

**STATE OF MINNESOTA
IN THE SUPREME COURT
Court File No. A08-2169**

Norm Coleman, et al.,)
)
Petitioners,)
)
v.)
)
Mark Ritchie, Minnesota Secretary of State, the Minnesota State Canvassing Board, Isanti County Canvassing Board, et al.,)
)
Respondents.)

AMICUS CURIAE BRIEF OF LAWYERS DEMOCRACY FUND

As amicus curiae and pursuant to the Court's order of December 15, 2008, the Lawyers Democracy Fund hereby submits this brief for the Court's consideration.

Interest of the Amicus

Amicus curiae Lawyers Democracy Fund is a non-profit, tax-exempt organization under § 501(c)(4) of the Internal Revenue Code. The mission of the Fund is to promote fair and honest elections in accordance with the governing statutes and regulations. To that end, the Fund seeks to ensure that all properly

cast ballots are counted and that no fraudulent or improperly cast ballots are counted.¹

Introduction

The State Canvassing Board has requested county election officials to reexamine previously rejected absentee ballots to determine if they were mistakenly rejected. There is no legal authority for such a request and counties representing a significant fraction of Minnesota voters have declined to participate.

As a result, it is an absolute certainty that absentee ballots will not be treated the same in all parts of the State. Ballots in counties that do not participate will not be reviewed at all. Ballots in participating counties will be reviewed under the idiosyncratic methods adopted by the election judges in each county. At least some of the instructions the Board has given are wrong as a matter of law.

There is no reason to resort to this ad hoc procedure. Any voter or candidate dissatisfied with the final count certified by the Board may file an election contest under § 209.02 of the Minnesota statutes. Submitting all ballots and all issues to the three-judge panel that hears election contests means that all ballots will be treated equally.

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus contributed monetarily to this brief. Ms. Smith has participated in some of the election and recount activities in connection with this election. She is not, however, counsel to Mr. Coleman or any other party in this case.

Statutory Background

Chapter 203B of the Minnesota statutes governs absentee voting. This Court has held that absentee voting is “an exception to the general rule and is in the nature of a special right or privilege.” Wichelmann v. City of Glencoe, 273 N.W. 638, 640 (Minn. 1937). As such, the statute should be “strictly construed” and “rigidly adhered to.” Id. at 641. Strict compliance is therefore “mandatory,” and the failure to do so “grounds for rejecting the ballot.” Id. at 640. Accord, Bell v. Ganaway, 227 N.W.2d 797, 903 (Minn. 1975).

Section 203B.04.1 sets forth a number of requirements for obtaining an absentee ballot, one of which is that the application must be “signed and dated by the applicant.” Section 203B.24 sets forth four mandatory requirements for an absentee ballot to be counted:

- The voter’s name “on the return envelope appears in substantially the same form as on the application records.”
- The voter “has signed the federal oath prescribed” by 42 U.S.C. § 1973ff-1.
- The voter must set forth his or her passport number, driver’s license or state identification number, or the last four digits of the voter’s Social Security number (if the voter has one of these documents).
- The voter may not have already voted, either in person or by absentee ballot.

Section 204C.35.1 provides for an automatic manual recount of the ballots whenever the difference between the candidates is less than one half of one percent. Section 204C.35.3 limits the recount to “ballots cast in the election and the summary statements certified by the election judges.”

Section 204C.33.3 requires the Board to certify the number of persons who voted in the state and in each county and the number of votes received by each candidate. Administrative Rule 8235.1100 requires the Board to certify the results of any recount and to rule on any challenges to cast ballots that either candidate has timely made.

None of these statutes or regulations authorizes the Board to revisit the issue of rejected absentee ballots, or specify the criteria under which county election judges are supposed to evaluate them. There are no statutes or regulations authorizing the election judges to revisit the issue or specifying criteria for doing so.

Instead, § 209.02 authorizes any eligible voter or a candidate to file an election contest if there is “an irregularity in the conduct of an election” or if there is a dispute over “who received the largest number of votes legally cast.” Section 209.045 specifies that, for statewide election contests, a three-judge panel in Ramsay County shall hear and determine the matter. This Court has held that such a contest is the “exclusive statutory proceeding” for resolving challenges to election results. Hancock v. Lewis, 122 N.W.2d 592, 594 (Minn. 1963).

Argument

I. The Board Has No Legal Authority To Request County Election Judges To Revisit The Status Of Absentee Ballots And Its Ad Hoc Effort To Do So Poses Serious Constitutional Risks.

It is axiomatic that entities created by the legislature, such as the Board, have such powers as the legislature chooses to confer upon them and no more. Here, there is no legal basis for the Board's ad hoc approach and there are no criteria to guide the county election judges. That guarantees that absentee ballots in different counties will be treated differently in this ad hoc review, a clear violation of equal protection.

As a matter of Minnesota state law, the Board's ad hoc approach exceeds its authority. As a "creature of statute," the Board "has only those powers given to it by the legislature." In the Matter of Qwest's Wholesale Service Quality Standards, 702 N.W.2d 246, 259 (Minn. 2005), quoting People's Natural Gas Co. v. Minn. Pub. Util. Comm'n, 369 N.W.2d 530, 534 (Minn. 1985). The Board certainly has no express authority to ask local election judges to revisit rejected absentee ballots:

"[A]ny enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." . . . Neither an agency nor the courts may "enlarge the agency's power beyond that which was contemplated by the legislative body."

Id. quoting Peoples Natural Gas, 369 N.W.2d at 534 (emphasis supplied by the court). “As a general rule, we resolve any doubt about the existence of an agency’s authority against the exercise of such authority.” Id.

Nothing in the statutes or regulations even hints that the legislature intended the Board to be able to request county election judges to revisit absentee ballots after the election was over, still less in an ad hoc, voluntary fashion. On the contrary, the legislature delegated the authority to review absentee ballots to the courts in the form of an election contest under chapter 209.

At least one of the guidelines in the Board’s ad hoc policy is flatly wrong as a matter of law. The Secretary of State’s clarification and instruction direct county election judges to reject ballots when “there was no voter signature on the application,” except when the application was obtained in person and witnessed by a county or city official.

The instruction is not entirely clear about what procedure the election judges are supposed to follow in the latter circumstances; apparently, such a ballot belongs in “category five” and may ultimately be counted. That flatly contradicts § 203B.04, which mandates that the application must be signed.

The Board’s ad hoc approach to reviewing absentee ballots guarantees that such ballots will be treated differently in different counties. At least ten counties, some quite large, have declined the Board’s invitation to revisit rejected absentee ballots. Thus, ballots in those counties will by definition receive different treatment than ballots in counties that do participate.

The absence of legal guidelines for the ad hoc review means that ballots in participating counties will receive different treatment, depending on the idiosyncrasies of the election judges. In the review process, some counties have decided that the absence of a city in the address on the voter's application does not prevent the ballot from being included in "category five." Other counties have taken the opposite approach.

The lack of uniform procedures inherent in the Board's ad hoc approach violates equal protection. The political furor surrounding the remedy ordered in Bush v. Gore, 531 U.S. 98 (2000), has obscured its holding on the merits. The remedy – an end to the recounting – was indeed a 5-4 decision. The merits decision – that the absence of uniform procedures violated equal protection – was a 7-2 vote, with only Justices Ginsburg and Stevens dissenting.

The per curiam opinion holds that a State "may not . . . value one person's vote over that of another." 531 U.S. at 104-05. The absence of "specific rules designed to ensure uniform treatment" has "led to unequal evaluation of ballots." Id. at 106. Accord, 531 U.S. at 134 (Souter, J., concurring and dissenting) ("I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights"); 531 U.S. at 146 (Breyer, J., concurring and dissenting) ("basic principles of fairness may well have counseled the adoption of a uniform standard").

The Board's ad hoc approach will produce precisely the same equal protection violation that Bush v. Gore condemned. In that case, "Broward County

used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes.” 531 U.S. at 107. Here, different counties have applied different rules on whether the absence of an address on the application is a fatal defect, producing many more “category five” ballots in those counties that do not so regard the absence of an address.

Similarly, in Bush v. Gore, some counties had completed their recounts; some had done no recounting; and some had only partial recounts. Including “whatever partial counts are done by the time of final certification” ignores “equal protection guarantees.” 531 U.S. at 108. Here, counties representing a substantial fraction of the State’s vote have opted not to review any rejected ballots, resulting in plainly unequal treatment of voters in those counties.

The leading Minnesota case is Erlandson v. Kiffmeyer, 659 N.W.2d 724 (Minn. 2003), which arose from the death of then-Senator Paul Wellstone two weeks before the 2002 general election. The secretary of state prepared supplemental ballots replacing Senator Wellstone’s name on the ballot for Senate with the new nominee, former Vice-President Walter Mondale. The case dealt with absentee voters who had submitted their ballots before the supplemental ballots were prepared.

The parties agreed that such a voter could obtain a supplemental ballot if he or she appeared in person at the local election office or at the polls on election day. The statutes prohibited the secretary of state from mailing a supplemental ballot to persons who could not appear in person. This Court held that “allowing some

absentee voters to revote with replacement ballots but denying that opportunity to the very group for which absentee voting is designed” violated equal protection. 659 N.W.2d at 734.

So it is here. The treatment afforded absentee ballots depends on the chance of a voter’s residence. Some counties are not participating; those that do participate intend to apply different and inconsistent standards on whether to place a ballot in “category five.” The chance and inconsistent standards occasioned by the Board’s ad hoc, ex-post-facto decision will inevitably lead to disparate treatment of voters.


It is hornbook law that “we construe statutory language to avoid constitutional conflicts.” State v. Mauer, 741 N.W.2d 107, 115 (Minn. 2007). In considering whether the Board has the authority to adopt its ad hoc procedure for revisiting absentee ballots, the Court should consider the serious equal protection issues that that procedure raises.

The Board’s approach is also entirely unnecessary. Any voter or candidate dissatisfied with the results of the recount can file an election contest. Under § 209.045, a three-judge panel will hear that contest and resolve all issues presented, subject to any potential appeal. Because the same three people will be making the decision for all ballots cast across the State, the Court can be confident that they are applying uniform, statewide procedures as required by equal protection.

Conclusion

For these reasons, amicus respectfully prays that the Court exercise its authority under § 204B.44 to prohibit the Board from requesting, and any counties or their officials from complying with such a request, to revisit the validity of any absentee ballot.

Respectfully submitted,

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