

NO. A12-0920

**STATE OF MINNESOTA
IN SUPREME COURT**

League of Women Voters Minnesota;
Common Cause, a District of Columbia
nonprofit corporation; Jewish Community
Action; Gabriel Herbers; Shannon Doty; Gretchen
Nickence; John Harper Ritten; and Kathryn Ibur,

Petitioners,

vs.

Mark Ritchie, in his capacity as Secretary of
State of the State of Minnesota, and not in his
individual capacity,

Respondent.

**BRIEF AND APPENDIX OF *AMICUS CURIAE*
CITY OF SAINT PAUL IN SUPPORT OF PETITIONERS**

SARA R. GREWING, No. 0327803
City Attorney
GERALD T. HENDRICKSON, No. 0043977
Deputy City Attorney
400 City Hall and Court House
15 West Kellogg Boulevard
Saint Paul, MN 55102
Sara.Grewing@ci.stpaul.mn.us
(651) 266-8710

Counsel for Amicus Curiae City of Saint Paul

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

INTEREST OF THE AMICUS 1

ARGUMENT 2

 I. THE GOVERNOR VETOED SECTION 2 OF H.F. 2738 2

 A. The Particular Title Has Been Vetoed 2

 B. The Particular Question Has Been Vetoed 4

 C. If the Amendment Appears on the Ballot, the Court must
 Determine How it Is Submitted to the Voters 7

 II. VOTERS WILL BE UNAWARE THAT THE PROPOSED
 AMENDMENT COULD STRIP CERTAIN CITIZENS OF THEIR
 CONSTITUTIONAL RIGHT TO VOTE 7

 A. Voters Without Current Valid Identification 8

 B. Voters Required to Vote via Absentee Ballot 9

 C. The Ballot Question Problem 11

 III. BEING UNAWARE OF THE PROVISIONAL VOTING MEASURE,
 VOTERS CANNOT ACCURATELY WEIGH THE COSTS OF THE
 PROPOSED AMENDMENT 11

 IV. THE BALLOT QUESTION AND PROPOSED AMENDMENT ARE
 AMBIGUOUS WHICH COULD LEAD TO PRECINCTS
 INTERPRETING THE MEASUREMENT DIFFERENTLY 12

CONCLUSION 14

CERTIFICATE OF COMPLIANCE AND SERVICE 15

INDEX TO THE APPENDIX 16

TABLE OF AUTHORITIES

Constitution and Statutes

| | |
|---|------|
| Minn. Const. art. IV | 3 |
| Minn. Const. art. IX | 5, 7 |
| Minn. Const. art. V | 3 |
| Minn. Stat. § 201.061, subd 3(4) | 8 |
| Minn. Stat. § 203B.17 | 9 |
| Minn. Stat. § 203B.21 | 9 |
| Minn. Stat. § 203B.24 | 9 |
| Minn. Stat. § 204B.36 | 6, 7 |
| Minn. Stat. § 204B.44 | 1 |
| Minn. Stat. § 204D.11 | 5, 6 |
| Minn. Stat. § 204D.15 | 2-6 |
| Minn. Stat. § 3.20 | 5 |
| 1985 Minn. Sess. Law Serv. Ch. 72 (H.F. 759) (West) | 9 |

Cases

| | |
|--|-------|
| <i>Breza v. Kiffmeyer</i> , 723 N.W.2d 633 (Minn. 2006) | 2, 11 |
| <i>State ex rel. Marr v. Stearns</i> , 72 Minn. 200, 75 N.W. 210 (1898) | 11 |
| <i>State v. Duluth & N.M. Ry. Co.</i> , 102 Minn. 26, 112 N.W. 897 (1907) | 2, 11 |

Rules

2011 Minn. R. 8250.0365 5

Other Authorities

Att’y Gen. Op. 213-C (March 9, 1994) 4

PRELIMINARY STATEMENT

The City of Saint Paul submits this brief as *amicus curiae* to urge the Court to strike the ballot question pertaining to the Voter Identification and Provisional Ballot Amendment, Chapter 167, House File 2738, of the 2012 Session Laws, from the November 2012 election ballot.

The Court has original jurisdiction in this action pursuant to Minn. Stat. § 204B.44(a), (b) and (d). *See* Pet'r's Br. 7.

INTEREST OF THE AMICUS

The City of Saint Paul ("City") is the capital city of Minnesota, the second largest city in the state, with over 213,000 eligible voters.¹ At the outset, the City, through its officials with the Ramsey County Elections division, is not empowered to put a vetoed question before the voters. Section 2 of H.F. 2738—which was ordinary legislation directing a particular form of ballot title and question, thereby amending other statutes—was vetoed by the governor. The result of the veto was to make ineffective both the title as well as the question. The City is, therefore, powerless to put the vetoed measure before its voters.

In addition, the City opposes the question as worded because it could strip voters of their constitutional right to vote, force the City to spend substantial tax dollars to implement provisional voting programs, and precincts could interpret the confusing and ambiguous

¹Pursuant to Minnesota Rule of Civil Appellate Procedure 129.03, Counsel certifies that this brief was authored by Counsel for amicus curiae City of Saint Paul, with the assistance of law clerk Bryan Morben. No person or entity other than the City made any monetary contribution to the preparation or submission of this brief.

measure in different ways leading to inconsistent application of which citizens are allowed to exercise their constitutional right to vote.

ARGUMENT

I. THE GOVERNOR VETOED SECTION 2 OF H.F. 2738.

The form and manner of submitting a constitutional amendment to the people is left to the judgment and discretion of the legislature. *See State v. Duluth & N.M. Ry. Co.*, 102 Minn. 26, 112 N.W. 897 (1907); *Breza v. Kiffmeyer*, 723 N.W.2d 633, 634 n. 2 (Minn. 2006). The legislature exercised its judgment and decided to proceed by way of ordinary legislation on the form and manner of submitting an amendment. Subdivision 2 of H.F. 2738 sought to amend that ordinary legislation, and is thereby subject to the governor’s veto.

A. The Particular Title Has Been Vetoed.

The legislature proposed the so-called “Photo ID Amendment” through the two houses’ enactment of a bill, H.F. 2738. The bill contained two sections: section 1 was the text of the proposed constitutional amendment; and section 2 contained two subsections directing that a particular form of ballot be submitted to the people. Section 2(a) required a particular question purporting to summarize the proposed amendment. Section 2(b) required a particular title.

But when the legislature passed H.F. 2738, there was an existing statute (ordinary legislation) governing the subject of ballot titles for constitutional amendments. Minnesota Statute Section 204D.15, subdivision 1 provides, in part:

Titles for constitutional amendments. The secretary of state shall provide an appropriate title for each question printed on the pink ballot. The title shall be approved by the attorney general, and shall consist of not more than one printed line above the question to which it refers.

In other words, when H.F. 2738 was passed, there was already a law in the books delegating to the secretary of state and the attorney general responsibility for choosing the title of a constitutional amendment. Section 2(b) of H.F. 2738 was an amendment—by ordinary legislation—to Minn. Stat. § 204D.15.

On April 5, 2012, the revisor of statutes presented H.F. 2738 to the governor. A 1. On April 9, 2012, the governor vetoed and returned H.F. 2738. A 2 - 4. Before it adjourned, the legislature did not act to override the governor's veto. Because the governor vetoed this ordinary legislation, section 2(b) has no legal force and effect.

The Minnesota Constitution empowers the governor to veto this ordinary legislation. Article IV, section 24 provides: "Each order, resolution or vote requiring the concurrence of the two houses except such as relate to the business or adjournment of the legislature shall be presented to the governor and is subject to his veto as prescribed in case of a bill." The phrase "as prescribed in case of a bill" refers to Article IV, section 23, which provides that "[e]very bill . . . shall be presented to the governor." The governor has the right to veto a bill and "shall return it with his objections to the house in which it originated." Consistent with these two provisions, section 4 of Article V provides that the governor "shall have a negative upon all laws passed by the legislature, under such rules and limitations as are in

this Constitution prescribed.” As a result, there can be no question regarding the governor’s power to veto the ordinary legislation in section 2(b) of H.F. 2738.

The attorney general confronted this very issue in Opinion 213-C dated March 9, 1994, concerning a bill containing both a constitutional amendment and ordinary legislation. The attorney general opined that the proposed amendment itself could not be vetoed, but that the governor maintained his “constitutional authority” to approve or veto ordinary legislation within the same bill. “Indeed, we can conceive of no rational basis upon which to conclude the constitutional drafters would have intended to permit the legislature to insulate general legislation from exposure to veto simply by including it in a bill containing an amendment proposal.”

Since section 2(b) is ordinary legislation, which the governor vetoed and the legislature failed to override that veto, the legislature’s effort to amend Minn. Stat. § 204D.15 through § 2(b) is entirely ineffective. If the Court decides that the amendment should appear on the ballot, the secretary of state should provide the title, subject to approval by the attorney general.

B. The Particular Question Has Been Vetoed.

The legislature not only purported to designate a particular title to appear on the ballot for the proposed amendment, but also purported to designate a particular question to be posed to the voters.

The City is not aware of the origins of the custom of presenting a summary question to the electorate, rather than the text of the amendment itself. In fact, the plain words of the

constitution suggest that the amendment itself—not a legislatively-drafted summary—be submitted to the people. The second sentence of Article IX, section 1 commands: “Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval or rejection at a general election.” The phrase “Proposed amendments shall be . . . submitted” suggests that the amendment itself—not a question carefully crafted by the legislative advocates purporting to summarize it—should go to the voters.

To the same effect is Minn. Stat. § 3.20, which provides:

Every act for the submission of an amendment to the Constitution shall set forth the section as it will read if the amendment is adopted, with only the other matter necessary to show in what section or article the alteration is proposed. It shall be submitted and voted upon at the next general election as provided by the law relating to general elections[.]

In other words, the legislature is to adopt proposed text with reference to articles and sections. How the amendment is to be submitted to the voters is to be governed by “the law relating to general elections,” which is found in the detailed statutes that constitute the Minnesota Election Code.

The Code expressly grants the secretary of state authority to promulgate regulations, which must be followed by county auditors when they prepare the ballot, and to regulate the form of the ballot for constitutional amendments. *See* Minn. Stat. §§ 204D.11, 204D.15, subd. 2. Pursuant to this statutory grant of authority, the secretary of state has promulgated regulations regarding the form of the ballot, including for proposed constitutional amendments. For example, Rule 8250.0365, subpart 1 provides: “The [pink] ballot for

constitutional amendments must be prepared in the same manner as the white ballot, except as provided in this part.”

How questions are to be submitted to the voters is covered by Minn. Stat. § 204B.36, which suggests that it is the election officials (the secretary of state, in the case of a statewide question), not the legislature acting without the governor, who have authority to prepare the question. Minn. Stat. § 204B.36, subd. 3 directs: “When a question is to be submitted to a vote, a concise statement of the nature of the question shall be printed on the ballot.” Because the secretary of state has jurisdiction over the form of the pink ballot, and because state law explicitly confers on the secretary of state the authority to provide the amendment title, it is logical that the secretary of state also has the authority to craft the statutorily-required “concise statement of the nature of the question.”

Although custom and practice seem to be to the contrary, the important legal issue remains: whether the form of the concise question—as opposed to the proposed amendment itself—is ordinary legislation subject to a governor’s veto. To the City’s knowledge, this issue is a matter of first impression in Minnesota.

While there is no case on point, logic dictates that section 2 of H.F. 2738 as distinct from the amendment itself, was ordinary legislation. Section 2 directs a particular form of ballot title and question, thereby amending Minn. Stat. §§ 204D and 204B.36. Section 2 thereby purports to amend the Minnesota Election Code. Like other ordinary legislation, H.F. 2738 was a bill and was presented to the governor. At least as to section 2, the governor “shall have a negative,” which he exercised in his April 5, 2012 veto. The City further

submits that the governor's veto is effective not only as to the title, but to the question as well.

C. If the Amendment Appears on the Ballot, the Court must Determine How it Is Submitted to the Voters.

If the Court determines that the proposed amendment should appear on the ballot, but that the governor's veto of the legislature's question was effective, the issue arises as to how the amendment should be submitted to the people.

Consistent with Minn. Stat. § 204B.36, the Court could leave it to the secretary of state to prepare a "concise question." If the question prepared by the secretary were unreasonable or misleading, that could be challenged in a court of law.

Alternatively, in this case of first impression and in these unusual circumstances, it would be fair and equitable for the Court to order that the full text of the amendment be "submitted" to the people in compliance with Article IX. The text of the amendment could be followed by a neutral question, such as: "Should this proposed amendment to the Minnesota Constitution be ratified?"

II. VOTERS WILL BE UNAWARE THAT THE PROPOSED AMENDMENT COULD STRIP CERTAIN CITIZENS OF THEIR CONSTITUTIONAL RIGHT TO VOTE.

Two main classes of Saint Paul voters are adversely affected by the provisions of the proposed amendment: 1) voters without a valid, government-issued ID card who are not currently registered to vote at their address of residence, and 2) voters who need to vote by using an absentee ballot.

A. Voters Without Current Valid Identification.

There are numerous groups of citizens that do not have a form of government-issued identification that would be valid under the proposed amendment. Some of these groups include elderly voters who no longer drive, students at private colleges who do not have a Minnesota driver's license, people who do not have a stable residence from which to apply for a driver's license or state ID card, homeless and other individuals with sporadic or no residence at all, and low income persons who cannot afford to obtain a government-issued photo ID.

Currently, these voters are permitted to register, vote, and have their ballot counted along with all other ballots cast by using a voucher, as provided in Minn. Stat. § 201.061, subd 3(4). If the amendment is adopted, these voters would be required to cast a provisional ballot or not be allowed to vote at all. In the most recent presidential election, 4,343 Saint Paul residents voted by using a voucher. *See* E-mail from Joseph Mansky, Ramsey Cnty. Elections Manager (June 8, 2012, 11:39 AM) (on file with author). It is estimated that approximately 8,000 voters have to use this method in Ramsey County alone. *Id.* Finally, according to the Minnesota Secretary of State's Office, it is estimated that the proposal would affect nearly 5,300 total voters in Saint Paul and more than 215,000 current voters state-wide. *Estimate of Registered Voters Lacking Valid or Current ID*, Office of the Minn. Sec'y of State (Jan. 5, 2012), <http://www.sos.state.mn.us/index.aspx?page=1709>.

These voters will be unable to vote or will be required to vote using a provisional ballot. A provisional voting system is not an effective way to allow citizens to vote, since

approximately one-third of provisional ballots cast in states that employ such a system already are never counted. *See* Petr’s Br. 13. Under a similar law in Indiana (which the proposed Minnesota amendment is based upon), only 13% of the provisional ballots cast in the 2008 presidential election were ever counted. *See* Mansky, 6/18/12 (12:06 p.m.) email (on file with author). Likewise, in Michigan, the state with election laws most similar to Minnesota, only 48% in 2008 and 39% in 2010 of the provisional ballots cast were ever counted. *Id.* The provisional ballot system simply creates a regime where citizens are deprived of their constitutional right to vote and have their vote actually counted.

B. Voters Required to Vote via Absentee Ballot.

Absentee voting is a challenge for many voters under the best of circumstances. For Minnesotans who find themselves on active duty with the armed forces, or working, volunteering, or studying abroad, the smallest barrier can prove to be an insurmountable obstacle to exercising their right to vote while away from home. The “substantially equivalent” language of the proposed amendment would revoke the ability of overseas and military voters to self-certify their absentee ballots without having to find an authorized witness to whom the appropriate documents could be shown before voting. *See* Minn. Stat. §§ 203B.17, subd 2(f), 203B.21, subd 3(6), 203B.24, subd 1. The very reason that the legislature enacted the self-certification methodology in the Laws of 1985, Chapter 72- H.F. No. 759 for voters serving in the armed forces or residing overseas was to eliminate this unnecessary obstacle.

In presidential elections, more than 2,000 Ramsey County residents who reside overseas or are serving in the armed forces typically attempt to vote by absentee ballot. *See* Mansky, 6/18/12 (12:06 p.m.) email (on file with author). In 2008, more than 1,200 Saint Paul voters were in one of these circumstances. *Id.* These numbers of affected voters, while appearing small at first, have enormous impacts. Multiple important races in Saint Paul have been decided by very narrow margins, including: the 2001 contest for mayor—decided by 403 votes; the 2011 contest for council member in ward five—decided by 36 votes; and the 2008 statewide election for U.S. Senator—decided by a total of 312 votes. *Id.* (June 8, 2012, 11: 39 AM).

The difficulties of voting by absentee ballot already prevent nearly 20% of these voters from returning a ballot that can be counted. *Id.* (June 8, 2012, 12:06 PM). This problem is especially acute among voters serving in the armed forces, where nearly 30% of the ballots sent by the Elections Office of Ramsey County are never returned or are returned in a manner that prevents them from being counted. *Id.*

As more procedural hurdles are placed in front of voters that are far removed from the state, the greater the chance that even a small mistake has a catastrophic result. This is magnified by the fact that an absentee voter does not get to participate in the provisional voting process. The effect is to take away from our service members the democratic freedom that they are away fighting for.

C. The Ballot Question Problem.

The ballot question as it is currently worded does not mention provisional ballots or the change to absentee voters. As a result, the proposed amendment will invoke changes to the Constitution that the ballot question does not refer to at all. In fact, the ballot question only refers to a single change the proposed amendment would make: that a photo ID would be required to vote in person. In fact, the question does not even accurately state that issue, as the photo ID has to be government-issued. This issue is more than the ballot question being fairly worded; it is a problem of the question deceiving voters except for those who divest into the exact wording of the proposed amendment. The “clear and essential purpose of the proposed amendment” is not “fairly expressed in the question submitted.” *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006) (quoting *State ex rel. Marr v. Stearns*, 72 Minn. 200, 218, 75 N.W. 210 (1898)). Since the language is “unreasonable and misleading” at best, the question should be struck from the ballot. *Id.* (quoting *State v. Duluth & N.M. Ry. Co.*, 102 Minn. 26, 30, 112 N.W. 897 (1907)) (internal quotations omitted).

III. BEING UNAWARE OF THE PROVISIONAL VOTING MEASURE, VOTERS CANNOT ACCURATELY WEIGH THE COSTS OF THE PROPOSED AMENDMENT.

Since the current ballot question does not inform citizens that those without valid identification will, at best, be subjected to casting a provisional ballot, voters cannot make an educated decision about whether the costs of implementing such a program will outweigh the benefits received from it.

In fact, the estimated costs of implementing a provisional voting program in Saint Paul for the 2013-2014 biennium is \$207,000. E-mail from Joseph Mansky, Ramsey Cnty. Elections Manager (June 8, 2012, 12:06 PM) (on file with author). The estimated costs for Ramsey County could exceed \$1,700,000. *See* Board of Ramsey County Commissioners, Impact of Proposed Constitutional Amendment Relating to Voting Rights (P 23) Available at co.ramsey.state.mn.us; accessed 6/14/2012. Creating a state-wide system could cost \$40 million initially, plus another \$3 to 4 million each election year thereafter. Pet'r's Br. 14.

These are devastating numbers to deal with in a time of extreme budget crises for many. These costs will undoubtedly be incurred by the voters, who will be voting to reallocate their taxes to implement a system without even knowing about it.

IV. THE BALLOT QUESTION AND PROPOSED AMENDMENT ARE AMBIGUOUS WHICH COULD LEAD TO PRECINCTS INTERPRETING THE MEASUREMENT DIFFERENTLY.

There are several different provisions in the proposed amendment that leave the City, and other precincts, to the difficult task of trying to interpret exactly what the legislature meant. This creates the potential problem of different precincts interpreting the measures differently, which may have the effect of allowing substantially similar voters to be allowed to cast a ballot in one location and not another.

First, it is not completely clear what exactly qualifies as a “government-issued” ID. It is obvious that a Minnesota driver’s license or state identification card will be valid. It is not clear whether ID cards issued by the state’s colleges and universities—especially private institutions—will qualify. It is also questionable whether military ID cards or government

issued driver's licenses from other states will suffice. Furthermore, the ballot question only requires "valid photo identification" to vote, which will undoubtedly cause some voters to think that non-government-issued IDs will work.

Second, the proposed amendment is unclear as to how provisional ballots will be certified. This issue needs to be decided before the measure is sent to the voters in order for the City to implement any system, and to protect the constitutional right of citizens who do not have valid identification to cast votes.

Finally, the legislature did not define what constitutes "substantially equivalent" verification for those not voting in person. Presumably, absentee voters will need a witness to certify their identification. But different voters may then be subjected to different identification scrutiny. It is unfair to voters, especially those who this provision will affect, to not include this information in the ballot question.

Sending the proposed amendment back to the legislature for clarity would harm no one. The legislature could revise the question to accurately describe the proposed amendment, or correct the amendment to match the question.

On the other hand, the harm to the voters in voting on a question that is ambiguous and leaves out important facts by not accurately describing the proposed changes to the constitution is substantial. A citizen's fundamental right to vote should not be altered or restricted based upon an amendment that does not clearly define the changes that will be effected or the costs taxpayers will bear.

CONCLUSION

The City of Saint Paul respectfully urges the Court to find in favor of the Petitioners and send the so-called "Photo ID Amendment" back to the Minnesota Legislature for a lawful veto override and/or further legislative clarification.

Dated: June 18, 2012

CITY OF SAINT PAUL



SARA R. GREWING, (#0327803)

City Attorney

GERALD T. HENDRICKSON, (#0043977)

Deputy City Attorney

400 City Hall and Court House

15 West Kellogg Boulevard

Saint Paul, MN 55102

Sara.Grewing@ci.stpaul.mn.us

(651) 266-8710

Counsel for Amicus Curiae City of Saint Paul

CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the work limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using WordPerfect Office 12, which reports that the brief contains 3511 words.

I hereby certify that on June 18, 2012, I caused the foregoing brief to be served upon all counsel of record via email and by depositing a true and correct copy thereof in the United States mail at Saint Paul, Minnesota, properly enveloped with postage prepaid.



Karin E. Anderson, Paralegal