85.

STATE OF MINNESOTA

COUNTY OF RAMSEY

FILED
Court Administrator
JAN 26 2009
By Deputy

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,

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

CONTESTEE'S MOTION IN LIMINE TO LIMIT ABSENTEE-BALLOT EVIDENCE TO BALLOTS PLEADED IN THE NOTICE OF CONTEST

Contestee Al Franken respectfully moves this Court for an Order excluding from trial the over 10,000 absentee-ballot envelope copies that Contestants have indicated they now wish to bring before this Court. As more fully set forth below and in Contestee's Memorandum of Law in Opposition to Contestants' Motion for Summary Judgment, the governing statute, the controlling case law, and the public interest all confirm these ballot envelopes have no legal relevance and should be excluded. A proposed order granting Contestee's motion is provided.

FACTUAL BACKGROUND

On January 6, 2009, Contestants Sheehan and Coleman ("Coleman") filed a Notice of Contest that made no reference to a sweeping attack on every single decision by local election officials to reject an absentee ballot cast in the November 4 election. In the Notice, Coleman at best specified that he was challenging the "approximately six hundred fifty" absentee ballots that he had identified in a late-December challenge before the Minnesota Supreme Court. Notice of Contest ¶ 10. Coleman nowhere indicated that his challenge went beyond those 650 to the more

than 10,000 absentee ballots rejected (out of nearly 300,000 total) by local election officials after multiple layers of review *and the Coleman campaign itself*. *See id.* ¶¶ 11-12; *id.* Exhibit B-1 (providing "representative examples" of challenged absentee ballots and including none beyond those on Coleman's list of "approximately six hundred fifty" particular ballots). Nor did Coleman make any allegation in his Notice that an absentee ballot should be counted – unless cast by a deceased individual or someone not registered – even if it does not comply with statutes governing the acceptance of absentee ballots. *See* Contestants' Memorandum of Law in Support of Motion for Summary Judgment, filed January 21, 2009, at 2 (raising this argument for the first time).

In fact, Coleman's Notice of Contest is irreconcilable with his newly raised, untimely attack. One of the challenges Coleman included in the Notice, for example, was to absentee ballots that officials had "erroneously and wrongfully *included* in the vote totals" even though (according to the Notice) the absentee ballots "did not comply with the requirements of Minnesota Statutes §§ 203B.13 [*sic*] and/or 203B.24." Notice of Contest ¶ 12, 12(e). This claim *directly* contradicts the newly raised claim and precludes a broader reading of the Notice of which it was a part.

The Notice of Contest was fully consistent with the positions Coleman had argued relentlessly for the prior two months: that there were relatively few wrongly rejected absentee ballots and that the statute governing absentee ballots had to be enforced. And it was fully consistent with the actions Coleman had taken and caused election officials to take. He had obtained an order of the Minnesota Supreme Court on the absentee ballot review process, had participated in developing the rules for that process, had vetoed a number of absentee ballots that local officials felt should be counted, and had only late in the process argued that the 650 absentee ballots, and no more, should be counted.

The first written notice of his about-face came when Coleman answered interrogatories on Monday, January 19, one week before trial. However, even in these interrogatories, he failed to identify which ballots were improperly rejected. *See* Patterson Affidavit in support of Conditional Motion for Partial Summary Judgment on Certain of Contestee's Counterclaims, Exhibit K at 6-7. In written submissions accompanying his Motion for Summary Judgment and in concessions made at oral argument of that motion, Coleman confirmed that he *still* does not know precisely how many additional absentee ballots he now wants counted.

Coleman has not – and cannot – provide any justification for his untimely reversal of course. Coleman filed the Notice of Contest after nearly two months of opposing the opening and counting of erroneously rejected absentee ballots. *See* Affidavit of David L. Lillehaug in support of Contestee's Opposition to Contestants' Motion for Summary Judgment ("Lillehaug Aff.") at 2-5. He had more than adequate time and opportunity to develop the theory and claims to be included in his Notice of Contest.

ARGUMENT

A. Controlling Case Law and Minnesota Statute Require Rejection of the Late-Filed Claims.

A Notice of Contest must "specify the grounds on which the contest will be made." Minn. Stat. §209.021. This Court held last week that "[a] notice of election contest is sufficient if it states facts sufficient to apprise the contestee of the grounds of the contests so that he is given a fair opportunity to meet the asserted claims." Order on Contestee's Motion To Dismiss, Ct. File No. 62-CV-09-56 at 7 (Jan. 22, 2009) (citing *Greenly v. Independent School Dist. No. 316*, 395 N.W.2d 86, 90 n.1 (Minn. Ct. App. 1986)). As explained above, the Notice of Contest did not include Coleman's newly raised claim, and it did not even come close to stating facts sufficient to apprise Franken of that claim so that he was given a fair opportunity to meet it. To the contrary, the Notice did the opposite: It stated facts and claims that, if taken as true, would

affirmatively defeat the newly raised claim. Coleman is precluded from making a claim contrary to his official, and verified, Notice of Contest.

Minnesota's election contests are not designed to proceed indefinitely, prolonged by whatever new claims a contestant decides to raise throughout the process. Quite to the contrary, the Legislature has required that a contestant "clearly state the points [upon which he or she brings suit]" in his Notice and "file [this] notice soon after the election" because, among other things, "there is a strong public policy in favor of finality in elections." *Greenly*, 395 N.W.2d at 91; *see also Franson v. Carlson*, 137 N.W.2d 835, 840 (Minn. 1965) ("[T]he whole system [is] intended to expeditiously dispose of election contests. . . . [T]he general idea inherent in the statute [is] that there may be a speedy determination of these matters . . . ."); *Hunt v. Roloff*, 28 N.W.2d 771, 776 (Minn. 1947) (Matson, J., concurring) ("The legislature has wisely provided a summary and strict procedure to avoid intolerable delay in the adjudication of election contests.").

Coleman's untimely, inconsistent, and procedurally improper claim not only seeks to undermine these important public policy concerns; it seeks to do so in favor of nothing more than a last-minute shift in tactics. As such, it should not overcome what the Minnesota Supreme Court has repeatedly recognized as the "interest of judicial economy" as applied to the election process. *Clark v. Pawlenty*, 755 N.W.2d 293, 330 (Minn. 2008); *see also Peterson v. Ritchie*, No. A09-65 (Minn. Jan. 16, 2009) (referring the petition of 64 voters to this Court based on "[j]udicial efficiency and the interests of justice"). With a week's notice of his reversal of course, Coleman seeks to overwhelm Contestee and this Court with an enormous universe of absentee ballot envelopes that, at this last stage in the proceeding, cannot be reviewed in a sufficiently thorough, careful, and timely manner and with local elections officials given the chance to explain and defend their actions.

B. No Exceptional Circumstance Warrants Deviation from These Rules.

"'The authority of courts to entertain election contests is purely statutory.'" *Derus v. Higgins*, 555 N.W.2d 515, 516 n.1 (Minn. 1996) (quoting *Phillips v. Ericson*, 80 N.W.2d 513, 517 (Minn. 1957)). As a result, the analysis ends when a contestant has failed to bring a claim in a timely, procedurally appropriate manner. That claim necessarily is precluded. Even if this were not the case – that is, even if it were possible, in certain exceptional circumstances, for a contestant in an election contest to bring an untimely, inconsistent, and procedurally improper claim – no such circumstances exist in this case. The claim lacks sufficient legal support to warrant ignoring the rules.

Coleman's new claim by definition argues a "systemic irregularity," not individual instances of incorrect decisions by election officials, and Minn. Stat. § 209.12 is clear that such a claim must go to the United States Senate. But even if this Court were to decide the issue, Coleman's new approach is legally flawed. He is wrong that, after Election Day, the rules governing the acceptance or rejection of absentee ballots become optional or "directory"; and, second, that any (allegedly) inconsistent pattern of application of Minn. Stat. § 203B.12, subd. 2, would violate the Equal Protection Clause.

Coleman's "directory" argument (which he occasionally refers to as a "substantial compliance" argument) flatly contradicts Coleman's prior submissions to local officials and the State Canvassing Board, *see* Lillehaug Aff. Exhibit A, and it flatly contradicts controlling precedent, *see* Contestee's Memorandum of Law in Opposition to Contestants' Motion for Summary Judgment 16-17. Beyond that, this sort of claim at most seeks to dictate what is within the discretion of election officials. As a result, there would be no legal basis for this Court to conclude that the ballots were somehow "legally cast" (if not in compliance with the law) or that a failure by election officials to exercise "substantial compliance" discretion was irregular or

illegal. While the Court is not bound by the factual and legal decisions of election officials, election officials are presumed to have acted lawfully and reasonably, and the Court is not entitled to substitute its judgment for decisions within the bounds of their discretion.

Coleman's Equal Protection argument also is defective as a matter of law. In fact, his new approach of counting illegally submitted ballots is a violation of the rights of the vast bulk of voters who complied with the law. The sole authority upon which Coleman relies, *Bush v. Gore*, 531 U.S. 98 (2000), resolved the question "whether the use of *standardless* manual recounts violates the Equal Protection and Due Process Clauses." *Id.* at 103 (emphasis added). Even if *Bush* were to apply to a State's rules and procedures for accepting absentee ballots (which it does not), there is simply no argument that Minn. Stat. § 203B.12, subd. 2 is "standardless." As Coleman himself acknowledged in his submission to the State Canvassing Board of November 18, 2008, *see* Lillehaug Aff. Exhibit A, the Minnesota standards for rejection of an absentee ballot are "very objective and clear." When *Bush* identified an equal-protection violation, it was with respect to a fundamentally different issue, as the Court made certain to explain:

> The recount process, in its features here described, is inconsistent with the *minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer*. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

531 U.S. at 109 (emphasis added).

Bush was responding to an extreme scenario. The Court's holding was correspondingly limited: "When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.* Here, it is Coleman who wants to do away with standards and substitute open-ended discretion, and it is

Coleman who wants to dilute the votes of those voters who complied with the law by retroactively forgiving those who did not.

In any event, *Bush* does not apply to a State's conditions and procedures for accepting absentee ballots. Rather, its scope is limited to a State's treatment of ballots *once accepted*. This distinction accords with the general rule that "where only the ability to vote by absentee ballot, and not the right to vote generally, has been at issue, the United States Supreme Court has applied rational basis analysis." *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 (Minn. 2003). Controlling Minnesota Supreme Court precedent requires that the distinction be followed. *See id.*; *Bell v. Ganaway*, 227 N.W.2d 797, 802 (1975) ("Since the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting." (citing *Wichelmann v. City of Glencoe*, 200 Minn. 62, 273 N.W. 638 (1937)); *see also McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969) (concluding that because a statute denying absentee ballots to unconvicted jail inmates restricted only the right to vote by absentee ballot, not the right to vote generally, the statute was constitutional because it bore "some rational relationship to a legitimate state end").

Under Minnesota law, the "conditions and procedures" for absentee voting require that a ballot comply with the four clear prerequisites set forth by statute to the "satisf[action]" of "the election judges or a majority of them." Minn. Stat. § 203B.12, subd. 2. When an election judge or "any other individual charged with any duty concerning an election" has committed any wrongful act, omission, or error, an affected individual can seek relief by petition to the Minnesota Supreme Court. Minn. Stat. § 204B.44. There is simply no argument that this statutory regime – clear, straightforward, and, with respect to Minn. Stat. § 203B.12, limited to *accepting absentee ballots* – violates the Equal Protection Clause. *See Bush*, 531 U.S. at 109 ("The question before the Court is not whether local entities, in the exercise of their expertise,

may develop different systems for implementing elections."); *see also Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1624 (2008) (acknowledging that, even with respect to in-person voting, the State may impose reasonable restrictions on the availability of the ballot to achieve its "valid interest in protecting the integrity and reliability of the electoral process.").

CONCLUSION

For the foregoing reasons, Contestee Al Franken respectfully requests that this Court exclude from the trial of Coleman's case any evidence that relates to absentee-ballots envelopes other than those of the "approximately six hundred fifty" absentee ballots referred to in Contestants' Notice of Contest.

Dated: January 26, 2009.

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ACKNOWLEDGMENT

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

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 v. Al Franken
Court File No.: 62-CV-09-56

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

Richard D. Snyder, being duly sworn on oath, deposes and states that on the 26th day of January, 2009, he served the following:

1. Contestee's Motion in Limine to Limit Absentee-Ballot Evidence to Ballots Pleaded in the Notice of Contest; and
2. Order Granting Contestee's Motion in Limine to Limit Absentee-Ballot Evidence to Ballots Pleaded in the Notice of Contest [Proposed]

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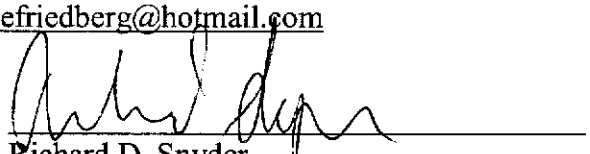
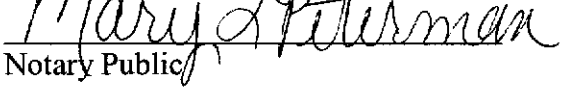


Richard D. Snyder

Subscribed and sworn to before me
this 26th day of January, 2009



Notary Public

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