

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

**Norm Coleman and Coleman for Senate
'08;**

Case No. _____

PLAINTIFFS,

**MOTION FOR TEMPORARY
RESTRAINING ORDER**

v.

**Cynthia Reichert, in her capacity as the
Director of Elections of the City of
Minneapolis; John Doe and Jane Doe,
unnamed Minnesota county auditors or
Minnesota election officials;**

DEFENDANTS.

**MOTION FOR EMERGENCY TEMPORARY INJUNCTIVE RELIEF AND
MEMORANDUM IN SUPPORT THEREOF**

Pursuant to Chapters 8210.3000 and 209.12 of the Minnesota Election Code, Norm Coleman and Coleman for Senate '08 ("Plaintiffs") requests that this Court grant an emergency temporary injunction preventing Cynthia Reichert ("Defendant"), as well as any other election officials in the State of Minnesota, or other persons, from unsealing, opening and/or tallying any absentee ballot envelopes or any other ballot, including but not limited to spoiled and rejected ballots, that were not included in ballot boxes sealed on Tuesday, November 4, 2008 ("Election Day") or included in the ballots tallied and sealed at the precinct polling locations.

MEMORANDUM

INTRODUCTION

At approximately 7:45 p.m. on Friday, November 07, 2008, Defendant contacted the Coleman for Senate '08 campaign office and informed a campaign employee that she was in

possession of thirty-two (32) absentee ballots in connection with the 2008 general election that she intended to open and count the next day (Saturday, November 8, 2008), that had not been counted on Election Day or included in the sealed ballot boxes. Tony P. Trimble of Trimble & Associates, Ltd., returned Defendant's call and spoke directly with Defendant about this matter, around 8:00 p.m. that same evening (Friday, November 7, 2008). *See* Affidavit of Tony P. Trimble dated November 7, 2008.

Defendant further stated that she intended to transport such ballots to the City of Minneapolis warehouse, where the sealed ballot boxes are being held, for the purpose of opening such ballots, counting such ballots, recording the vote totals obtained from such ballots, and unsealing the boxes in order to include such ballots with other votes that were legally cast. *Id.* Mr. Trimble informed Defendant that serious questions existed relative to the integrity of these ballots, but Defendant that she nevertheless intended to open and count such ballots at 10:00 a.m. on Saturday, November 8, 2008. *Id.*

CONTROLLING LEGAL AUTHORITY

The object of a temporary injunction is to maintain the matter in controversy in its existing condition until judgment, so that the effect of the judgment shall not be impaired by acts of the parties during the litigation. The granting of temporary injunctions serves only to maintain the *status quo* until a case can be decided on the merits. *Berggren v. Town of Duluth*, 304 N.W.2d 24 (Minn. 1981). A temporary restraining order may be granted if an applicant can show that immediate and irreparable injury, loss, or damage will result to him before the adverse party can be heard in opposition. *Polaski v. Heckler*, 585 F. Supp. 997 (D. Minn. 1984).

Rule 65.01 of the Minnesota Rules of Civil Procedure allows a Court to grant an *ex parte* restraining order when immediate and irreparable loss or damage will be occur prior to the adverse party being heard in opposition.

ARGUMENT

I. Plaintiffs Are Likely To Succeed On The Merits Of Their Complaint

The legal issue before the Court is straightforward: under Minnesota law, a statutory remedy exists for determining whether ballots not counted on election day are valid; this process is an election contest. “Any eligible voter, including a candidate, may contest...the nomination or election of any person for whom the voter had the right to vote if that person is declared nominated or elected to the Senate or the House of Representatives of the United States...” Minn. Stat. § 209.02. “The notice of election contest must specify the grounds on which the contest is made and be served...within 7 days after the canvass is completed in the case of a special or general election.” Minn. Stat. § 209.021. Jurisdiction over election contests involving statewide candidates lies with Ramsey County, Minnesota; hence, this Court. An election contest must be commenced within seven (7) days following certification of the results of an election by the Minnesota State Canvassing Board, which does not meet until November 18, 2008. This Court will have jurisdiction over any election contest relative to the United States Senate race, although an election contest is not yet ripe. The purpose of this Motion to preserve the issues that are properly within the province of an election contest for such contest (if any).

“Evidence on any other points specified in the notice of contest, including but not limited to the question of the right of any person to nomination or office on the ground of deliberate, serious, and material violation of the provisions of the Minnesota Election Law, must be taken and preserved by the judge trying the contest, or by some person appointed by the judge for that purpose...[T]he court administrator of the district court shall promptly certify and forward the

files and records of the proceedings, with all the evidence taken, to the presiding officer of the Senate or the House of Representatives of the United States.” Minn. Stat. § 209.12.

The facts giving rise to this case are straightforward: Defendant has informed Plaintiff that she fully intends to open previously-unopened absentee ballots that were not opened or counted on Election Day in order to include such ballot with votes that were legally cast. Because the integrity of these ballot is in serious doubt, and the validity of these ballots is properly within the province of an election contest (and not the arbitrary determination of Minneapolis election officials), injunctive relief should be granted barring the counting of these ballots until an election contest (if any) is commenced before this Court. If these ballots are opened, and the contents disclosed, and/or if these ballots are commingled with other ballots already counted on Election Day, the damage to the integrity of the election will be irreparable.

II. Irreparable Harm Will Result If The Temporary Injunction Is Not Granted.

Defendant’s actions threaten imminent irreparable harm to the Plaintiffs, whom have direct stakes in the current election. The threatened injury is irreparable because the cash value of an individual vote to the voter, or the cash value of the efficacious conduct of an election to a candidate or party, simply is not quantifiable: because the damage cannot be quantified by any measurable or accurate standard, the injury is irreparable. *Polaski*, 585 F. Supp. at 997. Indeed, money damages would be categorically inapt: Plaintiffs do not seek to be *repaid* for the *cash value* of the injuries imposed by a flawed election — they request that the election be conducted in accordance with the controlling legal standards.

The irreparable harm is clear: the integrity of these ballots is in serious doubt (due to the absolute inability of Plaintiff, or any other person, to discern the location of these ballots since Election Day, which occurred five (5) days ago), which validity must be determined at an election contest. This analysis applies to any other similarly-situated ballots throughout the State

of Minnesota, as the counties continue their reconciliation and canvassing process relative to the results of election night. An election contest is not yet ripe because the canvassing board has not yet met to certify the election results. Opening the ballots now, and revealing the results, would have a prejudicial effect in this politically-charged climate that exists over this extremely close election that faces an administrative recount. The more prudent course is to leave the ballots unopened, sealed and uncounted, until an election contest is held (if any) to determine their validity in open court.

III. Plaintiffs Have No Adequate Remedy Available At Law

For the same reason that Plaintiffs' injuries are irreparable, Plaintiffs have no adequate remedy at law. First, Plaintiffs' injuries are not calculable or quantifiable and money damages would be impossible to quantify; hence, the legal remedy is inadequate. Second, and as explained above, Plaintiffs do not merely seek monetary compensation for their injuries — they seek vindication of their right to an election conducted in accordance with the straightforward mandates of law. The validity of these ballots (and any other similarly-situated ballots throughout Minnesota), which were not opened or counted on Election Night, is the proper province of an election contest, which is not yet ripe since the canvassing board has not yet met. No sum of money can compensate Plaintiffs for the deprivation of an election conducted in a manner consistent with the rule of law.

IV. Temporary Injunctive Relief Will Serve the Public Interest

Minnesota's electoral laws were enacted to protect the rights of the voters at large: in cases challenging electoral irregularities, the real parties in interest are the voters. They are possessed of the ultimate interest and it is they whom we much give primary consideration. *Minnesota's election laws* are intended to insure that those who vote are qualified and registered to vote and that they do so in a proper manner; any dispute over validity of ballots that were not

counted on Election Day (for whatever reason) is within the province of an election contest, and not local election officials. Defendant's violation of Minnesota's straightforward statutory provisions at issue in this case poses a severe threat to the integrity of the State's electoral process; vindication of Minnesota law vindicates the public interest.

In sum, the State of Minnesota recognized the public interest at issue in this matter when it codified the very statutory provisions at issue in this case. To enforce these statutory provisions is to promote the public interest; to allow Defendants to thwart the statutes would be to subject the public interest to severe harm.

CONCLUSION

WHEREFORE, for the reasons stated above, Plaintiffs respectfully request that this Court enter an emergency temporary injunction preventing Defendant, as well as any other election officials in the State of Minnesota, or other persons, from unsealing, opening and/or tallying any absentee ballot envelopes or any other ballot, including but not limited to spoiled and rejected ballots, that were not included in ballot boxes sealed on Election Day or included in the ballots tallied and sealed at the precinct polling locations.

Respectfully Submitted,

DATED: November 5, 2008

KNAAK & KANTRUD, P.A.

By 

Frederic W. Knaak #56777

Greg T. Kryzer #346512

3500 Willow Lake Blvd, Suite 800

Vadnais Heights, MN 55110

651/490-9078

Attorneys for Plaintiffs

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

**Norm Coleman and Coleman for Senate
'08;**

PLAINTIFFS,

v.

**Cynthia Reichert, in her capacity as the
Director of Elections of the City of
Minneapolis; John Doe and Jane Doe,
unnamed Minnesota county auditors or
Minnesota election officials;**

DEFENDANTS.

Case No. _____

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER
FOR TEMPORARY INJUNCTION**

On November 8, 2008 the above-entitled matter came on for a hearing before the undersigned Honorable Judge, Judge of District Court, regarding the Plaintiffs motion for an Emergency Temporary Injunction against Defendants Cynthia Reichert, in her capacity as the Director of Elections of the City of Minneapolis; John Doe and Jane Doe, unnamed Minnesota county auditors or Minnesota election officials.

Frederic W. Knaak, Esq. appeared on behalf of the Plaintiffs. The Defendant Cynthia Reichert, and Mr. David Lillehaug, attorney for Al Franken for Senate, were given notice of the Plaintiffs' motion for an emergency restraining order.

Based upon all the files and records, herein, the Court makes the following:

FINDINGS OF FACT

1. On Friday, November 7, 2008, Tony P. Trimble had a telephone conversation with Cynthia Reichert, Assistant City Clerk/Director of Elections, Elections and Voter Registration, Minneapolis, Minnesota.
2. During that telephone conversation, Ms. Reichert informed Mr. Trimble that she was in the personal possession of thirty-two (32) absentee ballots relative to the 2008 general election, and that she intended to transport such ballots to the City of Minneapolis warehouse where ballots are stored on Saturday, November 8, 2008, for the purpose of opening such ballots, counting such ballots and recording the results of such ballot count with the Minnesota Secretary of State.
3. Ms. Reichert stated that she intended to open and count such ballots at 10:00 a.m. on Saturday, November 8, 2008.
4. Irreparable harm will be caused to the Minnesota election system if the ballots are opened and counted without a hearing.

CONCLUSION OF LAW

1. In the interests of justice and equity the Plaintiffs are entitled to a temporary restraining order preventing the Defendants and their assigns from opening and counting the absentee ballots at issue as well as any other similarly situated ballots.
2. This matter is properly venued pursuant to Minn. Stat. § 209.021 Subd 2 (2008).

ORDER

1. The Plaintiffs' motion for a Temporary Restraining Order is **GRANTED**.
2. The Defendants shall not open or count any absentee ballots not previously counted until such time as ordered by the court.
3. The Ramsey County Court Administrator shall schedule a hearing for a permanent restraining order within 10 days of the date this order pursuant to Minnesota Rule of Civil Procedure 65.01 (2008).
4. A copy of this order shall be as effective as an original.

BY THE COURT:

DATED: _____

Kathleen Gearin
Chief Judge of District Court