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By Deputy

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

In the Matter of the Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota,

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

No. 62-CV-09-56

MEMORANDUM OF LAW IN OPPOSITION TO OFFER OF PROOF

Contestants continue to occupy this Court's time and to delay the seating of Minnesota's second senator with claims that already have been argued and rejected. Contestants' most recent attempt to advance their purported Equal Protection claim comes in the form of an offer of proof into evidence. Contestee respectfully request that this Court accept Contestants' offer of proof for purposes of preserving the record and confirm its prior rulings rejecting Contestants' Equal Protection claim as a matter of law, both on substantive and procedural grounds.

Contestants first raised their breathtakingly expansive Equal Protection claim in a summary judgment motion filed on January 21, 2009—five days before the start of trial. In this motion, Contestants set forth the following claim: That "to satisfy equal protection the Court should order that all rejected absentee ballots cast by registered voters who were living on election day and did not otherwise vote in this election be counted." Contestants' Memorandum

of Law in Support of Motion for Summary Judgment at 3 (Jan. 21, 2009) ("Contestants' SJ Motion"). The following day, Contestees set forth the myriad reasons why Contestants' claims were deficient. *See* Memorandum of Law in Opposition to Contestants' Motion for Summary Judgment (Jan. 22, 2009). Even in the present posture, most of these reasons still apply. On February 3, this Court denied Contestants' motion for summary judgment. Order on Contestants' Motion for Summary Judgment, Ct. File No. 62-CV-09-05 (Feb. 3, 2009) ("SJ Order"). Since that time, Contestants have continued to advance their Equal Protection claim in an increasingly aggressive manner.

At the outset, Contestant's position is simply wrong on the merits. As this Court correctly held, the 2008 election in Minnesota for United States Senator was quite "[u]nlike the situation presented in Florida in *Bush v. Gore*, [531 U.S. 98 (2000)]." SJ Order at 7. In *Bush*, the Court considered Florida's basic command for the count of legally cast votes, which was to consider the "intent of the voter." *Id.* While "unobjectionable as an abstract starting principle," this command was problematic in light of "the absence of specific standards to ensure its equal application." *Bush*, 531 U.S. at 106. There is nothing close to analogous in Minnesota. To the contrary, "the Minnesota Legislature has enacted a standard clearly and unambiguously enumerating the grounds upon which an absentee ballot may be accepted or rejected." SJ Order at 7. *See also, e.g.*, Minn. Stat. §§ 203B.12, 203B.08, 203B.07, 203B.04, 201.071; Minn. R. 8210.0500, 8210.0600.

Contestants nevertheless persist in their sweeping objection to Minnesota's election system, maintaining that, in the context of the nearly 3 million votes cast in the November 2008 election, "[t]o count one ballot and not all others similarly situated" would violate the Constitution. Contestants' SJ Motion at 3. Yet, as Contestee has explained in prior filings, it is

of course the case that the Equal Protection clause does not constitutionalize every minor error and inconsistency in an election. It certainly does not do so with respect to the conditions and procedures imposed upon voting by absentee ballot, which receives less constitutional protection than does voting at the polls. *See* SJ Order at 5 ("'[T]he opportunity of an absentee voter to cast his vote at a public election by mail has the characteristics of a privilege rather than of a right.'") (quoting *Erlandson v. Kiffmeyer*, 659 N.W.2d 733, n. 8 (Minn. 2003)). Under Contestants' theory, any mistake by a local election judge official—any misapplication of the statutory standard to a particular ballot—would constitute a constitutional violation and draw the entire election into question. Not only would this result in an untenable rule that would make democratic government impossible; it finds no support in the case law. To the contrary, *Bush* itself makes clear that "the question before the Court [wa]s not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109 (emphasis added).

Applying the same federal constitutional law that Contestants invoke, lower courts have consistently refused to find constitutional violations due to mere errors or inconsistencies. *See, e.g., Graham v. Reid*, 779 N.E.2d 391, 395 (Ill. App. Ct. 2002); *Griffin v. Burns*, 570 F.2d 1065, 1076-1079 (1st Cir. 1978); *Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 14 (1st Cir. 2004); *Duncan v. Poythress*, 657 F.2d 691, 701-704 (5th Cir. 1981); *Pettengill v. Putnam County R-1 School Dist., Unionville, Mo.*, 472 F.2d 121, 122 (8th Cir. 1973); *Welker v. Clarke*, 239 F.3d 596, 597 n.3 (3d Cir. 2001); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006) (reiterating earlier warnings that courts should be hesitant to interfere with voting procedures on federal constitutional grounds). In short, *Bush* in no sense holds that the occasional misapplication of a

standard to a particular ballot renders an election unconstitutional. Such a holding would be absurd.

On the merits, therefore, Contestants' Equal Protection claim fails as a matter of law. This Court has already reached this holding, and it did so correctly.

In addition, this Court has already ruled that Contestants' Equal Protection claim fails independently on procedural grounds. As this Court determined on February 3, Contestants failed to plead their case in the manner and to provide the notice that would have been required for their Equal Protection claim to succeed. *See* Order on Contestee's Motion in Limine To Limit Absentee Ballot Evidence to Ballots Pleaded in the Notice of Contest, Ct. File No. 62-CV-09-05 at 4-5 (Feb. 3, 2009) ("Order on Contestee's Motion in Limine").

The whole premise of Contestants' claim is that the "same standard" and the "same methods" must be used with respect to every absentee ballot cast in the November 2008 election. *See* Letter from Joseph S. Friedberg et al. to Judges Hayden, Reilly, and Marben, at 2 (Feb. 16, 2009) ("February 16 Letter"). Contestants claim that because it would be impossible to go back, close, and subtract from the totals ballots already opened and counted, this Court therefore must adopt the most lenient criteria that are purportedly inferable from the ballots that have already been counted. It then must apply those lenient criteria to the remaining, unopened ballots.

This approach is unprincipled and unworkable for a host of reasons. At the outset, it is surely the case that isolated errors led to the counting of some small number of absentee ballots that did not meet even the bare-bones criteria that Contestants have proposed. So it is not at all clear why, under the terms of Contestants' own argument, their standard would be the correct one. Above and beyond the flaws inherent to Contestants' approach, however, Minnesota law bars it *in this case* because, pursuant to state law, Contestants have failed to present their claim in

a manner that would allow the relief they demand. On February 3, this Court limited the scope of the trial to some fraction of the approximately 12,000 absentee ballots from the November 2008 election that remain rejected. *See* Order on Contestee's Motion in Limine at 4-5 (holding that a contestee in an election contest must be given "a fair opportunity to meet the asserted claims" and, as a result, Contestants must be "limited to presenting evidence on only those ballots that were specifically disclosed to Contestee by name prior to as of January 23, 2009 [*i.e.*, the date of the hearing on the Contestants' SJ Motion]"). The Court's ruling limited this Court's review to approximately 5,000 rejected absentee ballots.

Central to Contestants' Equal Protection claim is the contention that, if the Court fails to apply the standard they propose to the remaining rejected absentee ballots, "it will serve only to further exacerbate inconsistencies and inequities in the process and the already-existing equal protection problem." February 16 Letter at 1. Due to deficiencies in the manner in which Contestants have presented their own case, however, this Court *cannot* apply that standard (or, for that matter, any standard) across the 12,000 rejected absentee ballots—only some 5,000 ballots even remain at issue in Contestants' case. This discrepancy is by no means a procedural nicety. To the contrary, the defect goes directly to the heart of Contestants' sweeping Equal Protection claim, which has as its foundational premise that "this Court must ensure that the standard for rejection is consistently applied for *all those voters* whose absentee ballots remain uncounted." Contestants' SJ Motion at 2 (emphasis added). It is fatal to Contestants' claim.

On at least two, independent grounds, therefore, Contestants' Equal Protection claim fails as a matter of law. Additional independent reasons for its failure are set forth in Contestee's Memorandum of Law in Opposition to Contestants' Motion for Summary Judgment, which Contestee incorporates herein. For the foregoing reasons, Contestee respectfully requests that

the Court accept Contestants offer of proof for appellate purposes and confirm this Court's prior rulings that Contestants' Equal Protection claim is deficient as a matter of law, both on substantive and procedural grounds.

Dated: February 18, 2009.

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Applicants acknowledge that sanctions may be imposed under Minn. Stat. § 549.211.

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