who has a direct stake in the current election. The certification of such a report, based on the double-counting of Non-Matching Original Ballots, will result in voter disenfranchisement and dilution, in violation of the Equal Protection Clause. Because the Board is obligated to certify a true and accurate report of “votes validly cast” for the U.S. Senate office, Minn. Stat. § 204C.35, subd. 3, it must be enjoined from including the Challenged Ballots in its total. The “original” ballots for which duplicates were made were *not* “validly cast” or counted on election night (under Minn. Stat. § 206.86, subd. 5)

and, hence, must not be counted during this Recount if no marked duplicate corresponding to the challenged original was found and matched-up to the original during the Recount.

Cynthia Reichert, Minneapolis Director of Elections, has publicly stated that the failure of election judges to properly create and mark duplicate ballots “is a big issue” and that she “know[s] it happened in several precincts.” *See* Walstien Aff. Ex. 8. Because the originals were not within the universe of ballots counted on election night, they should not be within the universe of ballots certified in this Recount by the Board. If included and certified, double-counting is inevitable.

III. Petitioner Is Likely To Prevail On the Merits Of His Claim

To preserve the integrity of the Recount and to avoid clear double-counting of Non-Matching Original Ballots, the Board is required to comply with the statutory mandates governing duplicate ballots.¹ Original but defective ballots for which no corresponding duplicate ballots exist should not be counted. Only those originals for which there are corresponding duplicates should be counted.

Minnesota Statutes section 206.86, subd. 5, requires the accurate creation of duplicate ballots. It also requires counting only duplicate ballots while preserving (but not counting) original ballots. The statute provides an explicit procedure for creating and counting duplicate ballots in the event “a ballot card is damaged or defective so that *it*

¹ The Recount rules adopted by the Secretary of State and later unilaterally “clarified” by Secretary of State staff contravened Minnesota law. The rules adopted by the Secretary of State and the campaigns prior to the Recount do not replace clear Minnesota law or the U.S. Constitution.

cannot be counted properly by the automatic tabulating equipment.” Minn. Stat. § 206.86, subd. 5 (emphasis added). Where a ballot card is damaged or defective and cannot be counted properly by the automatic tabulating equipment, a “true duplicate copy” of the damaged ballot “must be made” in the presence of two judges not of the same party and “must be substituted” for the damaged ballot card. *Id.* The statutorily mandated procedure for creating duplicate ballots further requires that the duplicate ballots: (1) be clearly labeled “duplicate;” (2) indicate the precinct in which the corresponding damaged or defective ballot was cast; and (3) bear a serial number, which also must be identified on the original, defective ballot. *Id.* For purposes of the automated tabulation of votes, the duplicate ballots are counted in lieu of the damaged or defective ballot cards. *Id.* The original, defective ballots—which must bear a serial number corresponding to their duplicates—nonetheless must be retained. *Id.*

Minnesota Rule 8230.3850 further supports the statutorily mandated procedures for creating and counting duplicate ballots, and for retaining the original ballots. It provides as follows:

Any ballots requiring duplication at the polling place or central counting center must be duplicated in the following manner:

A. Whenever a ballot is required to be duplicated, the duplication process must be performed by two election judges not of the same political party.

B. *Whenever it is necessary to duplicate a ballot, the duplicate ballot and the original ballot must be identified with a single number written on both ballots. The number on the duplicate ballot must be the same number as on the original. When more than one ballot is being duplicated in a precinct, the numbering must be serial.*

C. *The reason for duplication must be written on the duplicate ballot. The election judges duplicating the ballot shall initial the duplicated ballot and the original ballot.*

D. When duplicating a ballot, one election judge shall call from the original ballot the valid selections of the voter; another election judge shall prepare the duplicate ballot with the voter's valid selections. The duplicate ballot must be compared against the original ballot to ensure it has been accurately duplicated.

E. *All original ballots which require duplication must be placed in an envelope marked "ballots for which duplicates were or are to be made."* **The duplicate ballot must be placed with the other valid ballots to be tabulated.**

The principle that each citizen is entitled to one (but not more than one) vote is deeply engrained in the American tradition of voting rights. As the Supreme Court has explained, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." *Reynolds*, 377 U.S. at 558 (internal quotation omitted). When one person casts two votes, or has his vote counted twice due to mistake on the part of election officials, *all other citizens are disenfranchised* (no less than the disenfranchisement that occurs when a legally-cast ballot is not counted at all). See *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1619 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."). Moreover, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy . . . [v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

In other words, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds*, 377 U.S. at 555.

The Board has a duty to prevent such unfairness from occurring. See *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989) (“[a] State indisputably has a compelling interest in preserving the integrity of its election process”); *Crawford*, 128 S.Ct. at 1620 (2008) (recognizing Indiana’s interest in maintaining the integrity and legitimacy of representative government.”); *id.* at 1619 (“the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process”).

Although no Minnesota case law addresses whether improperly created “duplicate ballots” should be counted, and if so, in what matter, other jurisdictions have addressed the issue. In *Wright v. Gettinger*, 428 N.E.2d 1212 (Ind. 1981), the statute then in effect (but since repealed) in Indiana was similar to Minnesota’s statute. It provided that “all duplicate ballots shall be clearly labeled duplicate” and “shall bear a serial number which shall be recorded on the damaged or defective ballot and shall be counted in lieu of the damaged or defective ballot.” *Id.* at 1221.

The *Wright* court considered 21 ballots in which there were various issues, including an original ballot for which there was no matching duplicate, a duplicate for which no original was found, and other ballots that did not contain serial numbers such that the originals and duplicates could be tied together. *Id.* at 1221. The Court held that the ballots at issue would not be counted because, to do so, would be to “ignore the clear

written law on the subject, and create a situation that would authorize procedures that would frustrate the proper handling of ballots and even create methods for fraudulent mischief in the counting of the votes.” *Id.* at 1222-23. Thus, under a comparable Indiana law, originals without duplicates would not be counted (because, per statute, duplicates are the ballots to be counted) and a duplicate that does not tie to an original would not be counted because the strict statutory procedure ensuring the integrity of the vote was not followed. *See generally id.*

By counting *both* an original and duplicate ballot corresponding to the same person, *other voters have been disenfranchised.* *See* Minn. Stat. § 204C.35, subd. 3 (the scope of the recount is limited to “the determination of the number of *votes validly cast*”) (emphasis added). Further, the Board does not have the authority to count Non-Matching Original Ballots because they were not votes cast in the election and therefore are not votes that can be considered during the recount. *See* Minn. Stat. § 204C.35, subd. 3 (“Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process”). Accordingly, the Board simply should not count those original ballots where corresponding ballots marked “duplicate” could not be found. The object of elections, after all, is “to declare elected the candidate who receives the most legal votes.” *In re Application of Andersen*, 119 N.W.2d 1, 10 (Minn. 1962). It follows that the “the method of arriving at the correct result, [a]fter it is in fact accomplished, should not be permitted to control so as to declare the loser to have won the election.” *Id.*

IV. Public Interest Demands That Consistent Standards Be Consistently Applied

Minnesota's electoral laws were enacted to protect the rights of the voters at large. The purpose of an administrative recount is to determine the number of "votes validly cast." Minn. Stat. § 204C.35, subd. 3. Minnesota has a very strong public policy in support of counting all votes where voter intent can reasonably be determined. *See* Minn. Stat. § 204C.22, subd. 1. In accordance with that policy, "an election which has resulted in a fair and free expression of the will of the legal voters upon the merits will not be invalidated because of a departure from the statutory regulations governing the conduct of the election *except in those cases where the legislature has clearly and unequivocally expressed an intent that a specific statutory provision is an essential jurisdictional prerequisite and that a departure therefrom shall have the drastic consequence of invalidity.*" *Anderson*, 119 N.W.2d at 9. Statutory requirements for the creation and counting of duplicate ballots are mandatory. Minn. Stat. § 206.86, subd. 5. While all legal ballots should be counted, *see Johnson v. Trnka*, 277 Minn. 468, 471, 154 N.W.2d 185, 187 (1967), the Board must strictly follow the legislatively imposed requirements for the creation and counting of duplicate ballots in order to ensure that legally-cast ballots were not *double*-counted.

V. Administrative Burden On The Court Is Minimal

The administrative burden involved in judicial supervision and enforcement of a temporary decree is minimal. Preventing the Board from denying challenges to the

Challenged Ballots or including Challenged Ballots in the Board's certified Recount total will not place any ongoing burden on this Court.

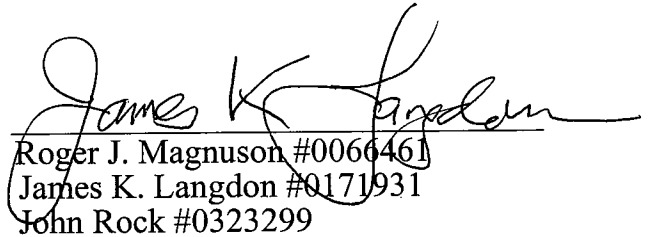
CONCLUSION

For the reasons set forth above, in the Petition, and in the Affidavits supporting it, Petitioner respectfully requests that this Court issue a temporary restraining order preventing the Board from: (a) rejecting any challenges to ballots that have been segregated by the Board as being challenged as original ballots for which no duplicate could be located during the recount; and (b) including in any recount totals certified or announced by the Board any votes resulting from such challenged ballots.

Dated: December 19, 2008

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