

NO. A-10-395

State of Minnesota
In Supreme Court

KSTP-TV, KSTC-TV, WDIO-TV, KAAL-TV, and KSAX-TV,
Appellants,

vs.

RAMSEY COUNTY,
Respondent,

RESPONDENT'S BRIEF

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STATEMENT OF ISSUES

Are rejected absentee ballots public data under the Minnesota Government Data Practices Act?

The Court of Appeals held that Minnesota Statute §13.37, Subd. 2 unambiguously provide that sealed absentee ballots are nonpublic or private data until opened by an election judge. AD 6. Because the rejected absentee ballots in possession of Ramsey County remain sealed and have not been opened by an election judge, the rejected absentee ballots remain nonpublic or private data. AD 6-8. While Minnesota Statute §13.37 does not provide what occurs after an election with rejected absentee ballots, Minnesota law prohibits Minnesota Courts from the District Court held that once an election process and all challenges have been concluded that the contents of a rejected absentee ballot become public data and the governmental entity in possession of the ballots must takes all necessary steps to ensure that voter privacy is maintained. AD 15-17.

Apposite Statutes and Cases

Prairie Island Indian Community v. MN Dept. of Public Safety, 658 N.W.2d 876 (Minn. Ct. App. 2003)

STATEMENT OF THE CASE AND FACTS

Ramsey County supplements KSTP's statement of the case and facts with the following facts.

The suggestion that the absentee ballots in question from the 2008 Senatorial election contest between Mr. Al Franken ("Franken") and Mr. Norm Coleman ("Coleman") haven't been scrutinized by the public is completely without merit. The process of analyzing absentee ballots has been thoroughly reviewed and scrutinized by the candidates, political parties, the media and the public.

This Court issued an injunction immediately after the election concerning the absentee ballots. Specifically, this Court held:

All local election officials, county canvassing boards, the Secretary of State, and the Minnesota State Canvassing Board are enjoined from opening any previously rejected absentee ballot envelopes and from including any previously rejected absentee ballots in the administrative recount now underway, except as provided herein . . .

Coleman v. Ritchie, 758 N.W.2d 306, 308 (Minn. 2008). This Court then went on to set forth the process by which the absentee ballots could be properly counted. *Id.*

The Office of the Secretary of State counted an additional 933 absentee ballots. *Coleman v. Franken*, 767 N.W.2d 453, 457 (Minn. 2009). The State Canvassing Board certified the election results finding that Franken received 225 more votes than Coleman. Coleman then contested the election results under Minn. Stat. §209.21 (2008) and sought a declaration that he was entitled to the certificate of election as a United States Senator. *Id.*

This Court appointed three judges to resolve the contest. The heart of the dispute was the issue of rejected absentee ballots. The trial court found that certain categories of rejected absentee ballots should not be opened as a matter of law – the categories were:

- Absentee ballot submitted by a voter in an absentee ballot return envelope on which the voter's address is not the same as on the absentee ballot application.

- Absentee ballot submitted by a voter in an absentee ballot return envelope in which the witness certification on the absentee ballot return envelope is signed by a person identified as a notary public but no notary seal or stamp is affixed to the absentee ballot return envelope.
- Absentee ballot submitted by a non-registered voter.
- Absentee ballots submitted by a voter in an absentee ballot return envelope in which the voter failed to sign the absentee ballot return envelope.
- Absentee ballot submitted by a voter whose absentee ballot application does not contain the voter's signature.
- Absentee ballot submitted by a voter whose absentee ballot application was signed by another unless the absentee ballot application was signed by another individual in accordance with Minn. Stat. §645.44, Subd. 14.
- A UOCAVA ballot received by election officials after the deadline for receipt of absentee ballots.
- Absentee ballot dropped off in-person by the voter on Election Day.
- Absentee ballot dropped off by a proper agent on Election Day but after the statutory deadline for delivery.
- A ballot submitted by a voter who was not registered to vote within the precinct in which he or she resides.

The information as to why the absentee ballots were rejected was evident for all interested parties to understand by simply reviewing the outside of the envelope containing the absentee ballot.

Following a seven week trial, "the court determined 351 additional absentee ballot return envelopes satisfied the statutory requirements and ordered that these envelopes be opened and the ballots inside counted." *Coleman*, 767 N.W.2d at 457. On April 13, 2009, the trial court issued findings of fact and conclusions of law finding that Franken won the Senate race by a margin of 312 votes.

Coleman then filed an appeal with this Court raising various constitutional law violations and violations of Minnesota election law. The ruling of the trial court was upheld by this Court as it noted that its scope of review was limited to determining who was entitled to receive an election certificate and that the United States Senate had final authority over who was seated. *Coleman*, 767 N.W. 2d at 453. This Court held that,

An election contest involving an officer of the United States Congress is governed by the special provisions of Minn. Stat. §209.12 (2008). Minn. Stat. §209.12 limits the question to be decided by the trial court to which candidate received the highest number of votes legally cast at the election and is therefore entitled receive the certificate of election . . . **After a final determination of the contest**, on the request of either party, the record must be transmitted to the house of Congress for which the election was held, in this case, the Senate. **The Senate has the final authority as to who is seated.** U.S. Const., Art. I, Sec. 5; see *Franken v. Pawlenty*, 762 N.W. 2d 558, 567 (Minn. 2009).

Id. at 458, footnote 5. Governor Tim Pawlenty subsequently signed an election certificate establishing that Franken received the most votes in the election.

All information as to why the rejected absentee ballots were not counted has been thoroughly litigated and analyzed. The public will not learn any additional information as to why the rejected absentee ballots were not counted. The only information the public will learn is how many additional votes Coleman and Franken would have received had the votes within the rejected absentee ballots been properly cast.

ARGUMENT

STANDARD OF REVIEW

This Court reviews questions of statutory construction de novo. *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). Statutory interpretation of the data practices act is a legal issue reviewed de novo. *Star Tribune Co. v. University of Minnesota*, 683 N.W.2d 270, 274 (Minn. 2004). This Court “employ[s] a de novo standard of review when interpreting the federal and state constitutions.” *In re Grand Rapids Public Utilities Comm.*, 731 N.W.2d 866, 874 (Minn. App. 2007); *State v. Shattuck*, 704 N.W.2d 131, 135 (Minn. 2005).

INTRODUCTION

The Court of Appeals, in the decision below, wrote a very clear opinion concerning the application of the Minnesota Government Data Practices Act (“Data Practices Act”). First, the Court of Appeals noted that the express language of the Data Practices Act defines absentee ballots as nonpublic and private data. The Court of Appeals then noted that under the Data Practices Act that absentee ballots don’t lose their status as nonpublic and private data until the ballots are opened by an election judge. Finally, the Court of Appeals stated that it was not troubled by the fact that the Minnesota Legislature did not expressly state what would occur if the absentee ballots were never opened by an election judge because of the well-established precedent of this Court and Minnesota statutory law that what has been omitted by the Legislature can’t be subsequently added by judicial fiat.

The relevant holding of the Court of Appeals decision is set forth below:

We conclude that section 13.37, subdivision 2, unambiguously classifies sealed absentee ballots as nonpublic or private data. The plain language provides that when absentee ballots are sealed and have not been opened by an election judge, they are nonpublic or private. The rejected absentee ballots in possession of Ramsey County are indisputably sealed and have not been opened by an election judge. Under the ambiguous language of section of 13.37, subdivision 2, the absentee ballots therefore are either nonpublic or private.

We conclude that the district court erred by determining that section 13.37, subdivision 2, does “not address the status of the rejected absentee ballots after the election process has ended.” The statute contains no time limitation of its application, and even if we agreed that a time limitation on the classification would be appropriate or consistent with the purpose of the data classification provided in the statute, courts cannot “supply what the legislature purposely omits or inadvertently overlooks.” *Ullom v. Indep. Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994). Particularly when the purpose at issue is one the legislature left unexpressed, we will not disregard the plain language of an unambiguous statute on the justification that a contrary result is more consistent with a statute’s purpose. See Minn. Stat. §645.16 (2008)(providing that when the words of a law are free from ambiguity, “the letter of the law shall not be disregarded under the pretext of pursuing the spirit”).

The legal reasoning of the Court of Appeals is sound. Ramsey County simply asks this Court to reaffirm Minnesota statutory law and its long held precedent. See, *Wallace v. Commissioner of Taxation*, 184 N.W.2d 588 (1971)(“We must reject this argument on the well-established ground that courts cannot supply that which the legislature purposely omits or inadvertently overlooks.”); *Martinco v. Hastings*, 122 N.W.2d 631 (1963)(“We have said that when a statute speaks with clarity in limiting its application to specifically enumerated subjects, its application shall not be extended to other subjects by process of construction.”); *State v. Moseng*, 95 N.W.2d 6 (1959)(“Where failure of expression rather than ambiguity of expression concerning the elements of the statutory standard is the vice of the enactment, courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature.”).

There are three arguments that KSTP raises in this appeal. First, KSTP argues that not specifying when absentee ballots can be reviewed after an election results an absurd result. Contrary to the argument of KSTP, the statute as drafted by the Legislature exercises proper discretion and deference to United States Constitution and United States Senate. Second, public policy will be served because the public will better understand why the absentee ballots were rejected. The public however will not learn any additional information about why the absentee ballots were rejected if the votes within rejected absentee ballots are counted. Finally, KSTP argues that voter privacy will be not be impacted by defining rejected absentee ballots as public data. Voter privacy can't be protected if this Court rules absentee ballots as public data because once the ballots are defined as public data anyone can learn the voter preference of any individual who submitted one of the rejected absentee ballots.

Because the decision of the Court of Appeals is legally sound and consistent with long established legal precedent in Minnesota and the arguments of KSTP are without merit, Ramsey County submits that this Court should affirm the decision of the Court of Appeals.

I. The Lack of an Explicit Statement Concerning the Status of Rejected Absentee Ballots After an Election Within the Data Practices Act Does Not Compel This Court To Act

The Data Practices Act clearly provides that rejected absentee ballots are classified as nonpublic or private data. Minn. Stat. §13.37, Subd. 2 unambiguously states that:

The following government data is classified as nonpublic data with regard to data not on individuals, pursuant to section 13.02, subdivision 9, and as private data with regard to data on individuals, pursuant to section 13.02, subdivision 12: sealed absentee ballots prior to opening by an election judge; sealed bids, including the number of bids received, prior to the opening of the bids; parking space leasing data, and labor relations information, provided that specific labor relations information which relates to a specific labor organization is classified as protected nonpublic data pursuant to section 13.02, subdivision 13.

(Emphasis added). This Court does not need to try and discern legislative intent as the wishes of the Legislature are clear. Rejected absentee ballots are nonpublic and private data under the Data Practices Act until they are opened by an election judge. Because the rejected absentee ballots in the possession of Ramsey County have never been opened by an election judge, the absentee ballots remain nonpublic and private data under the Data Practices Act.

The Court of Appeals in rejecting the arguments of KSTP to read additional language into the Data Practices Act cited to *Ullom v. Independent School Dist.*, 515 N.W.2d 615 (Minn. Ct. App. 1994). In *Ullom*, the Court of Appeals had to determine what rights to reinstatement a teacher may have when a school district only partially withdraws from a cooperative when the statute only addresses complete withdrawal from a cooperative. The *Ullom* court held that it could not “specify an event other than the district’s withdrawing entirely from the cooperative without adding words to the statute, something which this court is prohibited from doing. We cannot supply what the legislature purposely omits or inadvertently overlooks.” 515 N.W.2d at 617. The Court of Appeals in *Ullom* and

in the present case adhered to the long established rule of law that judges don't write the law but rather interpret the law.

This Court has held on numerous occasions that it is not the province of the Court to engage in an exercise to add additional causes or action, exemptions or rights under the guise of attempting to follow the spirit of the law when the language of a statute before the Court is clear. See, *Becker v. Mayo*, 737 N.W.2d 200, 207 (2007) (“Principles of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the legislature has not either by the statute’s express terms or by implication provided for civil tort liability.”); *Bruegger v. Faribault County Sherriff Dept.*, 497 N.W.2d 260, 262 (1993)(same); *Wallace*, 184 N.W.2d at 594 (Commissioner’s argument that express limitation not found in statute must be the result of legislative oversight must be rejected “on the well-established ground that courts cannot supply that which the legislature purposely omits or inadvertently overlooks.”) The argument advanced by KSTP in the present case is nothing more than a poor and thinly disguised attempt to have this Court engage in judicial activism by writing an amendment to the Data Practices Act.

In the present matter, this Court should reaffirm its commitment to judicial restraint and hold that there is no basis to overturn the decision of the Court of Appeals as the language of the Data Practices Act is clear and unambiguous. See, *Premier Bank v. Becker Development LLC*, Nos. AO8-1252 (July 22, 2010) (“[When] the language of a statute is clear and free from ambiguity, [the] role [of the Court] is to enforce the language of the statute, and not explore the spirit or purpose of the law.”); *Middle-Snake-Tamarac Rivers v. Stengrim*, 784 N.W.2d 834, 840 (Minn. 2010)(same); *Hutchinson Tech, Inc. v. Commissioner of Revenue*, 698 N.W.2d 1, 8 (Minn. (Minn. 2005)(same); *Phelps v. Commonwealth Land Title*, 537 N.W.2d 271, 274 (1995) (“Where the intention of the legislature is clearly manifested and the statute is unambiguous, no construction is necessary or permitted.”)

II. Defining the Rejected Absentee Ballots as Private and Non Public Data Shows Proper Deference to the United States Senate

The decision by the Minnesota Legislature to define rejected absentee ballots as private and nonpublic data shows proper deference to the United States Senate given that the Senate is the final body that judges the qualifications of its members. If the Court adopts the rule of law urged by KSTP, the new rule could potentially usurp the authority of the Senate.

The United States Constitution clearly states that the final decision maker concerning a dispute involving the election of a United States Senator is the United States Senate. Article I, §5, Clause 1 of the United States Constitution states,

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business, but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

(Emphasis added). The Supreme Court has long recognized that the United States Senate and not the Supreme Court is the tribunal of last resort in determining the qualifications of the members of the Senate. Specifically, the Supreme Court in *Barry v. Cunningham*, 279 U.S. 597, 613 (1929) noted that,

Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers, which are not legislative, but judicial, in character. Among these is the power to judge the elections, returns and qualifications of its own members.

The *Barry* Court further added that the power of the Senate “carries with it authority . . . to render a judgment which is beyond the authority of any tribunal to review.” *Id.*

The Supreme Court has also held that post election activities such as recount efforts by state election officials must be careful not to usurp the ability for the Senate to judge the qualifications of its members. In *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972), the Supreme Court held 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.” Justice Douglas in a separate concurrence in *Roudebush* noted that standing in the Senate is very broad in that “any number of citizens may submit a petition” challenging the qualifications of a Senator.” *Id.* at 29.

The power conferred to the United States Senate in Article 1, § 5, Clause 1 within the United States Constitution has been applied twice in the rich historical past of the State of Minnesota and both instances involved Senator Thomas D. Schall. See, *Anne Butler and Wendy Wolff, United States Senate Election, Expulsion and Censure Cases, 1793-1990, S. Doc. 103-33, Washington, GPO 1995*. On February 2, 1926, Minnesota’s then current Senator Magnus Johnson filed a petition to challenge Schall’s election. *Id.* The Senate’s Committee on Privileges and Elections recommended that Johnson’s request for a recount be denied after holding twelve days of hearings. *Id.* On June 16, 1926, the Senate accepted the unanimous opinion of the committee that Schall retain his seat. *Id.* On July 2, 1926, the Senate authorized a payment of \$15,500 to Schall for his expenses in defending his seat. *Id.*

On December 7, 1931, Schall appeared in the Senate and took his seat for a second term without protest. *Id.* On April 14, 1932, his opponent Einar Hoidale filed a petition to challenge Schall. *Id.* The Senate’s Committee on Privileges and Elections reviewed information for several months before issuing a report to the full Senate that the petition be dismissed. *Id.* The Senate on February 7, 1933, agreed by voice vote that Schall had been duly elected. *Id.*

The United States Senate has also 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*.

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 was 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 Election. The Committee subsequently 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. Among the disputed ballots were a number of ballots in which the voters had apparently copied and submitted a sample ballot that had been previously featured in local newspapers that showed 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.* 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.*

There is no provision within the United States Constitution that limits the time frame in which the Senate can review the qualifications of one of its members such as Senator Franken. Further, any individual citizen could submit a challenge in the United States Senate concerning the qualifications of Senator Franken.

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 would 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 the ballots contained ballot preferences in favor of Coleman - how could members of the Senate faithfully judge in an impartial manner whether those ballots were initially properly rejected?

Members of Coleman's political party would be accused of engaging in brazen partisanship if they decided that all of the ballots that were not notarized should now be counted by the Senate. Conversely, members of Franken's party would likely be accused of the same type of brazen partisanship if they decided that the same ballots that were not notarized now never be counted by the Senate. If the rejected sealed absentee ballots in the possession of Ramsey County are counted independently and prior to the explicit direction of the Senate; the ability of the Senate to independently and faithfully discharge its duties will be severely compromised.

Counsel for KSTP may attempt to argue that this harm is all conjecture given that Coleman has indicated on numerous occasions that he will not challenge the election contest in the Senate. While counsel for KSTP may very well be right in his assessment that Coleman will never challenge the election contest in the Senate, the issue is not limited to the particular 2008 Senatorial election but rather what should be the rule of law going forward in all elections in Minnesota for federal office. If the Court adopts the argument of KSTP, this Court will have potentially opened up Pandora's Box and leave open the possibility that the power of the Senate will be usurped. Any time there is an election contest for a federal office in which there is a recount in the future in Minnesota, what would prevent the candidate who does not get the election certificate from demanding that all rejected absentee ballots be opened for full public disclosure? Furthermore, what would prevent an ardent supporter from filing a challenge in the United States Senate.

Adoption of the rule suggested by KSTP in this matter has the potential to usurp the authority of the United States House of Representative and the United States Senate as all rejected ballots by state election officials could be opened prior to the Senate or House having an opportunity to initially weigh in on the merits of whether the ballots should be opened. While usurping the authority of the Senate *may* not occur in this election dispute, this Court should avoid opening the door to such a conflict when reading and applying the statute as written avoids any possibility of conflict with the Senate.

Accordingly, in the present case treating the rejected absentee ballots as nonpublic and private data shows proper deference to the United States Senate.

III. Voter Privacy as to Rejected Absentee Ballots Will be Lost If the Court Defines Rejected Absentee Ballots as Public Data

Voter privacy concerning absentee rejected ballots will be permanently lost if this Court determines that rejected absentee ballots constitute public data subject to disclosure to the public.

The right to secrecy regarding the manner in which a voter casts a ballot in a general election is sacrosanct. *Burson v. Freeman*, 504 U.S. 191, 207-209 (1992)(Discussing the importance of securing secrecy of the ballot in our democracy); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)(The “right to vote freely for the candidate of one’s choice is of the essence of a democratic society.”). The right to secrecy is not undermined by the fact that an absentee ballot is cast, as opposed to a ballot cast at a public polling place.

The purpose and intent behind absentee voting legislation is the preservation of the enfranchisement of qualified voters, the preservation of the secrecy of the ballot, the prevention of fraud, and the achievement of a reasonably prompt determination of the election result.

In the Matter of Contest of School Dist. Election Held on May 17, 1988, 431 N.W.2d 911, 913 (Minn. Ct. App. 1988)(Citing *Bell v. Gannaway*, 227 N.W.2d 797, 802 (1975)(emphasis added). See also, *Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. Ct. App. 1986)(Describing the “inviolable secrecy of the ballot”); see generally, Minn. Stat. §204C.17 (Secrecy of ballots).

KSTP acknowledges that voter privacy is an important fundamental right in society. KSTP has steadfastly maintained that it is not their intention to pierce the secrecy that surrounds the ballot or to infringe upon voter privacy in this action. However, there is no way that secrecy of the ballot or voter privacy can be protected if this Court adopts the interpretation advanced by KSTP.

If this Court construes the Data Practices Act to allow KSTP to obtain a copy of all rejected absentee ballots as public data then it logically follows that any individual or

entity could obtain just one rejected absentee ballots as it would constitute public data, what is to prevent a subsequent entity or individual from requesting a single rejected absentee ballot? The answer is nothing; nothing would prevent a subsequent entity or individual from requesting and obtaining a single rejected absentee ballot if the Court adopts the reasoning urged by KSTP. Accordingly, if the Court accepts the statutory construction advanced by KSTP, the voter preferences of all of the individuals who submitted a rejected absentee ballot would be at risk of disclosure.

KSTP may argue, as it did before the Court of Appeals, that this problem could simply be solved by not allowing a request for one rejected absentee ballot as the request is so narrow that disclosure of voter preference would necessarily be disclosed.

However the approach suggested by KSTP doesn't adequately resolve the issue but rather further begs the question as to when Ramsey County could decline to answer a Data Practices Act request.

For example, what happens if an entity requests five rejected absentee ballots? Should Ramsey County examine all five of rejected absentee ballots to ensure that the five individuals did not all vote for the same candidate? If Ramsey County election officials do not verify that the individuals did not all vote for the same candidate and it turns out that all of the individuals voted for the same candidate, are Ramsey County election officials exposing themselves to potential liability?

While the statistical probability of the rejected absentee voters all voting for the same candidate decreases with the number of rejected absentee voters, if an entity requests twenty rejected absentee ballots, must Ramsey County review the actual ballots to ensure that all of the individuals did not attempt to vote for the same candidate?

What if an entity submits multiple requests to Ramsey County for rejected absentee ballots? Can Ramsey County deny the subsequent requests on the grounds that the information could be potentially harvested in a manner that would reveal the candidate the individual attempted to vote for in the election?

The Data Practices Act defines a person's vote as nonpublic and private data that is beyond the reach of the public. Interpreting the Data Practices Act to eliminate any

opportunity for mischief that might occur by having individuals or entities seek to find out the preferences of individuals ensures the sanctity of the secret ballot in Minnesota. This Court should therefore affirm the decision of the Court of Appeals.

IV. The Public Will Not Learn Anything New About Why the Rejected Absentee Ballots Were Rejected If the Court Defines Rejected Absentee Ballots as Public Data

While weighing public policy concerns should not factor into the decision of this Court for the reasons discussed above, this Court should know that there is no merit to the public policy concerns raised by KSTP in this matter. The public has always had and continues to have information concerning how government officials made decisions concerning the rejected absentee ballots in the United States Senate Election Contest between Coleman and Franken.

All information related to why the rejected absentee ballots were not counted prior to certification by Governor Pawlenty is on the outside of the envelope that contains the rejected absentee ballots. The reasons why the absentee ballots in question were not counted by election officials has been thoroughly litigated. All information concerning how the election officials made the decision not to count the rejected absentee ballots has been and will remain in the public domain. KSTP has always had access to this information. There is nothing preventing KSTP from communicating, airing or publishing information to the public on any of these topics.

The only information that will be “learned” by the public if the rejected absentee ballots are opened is how many additional votes Coleman and Franken would have received had the rejected absentee ballots been properly cast. This new information is of no consequence as none of the decision makers in this matter have seen the contents of the rejected absentee ballots.

Disclosing the contents of the rejected absentee ballots will not shed light as to why election officials initially rejected the absentee ballots because election officials have never seen the contents of the rejected absentee ballots.

Disclosing the contents of the rejected absentee ballots will not shed light as to why judicial officials made the decisions they did prior to issuing their respective judicial decisions because no judicial official has seen the contents of the rejected absentee ballots.

Disclosing the contents of the rejected absentee ballots will not shed light as to why Governor Pawlenty made the decision to sign the election certificate as he has never seen the contents of the rejected absentee ballots.

No public interest will be served if the rejected absentee ballots that were illegally cast are subsequently tabulated and an unofficial vote total is published by KSTP. The public has all the information it needs to be able to assess whether rejecting the absentee ballots was properly done. Further, as discussed above, publishing an unofficial vote total could interfere with the ability of the United States Senate to properly discharge its duties.

This Court should therefore find that there is no public policy that supports finding that rejected absentee ballots are public data.

CONCLUSION

On the basis of the foregoing arguments, this Court should find that:

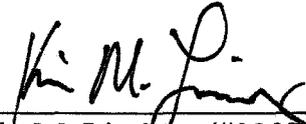
1. The Data Practices Act is clear and explicit that rejected absentee ballots are nonpublic and private data until the ballots have been opened by an election judge;
2. Minnesota Courts are bound by substantial precedent that they may not add additional language to a statute that is unambiguous;
3. Adopting the construction urged by KSTP may result in infringing upon the ability of the United States Senate to faithfully execute his duties and obligations in determining the qualifications of its members under Art. 1, § 5 of the United States Constitution;
4. Adopting the construction urged by KSTP could result in the sanctity of voter privacy concerning rejected absentee ballots being lost as anyone could request a single rejected absentee ballot; and

5. No public policy would be served by adopting the construction urged by KSTP as all of the information related to why the rejected absentee ballots is already in the public domain and accessible to KSTP.

This Court should affirm the decision of the Court of Appeals as the rejected absentee ballots in the possession of Ramsey County are nonpublic and private data.

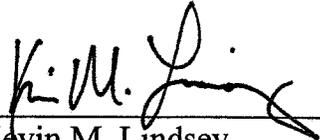
Dated: 12/21/2010

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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 5,639 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