

STATE OF MINNESOTA
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

DEC 15 2008

Court File No. AO8-2169

FILED

Cullen Sheehan, Norm Coleman, Cara Beth
Lindell, and John Doe,

Petitioners,

v.

Mark Ritchie, Minnesota Secretary of State,
the Minnesota State Canvassing Board,
Isanti County Canvassing Board and Terry
Treichel, Isanti County Auditor-Treasurer,
individually and on behalf of all County and
Local Election Officers and County
Canvassing Boards,

Respondents.

**MOTION FOR EMERGENCY
TEMPORARY RESTRAINING
ORDER OR TEMPORARY
INJUNCTION**

**MOTION FOR EMERGENCY TEMPORARY
RESTRAINING ORDER OR TEMPORARY INJUNCTION**

Pursuant to Minn. R. Civ. P. 65, Petitioners Cullen Sheehan, Norm Coleman, Cara Beth Lindell, and John Doe (“Petitioners”) move this Court for a temporary restraining order or, in the alternative, temporary injunction preventing the Hennepin County Canvassing Board, as well as any other canvassing board in the State of Minnesota (collectively, “the Canvassing Boards”), from: (a) opening any envelopes (herein, “Envelopes”) containing absentee ballots relative to the November 4, 2008 general election, which envelopes were rejected by local election officials and not counted on November 4, 2008 or pursuant to the administrative recount currently underway relative

to the election of United States Senator from the State of Minnesota; (b) counting any ballots (herein, "Ballots") contained in such Envelopes; and (c) from preparing and submitting to the Minnesota State Canvassing Board ("MSCB") any amended election returns (whether amended summary statements relative to the pending administrative recount or amended report(s) of the Board), pending this Court's resolution of the Amended Petition for An Order to Show Cause Pursuant to Minn. Stat. § 204B.44.¹

Because Petitioners seek the requested relief to stop the Canvassing Boards from causing Petitioners substantial, immediate, and irreparable harm, Petitioners respectfully request expedited consideration of this motion.

**MEMORANDUM IN SUPPORT OF MOTION
FOR EMERGENCY TEMPORARY RESTRAINING
ORDER OR TEMPORARY INJUNCTION**

INTRODUCTION

On December 12, 2008, the MSCB formally requested that Minnesota county Canvassing Boards re-canvass for the purpose of evaluating whether or not any absentee ballot envelopes in a county or municipality relating to the 2008 general election were improperly rejected by election judges and/or absentee ballots boards. The MSCB failed to provide uniform guidance to the counties on how to determine whether or not any absentee ballot envelopes in a county or municipality relating to the 2008 general election were improperly rejected by election judges and/or absentee ballots boards.

¹ As a prophylactic measure, Petitioners will also file an action in the District Court for the Fourth Judicial District to stop the Hennepin County Canvassing Board from taking action that will result in obvious error under that statute.

The Minnesota Secretary of State's Office provided guidance to counties on December 2 and December 7, 2008, regarding the "sorting" process. Those instructions were internally inconsistent, contrary to applicable law, and confusing. This conflicting and unclear guidance will result in counties applying different standards as to these ballots. *See* Affidavit of James K. Langdon. Although Minnesota law is clear on the grounds upon which absentee ballots may be rejected, a strong likelihood exists that these standards will be interpreted differently, indeed on an *ad hoc* basis, by each county and municipality that engages in this process (including counties that do not engage in the process at all).

CONTROLLING LEGAL AUTHORITY

A temporary restraining order is available under Minnesota Rules of Civil Procedure Rule 65.01 to preserve the *status quo* until a hearing on an application for temporary injunction can be conducted. The standard for a temporary restraining order is the same as that for a temporary injunction. *See M.G.M. Liquor Warehouse Int'l, Inc. v. Forsland*, 371 N.W.2d 75, 77 (Minn. Ct. App. 1985).

A court is to weigh five factors when determining whether it should issue a temporary restraining order or a temporary injunction:

1. The nature and background of the relationship between the parties preexisting the dispute.
2. The harm to be suffered by plaintiff if relief is denied as compared to that inflicted on defendant if it is granted pending trial.
3. The likelihood that one party or the other will prevail on the merits.

4. The aspects of the fact situation, if any, which permit or require consideration of public policy.
5. The administrative burdens involved in judicial supervision and enforcement.

Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, 638 N.W.2d 214, 221 (Minn. Ct. App.2002), review denied (Feb. 4, 2002) citing *Dahlberg Bros v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965).

ARGUMENT

Petitioners seek the requested relief to preserve the *status quo*, particularly because it appears that one or more of the Canvassing Boards for municipal subdivisions within Hennepin County have yet to or have declined to segregate and count purportedly “wrongly rejected” absentee ballots, and if the Hennepin County Canvassing Board is allowed to report amended recount numbers, such action will result in voter disenfranchisement, dissolution, and disparate treatment—equal protection violations pursuant to *Bush v. Gore*, 531 U.S. 98, 105-06 (2000).

I. The Relationship Between The Parties Favors Issuance Of An Injunction.

The preexisting relationship between the parties to be preserved is the uniform application of objective, statewide standards in determining what constitutes a valid vote in the general election and/or during the recount. To maintain this standard, the Canvassing Boards must stay well within their powers under the law. The threat to overstep these boundaries by prematurely opening the envelopes and counting the ballots therein impermissibly alters circumstances to the great detriment of Petitioners, including potential dilution of votes in violation of the Equal Protection Clause of the United States

Constitution as well as the effective destruction of evidence likely needed in an eventual election contest under Minn. Stat. Ch. 209A.

II. Irreparable Harm Will Result If The Emergency Temporary Restraining Order Is Not Granted.

The Canvassing Boards' action threatens imminent irreparable harm to Petitioners, who have direct stakes in the current election. Allowing the Hennepin County Canvassing Board, or any county board, to report amended recount numbers based on absentee ballots that were rejected by "all or a majority of the election judges" who reviewed the return envelopes pursuant to Minn. Stat. § 203B.12, when this Court may decide that any such review should happen only in an election contest pursuant to Minn. Stat. Ch. 209 and, in any event, without imposing consistent standards for review of such envelopes, or requiring that those standards be consistently applied, will result in voter disenfranchisement, dissolution, and disparate treatment.

Furthermore, allowing Canvassing Boards to open rejected absentee ballot envelopes now, and commingling those ballots with ballots validly cast on election night, will destroy any ability for Petitioners to investigate the authenticity of those ballots in an election contest. In order to preserve the rejected absentee ballot envelopes for scrutiny by a contest court, the more prudent course is to leave the envelopes sealed and the ballots uncounted, until an election contest (if any) is held to determine their validity in open court.

By contrast, Respondents will suffer no harm from waiting a little more before engaging in this sorting and counting process. The election occurred on November 4,

2008. The Canvassing Boards therefore waited this long after the election to engage in this process; there simply is no prejudice by waiting further until the Court makes a decision.

Moreover, even if the Court determines that this process should not occur during the recount, no prejudice will occur to any absentee voters because the election contest statute, Minn. Stat. Ch. 209A, provides a complete and adequate remedy and venue for counting ballots contained within envelopes deemed by a court to have been improperly rejected by local election officials. The very purpose of the election contest is to correct any such errors of law made during an election or a recount. However, if the envelopes are opened and the ballots are counted before the Court makes a decision, a constitutional violation may occur *and* valuable evidence needed in an election contest will be forever destroyed. The balance of harms therefore clearly favors Petitioners.

III. Petitioners Are Likely To Prevail On The Merits Of Their Claim.

The Minnesota Supreme Court has made clear that the boundaries of the Canvassing Boards' power do not extend to the opening, examination, and counting of previously-rejected absentee ballots. *See Taylor v. Taylor*, 10 Minn. 107, 10 Gil. 81, 1865 WL 940, at *3 (1865). The Canvassing Boards' duties are decidedly *not* judicial in nature. This Court has explained that it is "undoubtedly the duty of the county canvassing board to canvass the returns," but that the Canvassing Boards are not "competent . . . to decide whether [] errors or irregularities" occurred in the election. *Id.* Those decisions are "question[s] for judicial, not ministerial officers—[] question[s] that could only be decided by a court that could call in witnesses, hear evidence, and decide

questions of law and fact.” *Id.* It is the duty of a contest court to “go behind” a certificate of election “and inquire as a matter of fact whether the canvass was fairly conducted, and whether the result of the election is truly set forth in the certificate.” *Id.*

Pursuant to Minn. Stat. § 204C.31, subd. 3, the duties of Canvassing Boards are limited. In a general election, the county Canvassing Board’s duty is to:

promptly and publicly canvass the general election returns delivered to the county auditor. Upon completion of the canvass, the board shall promptly prepare and file with the county auditor a report which states:

- (a) the number of individuals voting at the election in the county and in each precinct;
- (b) the number of individuals registering to vote on election day and the number of individuals registered before election day in each precinct;
- (c) the names of the candidates for each office and the number of votes received by each candidate in the county and in each precinct, including write-in candidates for state and federal office who have requested under section 204B.09 that votes for those candidates be tallied;
- (d) the number of votes counted for and against a proposed change of county lines or county seat; and
- (e) the number of votes counted for and against a constitutional amendment or other question in the county and in each precinct.

Minn. Stat. § 204C.33, subd. 1. This exhaustive list of duties obviously does not include the power to search for, open, verify and recount any ballots, much less ballots that were rejected by local election officials. The Canvassing Boards’ review is clearly limited to ministerial counting and reporting of votes cast on election day. Investigation as to whether errors or irregularities occurred involving rejected absentee ballots is properly the role of a trial court, pursuant to an election contest filed under Minn. Stat. Chapter

209. Such a contest is not ripe until certification has been finalized by the MSCB. *See Franson v. Carlson*, 272 Minn. 376, 378, 137 N.W.2d 835, 837 (1965).

Allowing the Canvassing Boards to amend canvassing reports based on investigation into rejected absentee ballots would be entirely unprecedented. Petitioners are aware of no administrative recount in Minnesota history where rejected absentee ballot envelopes were searched for, reviewed, opened and/or counted (including the September 2008 recount of the State Supreme Court primary election involving Deborah Hedlund and Jill Clark).

With respect to the recount process, it is true that the Canvassing Boards have jurisdiction to recount “valid ballots” cast in elections for statewide office as part of a statewide administrative recount. Minn. Stat. § 204C.35, subd. 3 (“Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process.”). But rejected absentee ballot envelopes are not ballots cast in the election and were not certified by any local election officials.

The MSCB has encouraged counties to separate rejected absentee ballot envelopes into five categories—four categories based on the statutory reasons for rejection provided in Minn. Stat. § 203B.12, subd. 2, and one category for “wrongly rejected” envelopes. But the four statutory categories for rejection are clarified by other portions of Minnesota Election Law. *See, e.g.*, Minn. Stat. § 203B.07-.08; Minn. R. 8210.2200, 8210.2500. There is a risk that some Canvassing Boards will strictly interpret the four statutory categories for rejection based only on the text of Minn. Stat. § 203B.12, subd. 2, whereas other Canvassing Boards will take into account supplemental statutory language.

Even assuming *arguendo* that the Canvassing Boards have the authority to reevaluate rejected absentee ballots, Canvassing Boards across the state—86 county Canvassing Boards and 46 Hennepin County municipalities—must be required to consistently apply consistent evaluation standards. Failure to do so will violate the Equal Protection Clause because there will be no uniform procedure governing the acceptance or rejection of absentee ballots during the recount. *See Bush*, 531 U.S. at 105-06 (concluding that the recount mechanisms implemented in Florida did “not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right” because the command to consider the “intent of the cover” provided no “specific standards to ensure its equal application”).

IV. Public Interest Demands That Consistent Standards Be Consistently Applied.

Minnesota’s electoral laws were enacted to protect the rights of the voters at large. Voting by absentee ballot is a privilege, not a right. *Bell v. Gannaway*, 303 Minn. 346, 354, 227 N.W.2d 797, 803 (1975) (holding “that the failure of an absentee voter to properly execute his affidavit of residence and eligibility would require that the ballot be rejected if timely challenge is made”). In order to avoid the “possibilities of illegal voting, frauds, and dishonesty in elections,” the Minnesota Legislature has “prescribed many safeguards in the absent voters law to prevent such abuses.” *Id.* at 353-54, 227 N.W.2d at 803. While all legal ballots should be counted, *see Johnson v. Trnka*, 277 Minn. 468, 471, 154 N.W.2d 185, 187 (1967), the Canvassing Boards must strictly follow the legislatively imposed requirements for voting by absentee ballot in order to preserve the integrity of the entire election. Imposing clear and consistent standards on

Canvassing Boards—standards that must be consistently applied—will ensure that all validly cast ballots are counted and that illegal ballots do not dilute the true voice of the people.

V. Administrative Burden On The Court Is Minimal

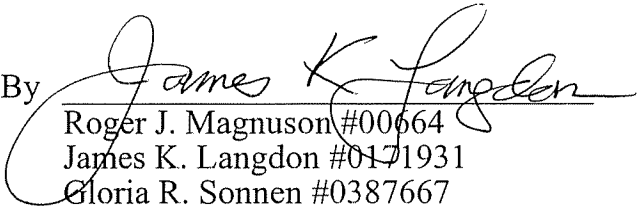
The administrative burden involved in judicial supervision and enforcement of a temporary decree is minimal. Preventing the County Boards from segregating and opening rejected absentee ballot envelopes, and from certifying or reporting amended returns, pending this Court’s resolution of the Amended Petition for An Order to Show Cause Pursuant to Minn. Stat. § 204B.44 will not place any ongoing burden on this Court. Moreover, the requested Order from this Court will avoid the necessity of individual actions seeking such relief in all 87 Minnesota counties.

CONCLUSION

For the reasons set forth above, in the Amended Petition and the Affidavits supporting it, Petitioners respectfully request that the Court issue a temporary restraining order, or in the alternative a temporary injunction preserving the *status quo* pending its consideration of the Amended Petition.

Dated: December 15, 2008

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