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March 3, 2009

The Honorable Elizabeth A. Hayden  
The Honorable Kurt J. Marben  
The Honorable Denise D. Reilly

By  Deputy

HAND AND EMAIL DELIVERY

Re: 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  
Court File No. 62-CV-09-56

Dear Judges Hayden, Marben, and Reilly:

In their most recent filing, Contestants identify cases from other states to support their argument that this Court should, without requiring Contestants to meet their burden of pleading or proof, adopt a new method of vote allocation in Minnesota election contests or, alternatively, set the election aside. These cases offer little actual support for Contestants' position.

Contestants' cited cases show that the pro-rata or speculative attribution method is frequently used as a screening device to validate elections, and *not* as a method to carry the contestant's burden of proof or to overturn an election. In *Singletary v. Kelly*, 242 Cal.App.2d 611, 612 (1966), for example, the court upheld the trial court's use of proportional analysis where the court deemed illegal votes apportioned among the candidates in the same proportion as the total votes cast; the court relied on *Russell v. McDowell*, 83 Cal. 70, 72-74 (1890), which noted that "such a method of disposing of illegal votes can never change the result of the election". See also *Singletary*, 242 Cal. App. 2d at 612 ("Our statute bars the presumption that all illegal votes favored the winning side"). In *Huggins v. Superior Court*, 163 Ariz. 348, 353 (Ariz. 1990), the court "defer[ed] deciding what must be done when proration would change an election result[.]" See also *Flowers v. Kellar*, 322 Ill. 265, 270 (applying proportional attribution, "the result will remain unchanged"). In a subsequent discussion of *Hammond v. Hickel*, 588 P.2d 256, 274 (Alaska 1978), the Alaska Supreme Court made clear that it "did not intend [in *Hammel*] . . . that the technique was to be used to actually reduce the candidate's official total. . . . the technique was to be used only as an analytical tool to aid in the determination of whether the contaminated ballot actually would effect the result of the election." *Fischer v. Stout*, 741 P.2d 217, 226 (Alaska 1987). In addition, in nearly all of these cases, the courts emphasized that the burden of proof is on the contestant, and that burden is not sustained simply "by showing that illegal votes were cast." E.g., *Briggs v. Ghrist*, 134 N.W. 321, 324 (S.D.1912).<sup>1</sup>

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<sup>1</sup> See also 26 Am Jur. 2d Elections § 357 (cited in Contestant's Letter and noting that "in the absence of proof of fraud or gross irregularities, the fact that some ballots were cast illegally may be disregarded" and that "the reception of illegal votes at an election may not affect its validity unless it is shown that their reception affected the result").

Thus, even if the holdings of these cases could be adopted in Minnesota, they would still be inapplicable to these facts, because Contestants wish to use proportional analysis to try to overturn the 2008 election and because they have failed to meet their burden of proof.

Moreover, there is significant out-of-state authority contrary to Contestants' position: Supreme Court decisions from Delaware, Idaho, Maryland, and Nebraska, and a recent trial court decision from Washington State, have all rejected the use of speculative attribution as a substitute for proof by the contestant that the winning candidate received the alleged illegal votes. *See State ex rel. Brogan v. Boehner*, 174 Neb. 689, 697-98 (1963) ("We do not believe that the courts should adopt and apply arbitrary rules which will determine elections on the basis of chance."); *State ex rel. Wahl v. Richards*, 44 Del. 566, 581 (1949) ("As heretofore stated the Board of Canvass applied the proportionate deduction rule. While some courts have adopted that rule we do not regard it as logical or satisfactory under the facts presented."); *Wilkinson v. McGill*, 192 Md. 387, 403 (1949) ("[B]ut we think the weight of authority and the better reasoning uphold the view that complainants, desiring to avoid an election because illegal votes are cast, have upon them the burden of proving for whom these votes are cast. They cannot thrust that burden upon the Court by arguing that there is a probability that such votes were cast for the side having the majority. They must prove, or at least attempt to prove, how the illegal voters voted."); *Jaycox v. Varnum*, 226 P. 285, 290 (Idaho 1924) (discussed in detail below); *Borders v. King County*, No. 05-2-00027-3 (Chelan County Superior Ct. June 6, 2005) (unpublished) (concluding that proportional reduction is methodologically unsound).

These cases all criticize and reject speculative attribution as an acceptable method of proof in election contests, and reveal the lack of consensus among the states regarding such evidence. As the court in *Jaycox v. Varnum* explained, it is an arbitrary mechanism for the court to provide proof that a contestant has failed to provide himself. In *Jaycox*, the contestant challenged the election on the basis that illegal votes were cast in the election. 226 P. at 285-86. After the court adjusted the tally based on the number of legal votes the candidates had received, the winning candidate was still ahead by a margin of 795 to 793. *Id.* at 288. There were three illegal votes, a number greater than the margin of victory. *Id.* But, the challenger failed to offer proof as to who received those illegal votes. *Id.* The court considered whether the vote should be rejected in its entirety and the election set aside, whether the votes should be deducted from the candidates in proportion to the legal votes they received, or whether the illegality should be disregarded because the contestant had failed to meet his burden of proof. *Id.* at 289-90. The court rejected proportionality and upheld the election. Quoting Paine's treatise on election law, the court reasoned:

There ought to be no arbitrary presumption of law, either that all illegal votes were cast by the political party in the majority, or that they were cast by the different parties in proportion to their numbers. To take the illegal votes all from one candidate, or pro rata from several candidates, would be, not to decide, but to make a case for the parties." . . . This method is justly open to the criticism made by Paine. It is purely arbitrary and decides nothing.

...

There were three candidates. The three illegal votes may have been cast for appellant or for the third candidate, or divided among them. In order to overcome the prima facie effect of the returns, it would seem incumbent on appellant to prove not only the illegal

votes, but also for whom they were cast. Both these elements of proof were required to show that the illegal votes affected the result, and but for them appellant would have been elected. It would be neither just nor logical to put the contestee at a disadvantage, because contestant was unable to sustain the burden of proof which rested upon him, contestee not being responsible for that fact. The rule that the party who is seeking affirmative relief has the burden of proof is one which necessarily underlies all our procedure. A party may have a just cause, and lose the benefit of his evidence through causes not of his making and beyond his control; yet we hold he is not entitled to recover because of failure of proof.

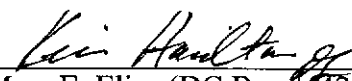
*Id.* at 288-89.

The Idaho Supreme Court's decision in *Jaycox* and similar decisions by other state supreme courts aptly illustrate the inequity of speculative attribution that would permit a court to deduct votes from Contestee to make up for Contestants failure to provide that proof.

Contestants' alternative and even more untimely suggestion—that the election should be set aside—fails as well. Not only has this remedy been applied primarily when there is evidence of fraud or systemic irregularities, *see, e.g., Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), but this Court lacks the authority to set aside the election: Its jurisdiction is limited to deciding which party received the highest number of legally cast votes, and therefore is entitled to receive the certificate of election. Minn. Stat. § 209.12; Order on Contestee's Motion to Dismiss. Any other remedy lies within the jurisdiction of the United States Senate. *See id.*; U.S. Const., Art. I, § 5, Cl. 1.

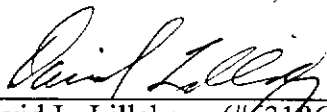
Sincerely,

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