STATE OF MINNESOTA

COUNTY OF RAMSEY

FILED
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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,

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

No. 62-CV-09-56

MEMORANDUM OF LAW IN OPPOSITION TO CONTESTANTS' MOTION FOR RULING APPLYING FEB. 13, 2009 ORDER TO PREVIOUSLY COUNTED ABSENTEE BALLOTS

INTRODUCTION

This Court has repeatedly and unequivocally ruled that the scope of Contestants' challenge is limited to the approximately 4,800 ballots pleaded in their Notice of Contest. Notwithstanding these court rulings, and after nearly five weeks of trial, Contestants now, for the first time, make a sweeping, unprecedented request for this Court to reconsider "all absentee ballots previously counted in this election"—roughly *286,000 ballots*—with the aim of un-counting some number of them. Contestants' Mem. of Law at 9. This extraordinary Motion is wholly without basis in law. Indeed, it is so outlandish that Contestants do not even ask for any specific relief, nor do they cite any rule of procedure in support of their filing. Because their Motion far exceeds the permissible scope of this Contest, because the legal claim that underlies it

is substantively meritless, and because the Court lacks authority to provide Contestants the relief they are suggesting, it should be denied.

ARGUMENT

A. Contestants' Motion Must be Dismissed as Beyond the Scope of the Pleadings and Unsupported by Record Evidence

As this Court has repeatedly recognized, a Notice of Contest must "specify the grounds on which the contest will be made." Minn. Stat. § 209.021. *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-09-56, at 3 (Feb. 3, 2009) ("In Limine Order"). A Notice is sufficient only "if it states facts sufficient to apprise the contestee of the grounds of the contest 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. App. 1986)); In Limine Order at 3 (citing *Christensen v. Allen*, 119 N.W.2d 35, 39 (Minn. 1963)).

These requirements preclude a contestant from specifying certain grounds in his Notice of Contest and then relying on wholly separate grounds in at trial. *Greenly*, 395 N.W.2d at 91 (explaining that 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".). Yet that is exactly what Contestants seek to do here—and in the most sweeping and unprecedented way imaginable.

On February 3, 2009, this Court ruled that the scope of Contestants' challenge would be limited to approximately 4,800 ballots. *See* In Limine Order at 1. Specifically, the Court ruled that "in order for Contestee to be given a fair opportunity to meet the asserted claims, Contestants are limited to the individual voters whose ballots they believed were wrongly

rejected prior to the commencement of trial. Contestants, therefore, are limited to presenting evidence on only those ballots [estimated to be 4,797 in total] that were specifically disclosed to Contestee by name as of January 23, 2009." *Id.* at 4-5. The Court's February 13, 2009 Order reiterated this determination. *See* Order Following Hearing, Ct. File No. 62-CV-09-56 (Feb. 13, 2009) at 3, n.1 ("Feb. 13 Order Following Hearing"); *see also* Order on Contestee's Motion in Limine to Exclude Testimony of King Banaian, Ct. File No. 62-CV-09046 (Feb. 18, 2009) ("Banaian Order").

Notwithstanding the Court's repeated and unequivocal rulings both in written orders and during trial, Contestants now seek to put at issue "*all absentee ballots previously counted in this election.*" Contestants Mem. of Law at 9. Thus, after nearly five weeks of trial, rather than proving their case with respect to the approximately 4,800 ballots they adequately pleaded, Contestants, by this Motion, seek to expand the scope of this proceeding to all of the *approximately 286,000 absentee ballots* cast in the November 2008 election. *See* Order Denying Contestants' Motion for a Temporary Injunction, Ct. File No. 62-CV-09-56, at 2 (Feb. 24, 2009) (estimating total absentee ballots cast).[1]

Contestants' stunning demand is directly contrary to this Court's repeated and explicit rulings regarding the scope of this contest and to Contestants' own previous positions. To allow them to proceed with this claim would severely prejudice Contestees, who have had no opportunity to conduct discovery, examine evidence, or build a case on this issue.

Moreover, Contestants' efforts are a desperate attempt to defy this State's "strong public policy in favor of finality in elections". *See* Order Granting in Part and Denying in Part

[1] Even Contestants' alternative request for relief, presented in a footnote, is vast in scope: That more modest request would still expand the scope of the contest three-fold to the nearly 12,000 "remaining absentee ballots as yet unopened and uncounted." Contestants' Mem. of Law at 9, n.1. Moreover, examining the 12,000 ballots would not address the harm Contestants' allege; their contention of supposed unequal treatment would still apply to the remainder of the ballots.

Contestee's Conditional Motions for Partial Summary Judgment, Ct. File No. 62-CV-09-56, at 4 (Feb. 23, 2009) ("Feb. 23 SJ Order") (quoting *McNamara v. Office of Strategic and Long Range Planning*, 628 N.W.2d 620, 631 (Minn. Ct. App. 2001) (citing *Greely v. Independent Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Ct. App. 1986)). Even construing Contestants' Motion as narrowly as possible, and even assuming relief were feasible, *but see* Part C, *infra*, granting the Motion would result in numerous additional months of ballot examination and litigation. Such result would be directly contrary to the Legislature's intent to expeditiously dispose of election contests—one of the primary reasons for requiring notice pleading. *See* Feb. 23 SJ Order; *see also Greenly*, 395 N.W.2d at 91 (explaining that 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"); *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.").

The burden that would be imposed by litigating 280,000 ballots is particularly great here because, nearly five weeks into trial, and just days before resting their case, Contestants have not put on any case whatsoever with respect to the hundreds of thousands of ballots they now contest.[2] The contestant bears a significant burden in an election contest. *See* Feb. 13 Order

[2] Even before trial began, Contestants failed to produce evidence necessary to proceed with this claim. Contestee's Interrogatory 17 specifically requested that Contestants identify all absentee ballots improperly accepted by local officials and provide evidence that acceptance was improper. In answering Interrogatory 17, Contestants did not identify the ballots allegedly properly accepted or provide any evidence whatsoever. *See* Contestants' Answers to

Following Hearing at 4-5; *see also Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. App. 1986) ("The certificate of the proper canvassing board declaring the result of an election is prima facie evidence of the result and places on a contestant the burden of showing that the person declared elected did not receive a majority of the legal votes."); *see also Bank v. Egan*, 60 N.W.2d 257, 258 (Minn. 1953) ("[T]he burden rests on the petitioner to prove the allegations of his petition."); *Blake v. Hogan*, 58 N.W. 867, 868 (Minn. 1894) (evidence with respect to specific votes casts must be "fairly clear and convincing"). With respect to the hundreds of thousands of ballots Contestants now raise, there can be no doubt that they have utterly failed to meet their burden. *See* Feb. 13 Order Following Hearing at 4-5.

In short, due to the manner in which Contestants have presented and pursued their case, this Court simply *cannot* consider all 280,000 absentee ballots—or even all 12,000 rejected absentee ballots: Less than 5,000 ballots remain at issue in Contestants' case. This Motion is procedurally barred.

B. Contestants' Argument that the Principles of Equal Protection Require Expanding the Scope of the Recount to All 280,000 Ballots is Without Merit.

Even if not procedurally barred, the Motion fails on the merits. This is yet another attempt to advance Contestants' baseless Equal Protection argument. 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. Relying on *Bush v. Gore*, 531 U.S. 98 (2000), they argued that "to satisfy equal protection, the Court should order that all rejected

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Contestee Al Franken's First Set of Interrogatories and Requests for Production of Documents to Contestants (Jan. 19, 2009). The Court has broad authority to fashion a variety of remedies when a party makes a claim without evidence, or when a party fails to produce evidence to support a claim. The Court may strike the portions of pleadings for which no evidentiary support has been produced, preclude entry of evidence that was not disclosed in discovery, and enter summary judgment where the undisclosed evidence is essential to a party's claim. *See Sudheimer v. Sudheimer*, 372 N.W.2d 792 (Minn. Ct. App. 1985); *Bhat v. Bhat*, 2003 WL 943708, at *2 (Minn. Ct. App. March 11, 2003).

absentee ballots cast by registered voters who were living on election day and did not otherwise vote in this election be counted." Contestants' Mem. of Law in Support of Motion for Summary Judgment at 3 (Jan. 21, 2009) ("Contestants' SJ Motion"). According to Contestants, only by applying the most lenient standard possible, would Equal Protection be achieved. The following day, Contestees set forth the myriad reasons why Contestants' claims were deficient. *See* Mem. of Law in Opposition to Contestants' Motion for Summary Judgment (Jan. 22, 2009). On February 3, this Court denied Contestants' motion for summary judgment, observing that the 2008 election in Minnesota for United States Senator was quite "[u]nlike the situation presented in Florida in *Bush v. Gore*." Order on Contestants' Motion for Summary Judgment, Ct. File No. 62-CV-09-05, at 7 (Feb. 3, 2009) ("Feb. 3 SJ Order"). Since that time, Contestants have continued to advance their Equal Protection claim—yet without any more legal basis than presented in their initial filing. *See, e.g.*, Order Denying Request to Bring Motion to Reconsider, Ct. File No. 62-CV-09046 (Feb. 18, 2009); Banaian Order at 2.

With this filing, Contestants have turned their Equal Protection argument on its head, where it fares no better. Having previously argued that as many ballots as possible should be accepted, and that it would be impossible to go back and subtract from the totals ballots already opened and counted, Contestants now reverse positions entirely, and ask this Court to examine ballots already opened and counted—with the goal of *uncounting* previously counted votes. *See* Contestants' Mem. of Law at 8 (arguing that all counted absentee ballots must be examined and, where necessary, retroactively rejected, to achieve "equal protection of the law.").[3]

[3] Contestants' request includes ballots counted absent their own objection, and sometimes with their express consent. *See, e.g.*, Ex. F-114; Stipulation of the Parties (Feb. 3, 2009); *see also* Feb. 3 SJ Order at 9. To the extent Contestants' claim relies on treatment of ballots following the Minnesota Supreme Court's December 18 Order, issued at Contestants' request, and the subsequent stipulation, it is barred. *See State v. Gisege*, 561 N.W.2d 152, 158 (Minn. 1997) ("The general rule in Minnesota is that a party cannot avail himself of invited error.").

Contestants' recast Equal Protection claim remains both wrong on the merits and procedurally barred. As this Court correctly observed, in *Bush*, the U.S. Supreme 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." Feb. 3 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; Banaian Order at 3.

Despite Minnesota's clear and uniform statutory standards, Contestants persist. They contend that it would violate Equal Protection to allow counted ballots that do not meet the statutory requirements to stand, now that the court is rejecting deficient ballots during the contest. Yet, as Contestee has explained in prior filings, the Equal Protection clause does not constitutionalize every 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* Feb. 3 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)); *see also* Feb. 23 SJ Order at 6.

Under Contestants' theory, any mistake by a local election official—any misapplication of the statutory standard to particular ballots—would constitute a constitutional violation and draw the entire election into question, especially when an election contest subsequently reviews

other errors. 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). Such local administration is central to our Nation's federalist system and our State's precinct-based election system.

Furthermore, as Contestee has previously shown, lower courts have consistently refused to find constitutional violations due to errors or inconsistencies, where clear state standards exist. *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, Equal Protection simply does not require that, whenever statutory requirements are applied correctly during a contest, all previously cast, opened, and counted ballots must be reexamined for potential misapplication of standards. Contestants do not, and cannot, cite any law to support this outlandish claim.

On the merits, therefore, Contestants' Equal Protection argument fails as a matter of law. In addition, for the reasons described in Part A of this Memorandum, and as this Court has already indicated, Contestants' Equal Protection claim fails independently on procedural grounds. *See* Order on Contestee's Motion in Limine, at 4-5. Contestants have failed to plead

adequately their case and to provide the notice or evidentiary support that would have been required for their Equal Protection claim to succeed.

C. Contestants Do Not Ask for Any Relief That This Court Has Authority to Grant

At bottom, Contestants' Motion is stunning both in its breadth and lack of legal support. Tellingly, Contestants offer no suggestion of how this Court could, within its statutory authority, provide them any redress. They do not even request any specific relief—perhaps because they know that none is available from this Court.

Contestants would apparently have this Court retroactively reject votes that have already been counted, but they do not indicate how the Court can or should do so. Perhaps Contestants want the Court to depose voters whose ballots were allegedly illegally cast, in order to determine for whom they voted, and then subtract those votes from the totals. But it is clear that the Court is without authority to take this unprecedented step. As the Court has recognized, ballot secrecy is fundamental in Minnesota. *See, e.g.*, Order Denying Temporary Injunction at 7. Minnesota law recognizes "the right of the people to express their preferences in a free election *by secret ballot*." *Application of Andersen*, 119 N.W.2d 1, 8 (1962) (emphasis added); *see also* Minn. Stat. §§ 202A.18, 206.80.

Alternatively, perhaps Contestants want this Court to abandon its efforts altogether. Not only would this request constitute an unjustified attack on this Court's work, but any other novel theory of relief they might seek would be far beyond the Court's authority: "The only question that can be decided in an election contest is which party received the highest number of legally cast votes, and therefore is entitled to receive the certificate of election." Banaian Order at 3 (citing Minn. Stat. § 209.12). "The judge trying the proceedings shall make findings of fact and

conclusions of law upon that question." Minn. Stat. § 209.12; *see also* Order on Contestee's Motion to Dismiss at 5.

To the extent Contestants' ask for anything other than findings of fact and conclusions of law on the question which party received the highest number of votes, they necessarily are asking for relief from the United States Senate. *See* Minn. Stat. § 209.12 (making clear that court lacks jurisdiction over questions "of deliberate, serious, and material violation of the provisions of the Minnesota election law" and that the court "shall make no findings or conclusion on those points"); *see also* U.S. Const., Art. I, § 5, Cl. 1 ("[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members.").

Indeed, to the extent Contestants believe that, in light of previous rulings, the Court is unable to fulfill its statutory duty to determine "which party received the highest number of legally cast votes and therefore is entitled to receive the certificate of election," their only recourse is the U.S. Senate. Similarly, to the extent they are suggesting that there were systemic election irregularities, the proper place for resolution is the Senate. *See* Minn. Stat. § 209.12; Order on Contestee's Motion to Dismiss.

But we are now just days away from the end of Contestants' case; the court has already observed that the evidence suggests no systemic irregularities in the election. Feb 13 Order Following Hearing at 3-4; and it has allowed Contestants to proceed with its contest regarding over 4,000 ballots. Only having failed to make their case, do Contestants now ask the Court for impossible relief and question the very authority of the Court to proceed. This ploy should be denied.

CONCLUSION

For the reasons discussed above, this Court should deny Contestants' Motion for Ruling Applying February 13, 2009 Order to Previously Counted Absentee Ballots.

Dated: February 24, 2009.

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