

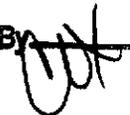
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STATE OF MINNESOTA

COUNTY OF RAMSEY

By  Deputy

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: CIVIL OTHER

File No. 62-CV-09-56

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.

**CONTESTANTS'
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR RULING APPLYING
FEBRUARY 13, 2009 ORDER
TO PREVIOUSLY COUNTED
ABSENTEE BALLOTS**

INTRODUCTION

In its February 13, 2009 Order the Court held as a matter of law certain categories of absentee ballots are not legally cast votes and, as a result, that it would not order the opening and counting of any absentee ballot within those categories: "the Court concludes that it must enforce the comprehensive statutory scheme governing absentee balloting in accordance with its unambiguous terms." Memorandum at 10. There are certainly hundreds, and likely thousands, of absentee ballots already opened and included in the current count that under the Court's analysis were not legally cast votes. As a result, the Canvassing Board recount includes a material number of illegally cast votes

that under this Court's decision no longer can be included in the totals the Canvassing Board certified. Including such votes changed the apparent winner, while at the same time diluting those votes that, applying the Court's standard, in fact were legally cast.

Under Minn. Stat. § 209.12, the Court is charged with the responsibility to determine "which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election." The Court has now declared the standard for determining whether an absentee ballot is a legally cast vote. As a matter of law, the Court must apply that standard to all absentee ballots it includes in the count for this election. This includes not only the remaining rejected absentee ballots but also those of the petitioners herein represented by Mr. Nauen, the 933 absentee ballots opened on January 3, 2009, and the thousands of absentee ballots already opened and counted on election day.

Accordingly, Contestants request that the Court grant their Motion for Ruling Applying the February 13, 2009 Order to Previously Counted Absentee Ballots and rule that, as a matter of law, any absentee ballot that does not meet the requirements of Minn. Stat. § 203B.12 (and, for UOCAVA ballots, § 203B.24) is not a legally cast vote and may not be included in the Court's calculation of the number of legally cast votes each candidate received.

STATEMENT OF ISSUE

Whether as a matter of law the Court must apply the rulings made in its February 13, 2009 Order to all absentee ballots cast in the election regardless of whether they have already been counted.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Election Day

Based on the evidence presented thus far, Contestants expect to be able to prove that a material number of absentee ballots opened and counted on election day in counties across the state were not legally cast votes because they did not meet all of the requirements of § 203B.12 (or, for UOCAVA ballots, § 203B.24) as detailed in the Court's February 13, 2009 Order. For example, although the Court ruled that a non-notary witness must be a registered voter in Minnesota, only 23 of the 87 counties rejected any ballots because the witness was not a registered voter. Several election officials, including those of Washington, Ramsey, and Scott Counties, testified that in their counties it was not the practice to check to determine whether a witness was registered. In Stearns County, the top elections official testified that the County's practice was not to check but that the City of St. Cloud, an independent election jurisdiction within the County, did check. Minneapolis did not reject any absentee ballots on the basis of witness registration, but Carver County rejected 181.

Another example is the fact that many counties appear not to have verified the voter's signature against that on the application, a practice the Court concluded was mandatory. Indeed, 23 counties did not reject any ballots on that basis. Of the remaining 64, 36 rejected less than 5 ballots on that basis. Moreover, many counties appear not to have required a signature verification when they could not locate the absentee ballot application. The Court has ruled, however, that there must be independent evidence that the voter actually made application before such a ballot could be counted.

Indeed, copies of representative samples from just five counties or municipalities of opened and counted absentee ballot envelopes that do not meet the standards announced in the February 13, 2009 Order are attached as Exhibit A to the Affidavit of James K. Langdon. They total 97 votes. They include absentee ballots having the following characteristics:

- voter did not sign the certification (A-1);
- voter did not sign absentee ballot application (A - 2);
- no voter address (A-3);
- no identification number or affirmation on UOCAVA ballot (A-4);
- witness notary failed to affix stamp or seal (A-5);
- witness gave out-of-state address (A-6);
- no witness address (A-7);
- no witness at all (A-8);
- no proof of residence (A-9).

Upon a more extensive review of accepted absentee ballot envelopes, Contestants expect to find many more such envelopes reflecting that ballots opened and counted did not meet the standards announced in the Court's February 13, 2009 Order.

II. Ballots Opened During the Recount

In its December 18, 2008 Order, the Supreme Court required that any absentee ballot which local election officials considered to have been wrongly rejected and on which both parties (with the sword of Rule 11 hanging over them) could agree be opened and counted. Local election officials thereafter identified approximately 1350 absentee

ballots they considered to have been wrongly rejected and, accordingly, to be legally cast votes. Ultimately, 933 of those envelopes were opened and their ballots counted. On February 3, 2009 the Court signed an Order, to which the parties had stipulated, stating that all such ballots were properly and lawfully cast.¹ Among those ballots, however, were ones that do not meet the standards announced by the Court on February 13, 2009. Copies of representative sample ballots having the following characteristics, each of which has now been ruled an illegal ballot that may not be counted under Minnesota law, are attached as Exhibit B to the Langdon Affidavit:

- voter did not sign the certification (B-1);
- voter did not sign absentee ballot application (B-2);
- no voter address (B-3);
- witness notary failed to affix stamp or seal (B-4);
- witness gave out-of-state address (B-5);
- no witness address (B-6);
- no witness at all (B-7);
- no proof of residence (B-8).

In total, it appears that more than 30 ballots like these were opened and counted on January 3, 2009 and certified by the Canvassing Board on January 5, 2009.

¹ Neither that Order nor the parties' stipulation to it, of course, can render an illegal vote suddenly legal. *Cf. McCauley v. Michael*, 256 N.W.2d 491, 498 (Minn. 1977) ("A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.") (citation omitted); *Ray v. Homewood Hosp., Inc.*, 27 N.W.2d 409, 412 (Minn. 1947) ("The good faith or intention of the parties in entering into such an agreement does not purge it of its illegality."); *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 356 (Minn. Ct. App. 1995) ("A contract violating law or public policy is void. When a contract offends a value of great public importance, the principle of freedom of contract must give way.") (citations omitted). In these circumstances, the Court should amend the February 3, 2009 Order to exclude all ballots that as a matter of law are illegally cast votes under the standards announced in the Court's February 13 Order. It should also enter an order directing the Secretary of State not to redact the ballot envelopes pending further order of the Court.

III. Ballots This Court Has Ordered Be Opened and Counted

On February 10, 2009 the Court ordered that the following ballots should be opened and counted:

- Kim Falde and Charles P. Quinn—even though neither of them signed their voter certification as the Court has now required without exception;
- Mr. and Mrs. Quinlan—even though each signed the other’s ballot envelope and therefore neither completed the certification properly according to the rule established by the Court’s February 13, 2009 Order;
- Greg McCool—even though the name on his certification was different than that on his application, which the Court has now declared must be the same;
- Audrey Verlo—even though her address does not match that at which she was registered and was sent new registration materials and she therefore was not properly registered, an element the Court has stated is mandatory;
- Donna Mortenson—even though the address on her certification does not match what she says was on her absentee ballot application, and she is not registered at the address reflected on the ballot envelope, both of which the Court has stated are mandatory.

Copies of the relevant documents regarding each voter are attached as Exhibit C to the Langdon Affidavit.

ARGUMENT

Minn. Stat. § 209.12 charges this Court with the responsibility to determine “which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election.” To do so, it has the power to determine that rejected votes in fact were legally cast; it also has the power

to determine that previously cast votes in fact were not legally cast. *Fitzgerald v. Morlock*, 120 N.W.2d 339 (Minn. 1963) (manual review of specific ballots to determine if the ballots were “legally cast”). *See also Taylor v. Taylor*, 10 Minn. 107, 1865 WL 940, *3 (Minn. 1865) (finding that it is in the authority of the court to determine which votes were legally cast). Indeed, Minnesota election law quite clearly states that “[a]n [i]llegal vote cannot be counted at all.” *Hanson v. Emanuel*, 297 N.W. 749, 755 (Minn. 1941); *Johnson v. Tanka*, 154 N.W.2d 185, 187 (Minn. 1967) (“The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes.”); *Berg v. Veit*, 162 N.W. 522 (Minn. 1917) (same); *see also 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.”).

The Court’s interpretation of Minn. Stat. §§ 203B.12 and 203B.24 is “an authoritative statement of what the statute meant before” as well as what it means as applied now. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). As a matter of law, the Court must apply that statute not only to the group of rejected absentee ballots Contestants and Contestee wish to have counted but also to those absentee ballots already opened and counted. If an absentee ballot is an illegal vote because it fails to comply with a particular element of the statute, then all ballots which fail to comply with that element of the statute are illegal votes—regardless of whether they have already been counted.

The Court must ensure that only legally cast votes are counted as a matter not only of consistency but also of the integrity of the election. Legally cast votes should not be diminished in value by the inclusion of votes that are illegal. As the U.S. Supreme Court has noted, “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy . . . Voters 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 v. Sims*, 377 U.S. 533, 555 (1964).

At the conclusion of the case, this Court must enter judgment declaring “which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election.” Minn. Stat. § 209.12. When it does so, as a matter of law it cannot include in that calculation any absentee ballots that are illegal under the Court’s rulings, lest it disenfranchise voters by diluting legally cast votes.

CONCLUSION

Contestants do not support a remedy that would disenfranchise Minnesota voters whose ballots already have been counted, but the Court’s current rulings dictate that result. All similarly situated voters must be treated consistently—and fairly. Elementary fairness as well as equal protection of the laws demands no less. Moreover, the Court is statutorily precluded from including illegal votes in determining who won the election.

Contestants accordingly respectfully request that the Court grant their Motion for Ruling Applying February 13, 2009 Order regarding Minn. Stat. §§ 203B.12 and 203B.24 to all absentee ballots previously counted in this election.²

Dated: February 20, 2009

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² Alternatively, the same standards by which the previously opened absentee ballots were determined to be legally cast votes should be applied to the remaining absentee ballots as yet unopened and uncounted. In that fashion, all similarly situated voters would be treated consistently—and fairly.