

February 16, 2009

VIA HAND

The Honorable Elizabeth A. Hayden
Room 135, Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1500

The Honorable Denise D. Reilly
Room 135, Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1500

The Honorable Kurt J. Marben
Room 135, Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1500

Re: 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
Second Judicial District Case No. 62-CV-09-56

Dear Judges Hayden, Reilly and Marben:

We write pursuant to Minn. R. Gen. Prac. 115.11 to request the Court's permission to file a motion for reconsideration of the Court's February 13, 2009 Order Following Hearing. We respectfully believe the Court has created a significant problem by adopting standards to be applied to the remaining unopened absentee ballots which are materially different than those which have been applied previously—by election officials, by recount personnel, by the Supreme Court and, indeed, by this Court itself—to absentee ballots already opened and counted. If the Court maintains the standards set forth in that ruling, it will serve only to further exacerbate inconsistencies and inequities in the process and the already-existing equal protection problem. Let us explain.

In its February 13, 2009 Order the Court held as a matter of law that absentee ballots having certain characteristics are not legally cast votes and, as a result, that it would not order the opening and counting of any such ballot: "the Court concludes that it must enforce the comprehensive statutory scheme governing absentee balloting in accordance with its unambiguous terms." Memorandum at 10. The standards the Court has now announced, however, were not applied:

On February 10, 2009, when the Court granted summary judgment to several of the petitioners represented by Mr. Nauen whose ballots do not meet these standards.

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On February 3, 2009, when the parties stipulated and the Court signed an order that all of the 933 ballots opened on January 3, 2009 were “properly and lawfully opened and counted,” even though it appears scores of them do not meet these standards.

In mid-January, when the Secretary of State notified only 413 voters that their absentee ballots had been rejected.

On January 3, 2009, when in accordance with orders of the Supreme Court and under the auspices of the Canvassing Board those scores of ballots, which would be illegal votes under the standards the Court has now adopted, were opened and counted.

On election day itself, when 87 counties and scores of municipalities opened some 280,000 ballots, a material number of which did not meet these standards.

As a result, there are certainly hundreds, and likely thousands, of votes already counted that under the Court’s February 13, 2009 Order were not legally cast votes—meaning that the recount included a material number of illegally cast votes which should not have been included in the totals the Canvassing Board certified. In our motion to reconsider, we will provide specific and numerous example ballots to the Court so that it may under the statutory power granted it for this contest correct these inconsistencies.

We believe the standard this Court applies to determine which of the remaining rejected absentee ballots is a legally cast vote must be consistent with the standards this Court has already applied to other ballots as well as the same standard applied to the thousands of absentee ballots already opened and counted by the counties. The earlier standards consistently applied include, as the testimony of county officials has made clear, that whether a voter had otherwise voted in the election was determined solely with reference to the roster in his or her precinct and that, among other things, many counties did not check the registration of the witness and some did not. Moreover, the Court should consistently apply the same methods used by the counties and municipalities on election day to determine whether an absentee ballot should be accepted.

One thing is clear about American elections: all voters must be treated equally. To apply different standards to different absentee voters is prohibited by the Constitution. In light of these

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facts and circumstances, which the Court may not have had the opportunity to consider, Contestants respectfully seek permission to file a motion, with attached exhibits, seeking reconsideration of the Court's February 13, 2009 ruling.

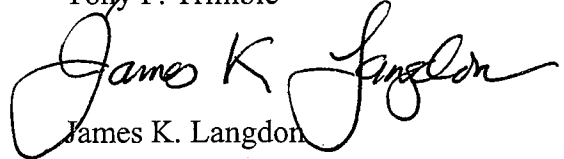
Sincerely,



Joseph S. Friedberg



Tony P. Trimble



James K. Langdon

cc: David L. Lillehaug, Esq.
Kevin J. Hamilton, Esq.