Case No. A10-395

STATE OF MINNESOTA

IN COURT OF APPEALS

RAMSEY COUNTY, A POLITICAL SUBDVISION OF THE STATE OF MINNESOTA,

Appellant,

vs.

KSTP-TV, KSTC-TV, WDIO-TV, KAAL-TV, AND KSAX-TV,

Respondents,

APPELLANT'S REPLY BRIEF

Ramsey County Attorney's Office
Kevin M. Lindsey
Attorney Reg. No. 220796
50 West Kellogg Boulevard
Suite 560 West
St. Paul, Minnesota 55102-1556
(651) 266-3217
Attorney for Appellant

Anfinson Law Firm, P.A.
Mark R. Anfinson
Attorney Reg. No. 2744
Lake Calhoun Prof. Bldg.
3109 Hennepin Avenue South
Minneapolis, MN 55408
(612) 827-5611
Attorney for Respondents

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Ramsey County submits the following reply brief to address the new arguments raised by KSTP in its memorandum to the Court and to clarify the misstatements made by KSTP as to the position of Ramsey County. Ramsey County respectfully asks this Court to reverse the grant of summary judgment in favor of KSTP by Ramsey County District Court. Ramsey County also asks the Court to find that the ballots inside the rejected absentee ballots shall remain contained within their secrecy envelopes consistent with the United States Constitution, Minnesota election law, the injunction issued by the Minnesota Supreme Court and the Minnesota Government Data Practices Act ("MGDPA").

1. ARGUMENTS CONCERNING ARTICLE 1 § 5 OF THE UNITED STATES CONSTITUTION ARE PROPERLY BEFORE THE COURT.

The argument that Ramsey County waived the argument that Article 1 § 5 is applicable to the present dispute is without merit as Ramsey County had no affirmative obligation to raise the issue as a defense nor is Ramsey County arguing that Article 1 § 5 of the United States Constitution is a complete bar to KSTP's Complaint. Ramsey County is arguing to the court that the factual foundation of the District Court's Opinion is wrong in that the election is not over and that Mr. Coleman (or other members of the public) may still challenge the qualifications of Senator Franken. Accordingly, Ramsey County has not waived any argument that it may have concerning Article 1 § 5.

Alternatively, the power of the United States Senate in Article 1 § 5 of the United States Constitution can't be waived by Ramsey County. If the Senate has been vested with power and authority under the United States Constitution, only the Senate can decide if and when it wishes to waive the power and authority vested to that branch of government.

The issue of the applicability of Article 1 § 5 of the United States Constitution is therefore properly before this Court.

Assuming that the Court were to make a finding to the contrary, the applicability of Article 1 § 5 would still be before this Court as the issue of the necessity of the

Minnesota Supreme Court's injunction was at the heart of the decision issued by the Ramsey County District Court.

2. RAMSEY COUNTY HAS CONSISTENTLY ARGUED THROUGHOUT THIS DISPUTE THAT THE MINNESOTA SUPREME COURT'S INJUNCTION REMAINS IN FULL FORCE AND EFFECT.

Ramsey County has argued throughout this litigation that the election between Al Franken and Norm Coleman is not over and that there has been a continuing need for the Minnesota Supreme Court's injunction to be enforced. The injunction issued by the Minnesota Supreme Court was predicated in part on the fact that Article 1 § 5 of the United States Constitution clearly establishes that the United States Senate is the tribunal of last resort in a Senate election. *Coleman v. Franken*, 767 N.W.2d 453, 458, (Minn. 2009). The injunction issued by the Minnesota Supreme Court was necessary to ensure the status quo was maintained for the United States Senate in the event of an election challenge contest being filed with the Senate. The language of the district court opinion illustrates that Ramsey County raised the issue of whether the election between Coleman and Franken was over before the district court when the district court addressed the question of whether there is a continuing need for the injunction previously issued by the Minnesota Supreme Court. The district court opinion provides in pertinent part,

> Defendant has also argued that the temporary injunction issued by the Supreme Court in 2008 during the recount process requires dismissal of this case. However, there is no indication by the Supreme Court that the injunction was intended to be permanent. The injunction was issued during the recount as a determination of which absentee ballots could be opened and counted and which could not. The election is now at an end and there is no reason to believe the injunction was intended to outlive its intended purpose. (Emphasis in original)

Appendix 48-49. The district court disagreed with Ramsey County on the issue of whether the election was over and decided that there was not a continuing need for the injunction issued by the Minnesota Supreme Court. The issue of whether the Minnesota Supreme Court's injunction had "outlive[d] its intended purpose" was therefore clearly part of the record before the district court.

3. THE UNITED STATES SENATE DOES NOT LOSE JURISDICTION OVER THE QUALIFICATIONS OF ITS MEMBERS ONCE THE MEMBER IS SWORN INTO OFFICE

The United States Senate doesn't lose jurisdiction over the qualifications of its members once the member is sworn into office. The United States Senate has previously removed a sitting United States Senator after conducting a recount of votes and coming to a different conclusion than state officials as to which person received the most votes in the election. See *Anne M. Butler and Wendy Wolff, United States Senate Election, Expulsion and Censure Cases, 1793-1990, S. Doc. 103-33, Washington, GPO 1995* (Discussing removal Iowa Senator Smith Brookhart from office). KSTP's argument that Roudebush v. Hartke, 405 U.S. 15 (1972) holds that the Senate loses jurisdiction over the qualifications of its members once the member is sworn into office misconstrues *Roudebush*. The United States Senate is the final tribunal in such matters and always retains jurisdiction concerning the qualifications of its members. Contrary to the suggestion of KSTP, the *Roudebush* opinion suggests that the Senate has broad and unlimited discretion to fashion whatever rules that it so chooses in determining the qualifications of its members including when it has jurisdiction.

A. THE SENATE HAS PREVIOUSLY REMOVED A SITTING SENATOR AFTER CONDUCTING A RECOUNT OF VOTES.

In 1924, Smith W. Brookhart faced off against Daniel F. Steck for a Senate seat in Iowa. The initial election contest was very close and a subsequent recount of votes was conducted. The recount showed Brookhart as the winner by a plurality of less than 800 votes.

On March 4, 1925, Brookhart was seated without incident. Steck initiated a challenge of the election results to the Senate Committee on Privileges and Elections ("Committee"). See *Anne M. Butler and Wendy Wolff, United States Senate Election, Expulsion and Censure Cases, 1793-1990, S. Doc. 103-33, Washington, GPO 1995* (Discussing removal Iowa Senator Smith Brookhart from office). The Committee had all of the more than 900,000 ballots transported from Iowa to Washington for a recount

which was carried out during the summer and fall of 1925. Id. Among the disputed ballots were a number on which the voters had apparently attempted to exactly copy a sample ballot that had been featured in local newspapers, showing an arrow pointing to the box marked for Daniel Steck. Id.

Iowa election officials during their recount had not counted any of the ballots copied from newspapers because the arrows constituted an extraneous mark that was illegal under Iowa law. Id. The Senate however examined each ballot copied from newspapers to ascertain the true intent of the voter; ultimately the Senate counted several ballots that had not been counted by Iowa election officials. Id. Upon completion of the recount, the majority of the Committee issued a report stating that Steck had received 1,420 more votes than Brookhart. Id.

In a minority report, one committee member protested that the ballots had not been properly examined and secured in Iowa before being sent to Washington. Id. Most notably, the minority report stated that some 3,500 fewer ballots were received in Washington than the number of people on record that Iowa had for voting in the election. Id.

On April 12, 1926, in a 45 to 41 vote that crossed party lines, the Senate unseated Smith Brookhart and replaced him with Daniel Steck. Id.

B. ROUDEBUSH STANDS FOR THE PROPOSITION ADVANCED BY RAMSEY COUNTY; THE SENATE IS THE FINAL TRIBUNAL AND STATES SHOULD BE WARY OF USURPING THE POWER OF THE SENATE.

Roudebush should be understood as a case that reaffirms that the qualifications of a member of the Senate are within the exclusive jurisdiction of the Senate and that once an election certificate has been forwarded to the Senate that state election officials should be wary of taking any action that may interfere with the ability of the Senate to faithfully perform its duty. KSTP's argument that *Roudebush* set forth limits on the jurisdiction of the Senate to judge the qualifications of its members is without merit.

In order to properly understand *Roudebush* it is important to understand the underlying facts. On November 16, 1970, Incumbent Senator Vance Hartke received a

certificate of election from the Governor of Indiana. On the following day, candidate Richard Roudebush filed a petition for a recount. Hartke then filed a complaint in federal court seeking an injunction against the recount which was granted. Roudebush filed an appeal and lost; Roudebush then sought relief before the Supreme Court. On January 21, 1971, shortly after jurisdictional statements had been filed with the Supreme Court, the Senate administered the oath to Hartke 'without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order.' 405 U.S. at 18. After the oath was administered, Hartke moved to dismiss Roudebush's appeal as being moot.

KSTP argues that the term moot in *Roudebush* means that once the Senate has seated an individual as a Senator all appeals to the Senate become moot[1]. The suggestion within the argument of KSTP is that the Supreme Court acts as a gatekeeper as to when a matter is ripe for review concerning the seating of a Senator. The term moot in *Roudebush* however refers to whether there was a justiciable question before the Supreme Court and not whether the Senate could review the qualifications of one of its members. Additionally, the discussion by Justice Douglas in *Roudebush* suggests that the Senate has complete discretion as to when to hear a challenge concerning the qualifications of a Senator.

The separate concurrence and dissent of Justice Douglas in *Roudebush* noted that "[t]he Senate has never perfected specific rules for challenging the right of a claimant to serve, inasmuch as each case presents different facts." 405 U.S. at 28. Justice Douglas noted that there have been times in which the Senator was sworn in and was permitted to be seated before the challenge was heard; alternatively, the Senate has held the Senate seat vacant during a challenge. Id. Finally, Justice Douglas noted that "any number of citizens may submit a petition" challenging the qualifications of a Senator. Id at 29.

The real question presented in *Roudebush* which the justices struggled with in the case can be found in the dissent of Justice Douglas where he wrote:

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[1] "[T]he clear implication of the Court's decision is that once the Senate actually accepts and seats a senator unconditionally, the Senate's final judgment on the election has been rendered, and no further appeals may be brought to that body." Page 11 of KSTP Brief.

> Although all agree that in the end the Senate will be the final judge of the seating contest, the nub of the instant case comes down to opposing positions on how important it may be to preserve for the Senate the opportunity to ground its choice in unimpeachable evidence.

405 U.S. at 32. The majority found that a recount by Indiana election officials of the votes initially cast to verify the accuracy of the initial count would not usurp the power of the Senate pursuant to Article 1, § 5. The dissent was concerned that any subsequent action by Indiana election officials may impair the ability to perform its duties. Specifically, the dissent noted:

> Charges or suspicions of inadvertent or intentional alteration, however baseless, will infect the case. No longer will the constitutionally designated tribunal be able to bottom its result on unassailed evidence. Since even a slight adjustment in the tally could dramatically reverse the outcome, the federal interest in preserving the integrity of the evidence is manifest. . . . the role of the courts is to protect the Senate's exclusive jurisdiction over the subject matter as did this Court in Barry v. United States ex rel. Cunningham.

The *Roudebush* majority found that "a recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent final judgment [and a] recount does not prevent the Senate from independently evaluating the election any more than the initial count does." 405 U.S. 15, 25.

In the present matter, if KSTP counts and broadcasts the number of votes each candidate would have received had the rejected absentee ballots been counted the actions of KSTP will frustrate the Senate's ability to make an independent final judgment. For example if there are 100 ballots that were rejected because the ballots were not notarized and 75 of those ballots were cast in favor of Mr. Coleman how could the Senate faithfully judge whether those ballots were properly rejected. Members of Mr. Coleman's party would be accused of engaging in brazen partisanship; of course, if the numbers were reversed in Mr. Franken's favor members of his party would face the same dilemma. If the sealed absentee ballots in the possession of Ramsey County are counted independent of the explicit direction of the Senate, the ability of the Senate to independently and faithfully discharge its duties will be compromised.

The Senate never loses jurisdiction to examine the qualifications of its members even after a member has been seated without incident to the Senate. *Roudebush* shouldn't be interpreted to limit the ability of the Senate to review the qualifications of its members after the member has been sworn into office. The Senate, as evidenced by the removal of Brookhart and the lack of any contrary authority, may conduct an independent recount of the ballots cast and may even review ballots not included within the certified election results of local state officials. The Senate still has jurisdiction to determine the qualifications of Mr. Franken should someone challenge him.

4. REVIEW OF THE VOTER BALLOTS WITHIN THE REJECTED ABSENTEE ENVELOPES WILL NOT SHED LIGHT ON WHY THE ABSENTEE BALLOTS WERE REJECTED

No additional information will be uncovered as to why the rejected absentee ballots were not counted by election officials if this Court upholds the district court decision. The only information that will be learned is how many votes would have been cast for candidates Coleman and Franken had the absentee ballots not been rejected. Any suggestion that the public will learn something new about why the absentee ballots were rejected is completely without any merit.

None of the rejected absentee ballots have ever been opened by election officials. No Minnesota election official relied on the information inside the ballot envelope to reject the absentee ballot as none of the information on the ballot has ever been disclosed. Election officials can't be influenced by information that they have not seen.

The judicial process in the election dispute between candidates Coleman and Franken more than adequately ensured that all of the information as to why the rejected absentee ballots were not counted by Minnesota election officials was provided to both the Coleman and Franken campaigns.

The three judge panel in reviewing the facts of the election contest dispute between Coleman and Franken had Minnesota election officials ensure that all information as to why the rejected absentee ballots were not counted be on the outside of the ballot

envelopes. In addition, on the outside of the absentee ballot return envelope is the voter's name, voter's address, and their respective ward and precinct. Appendix 37-38.

The public has been provided with all of the information as to why the uncounted absentee ballots were rejected. The Ramsey County district court in *Matter of the Contest of General Election held on November 4, 2008* identified ten categories for which absentee ballots were rejected. The *Matter of the Contest of General Election held on November 4, 2008* went further in explaining the statutory basis for rejecting the absentee ballots. Appendix 10-26. No new information as to why the uncounted absentee ballots were rejected by election officials will be learned upon opening the absentee ballots.

5. MINNESOTA LAW DOES NOT ALLOW RAMSEY COUNTY TO EMPLOY A SLIDING BALANCING TEST TO DETERMINE WHEN TO DISCLOSE REJECTED ABSENTEE BALLOTS

The brief submitted by KSTP to the Court concedes that the County in theory could reject the type of data privacy request that KSTP made in the present case.

> In addition, the trail court's ruling effectively gives the County considerable discretion in making judgments about what disclosures could threaten to infringe on voter confidentiality. For this reason, not only can the County redact the ward and precinct information on individual ballots, ***but it could also decline to respond to requests that are tailored to a particular precinct or other small geographical area. Nothing in the Data Practices Act compels the County to respond to such inquiries if the requester could reasonably deduce the identity of the voter from obtaining that information.***

(Emphasis added to original). KSTP is interpreting the Data Practices to provide a sliding scale in which Ramsey County could determine on a case by case basis which requests for absentee ballots create too great of a risk of disclosing the identity of the voter and thus deny the data practices request. KSTP cites no statutory or case law authority for its position.

The Data Practices Act does not provide the County or any executive branch governmental agency the ability to employ such a sliding scale to determine which data practices act requests are permissible. The sliding scale approach urged by KSTP is anti-ethical to the Data Practices Act. Under the Data Practices Act, the data sought is either

data can be disclosed or data that is not subject to disclosure. There is no third category of data under the Data Practices Act where data can be disclosed when the governmental agency holding the data can provide certain members of the public access while denying other members of the public access to the data.

CONCLUSION

Ramsey County respectfully submits that this Court should find that the ballots inside the rejected absentee ballots shall remain contained within the secrecy envelope in accord with the United States Constitution, Minnesota election law, the injunction issued by the Minnesota Supreme Court and the MGDPA. Ramsey County also prays that this Court reverse the order of summary judgment entered in favor of KSTP by the Ramsey County District Court.

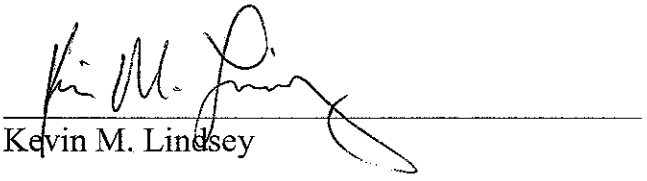
SUSAN GAERTNER
Ramsey County Attorney

Dated: MAY 9, 2010

By: _____
Kevin M. Lindsey (#220796)
Assistant Ramsey County Attorney
50 West Kellogg Boulevard, #560
St. Paul, MN 55102
Attorney for Appellees Ramsey County

CERTIFICATE OF COMPLIANCE WITH RULE 132.01, SUBD. 3

I hereby certify that Respondent's Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd 3(a). The brief contains 3,140 words, including footnotes, excluding the Table of Contents, Table of Authorities and Index to Appendix. This brief was prepared using Microsoft Word 2007 and text is 13-point Times New Roman.



Kevin M. Lindsey