

A08-2169
**STATE OF MINNESOTA
IN SUPREME COURT**

Norm Coleman, et al.,

Petitioners,

v.

Mark Ritchie, Minnesota Secretary of
State, et al.,

Respondents,

Al Franken for Senate and Al Franken,

Intervenor-Respondents

**MEMORANDUM OF AL FRANKEN
FOR SENATE AND AL FRANKEN IN
OPPOSITION TO PETITIONERS'
MOTION FOR EMERGENCY ORDER**

INTRODUCTION

Intervenor-Respondents Al Franken for Senate and Al Franken (the “Franken Parties”) oppose Petitioners’ Motion for an Emergency Order on both procedural and substantive grounds. As a procedural matter, Petitioners’ motion must be denied because the Court’s jurisdiction pursuant to Minn. Stat. § 204B.44 ended when the Court issued a final order on December 18, 2008. To the extent that Petitioners’ motion is construed as a request for rehearing of its original Petition, that request is untimely under Minn. R. Civ. App. P. 140.01.

Substantively, the motion is without a proper legal basis. Pursuant to this Court’s December 18 Order, the parties reached agreement regarding a reasonable process for identifying absentee ballots rejected in error that all agreed should be counted. That

process has been followed in good faith by local election officials throughout the state, working long hours over the holiday season under extraordinarily tight deadlines at significant expense, and it is nearly complete. Now in this, their third “emergency” application to this Court in as many weeks, Petitioners ask this Court to intervene to delay the conclusion of the recount and canvass, which is now only three days from completion, and to start all over again. There is no good reason to do so.

Petitioners’ complaint amounts to nothing more than disappointment with the likely result of the election as foreshadowed in the preliminary recount results. To the extent Petitioners believe any absentee ballot should be counted that has not been counted, their remedy lies in a different forum.

FACTUAL BACKGROUND

The Petition that underlies the instant motion concerned the counting of absentee ballots cast in the November 4, 2008, election for the office of United States Senator. As this Court has recognized, Minn. Stat. § 203B.12, subd. 2, sets forth the requirements for a valid absentee ballot:

- (1) the voter’s name and address on the return envelope are the same as the information provided on the absentee ballot application;
- (2) the voter’s signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;
- (3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and

- (4) the voter has not already voted at that election, either in person or by absentee ballot.

The statute further and expressly provides that “there is no other valid reason for rejecting an absentee ballot.” (*Id.*; *see* Order, December 18, 2008 (“slip op.”) at 3.)

On November 18, 2008, the State Canvassing Board directed the Minnesota Secretary of State to oversee an administrative manual recount of all votes cast for the office of United States Senator from Minnesota. During the recount, Deputy Secretary of State Jim Gelbmann testified before the State Canvassing Board that there were an estimated 12,000 rejected absentee ballots and that, of that number, a review by local election officials throughout the state had identified approximately 13%, or about 1600 ballots, that had been rejected in error. (Affidavit of Kevin J. Hamilton (“Hamilton Aff.”) ¶ 4.)

To provide a mechanism for including the erroneously rejected absentee ballots in the recount, the State Canvassing Board recommended that local canvassing boards reconvene to identify and count those absentee ballots that election officials determined were erroneously rejected. (*Id.*) On December 12, 2008, however, Petitioners filed a petition in this Court pursuant to Minn. Stat. § 204B.44, seeking an order, *inter alia*, *prohibiting county election officials and county canvassing boards from counting any rejected absentee ballots*, notwithstanding their identification by election officials as having been wrongly rejected. (*Id.*)

In its December 18 Order, this Court determined that it had no authority to order election officials to count rejected absentee ballots but that “where the local election

officials and the parties agree that an absentee ballot envelope was improperly rejected, correction of that error should not be required to await an election contest in district court. *See Andersen v. Donovan*, 264 Minn. 257, 119 N.W.2d 1 (1962); Minn. Stat. § 204B.44 (2006).” (Slip op. at 2.) The Court ordered local election officials to identify for the candidates’ review those previously rejected absentee ballot envelopes that were not properly rejected. (Slip op. at 3.) The Court further directed that any absentee ballots so identified that the local election officials and the candidates agreed were rejected in error shall be opened and counted in the election for United States Senator. (*Id.*) These directions were repeated in an order issued by this Court on December 24, 2008 (“the December 24 Order”).

The Court further directed in the December 18 Order that, in reviewing previously rejected absentee ballot envelopes for the purpose of reaching agreement whether the ballot envelope was rejected in error, the parties were not to object for any improper purpose, such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation. (Slip op. at 4.) The Court warned the parties that sanctions could be imposed in the event of a subsequent election contest. (*Id.* at 4-5.)

Pursuant to the December 18 Order and the December 24 Order, the Secretary of State’s Office, local officials, and the two candidates, working well into the afternoon on Christmas Eve Day, agreed to a process, which Petitioners describe as the “Protocol.” As Petitioners admit, “[t]he Protocol reflected the parties’ good faith negotiation and agreement regarding the appropriate means to accomplish the Court’s mandate.” (Motion

for Emergency Order, at 2.) The Protocol was emailed to the parties and the members of the State Canvassing Board at 9:26 p.m. on December 24, 2008. (Hamilton Aff., Ex. A.)

Once the Protocol had been established, local officials in elections offices and county attorney offices throughout the state worked long hours throughout the holiday week to identify erroneously rejected absentee ballots and to furnish both candidates lists of ballots recommended to be opened and counted. (Hamilton Aff., ¶ 7.) By the close of business on Friday, December 26, 2008, the local officials' lists totaled approximately 1350 ballots, from 60 counties. At no point during this process did Petitioners object, suggest that the process to which they had agreed was flawed or incomplete, or even hint in any way that hundreds of additional ballots should be reviewed by the counties. (*Id.*)

The Protocol contemplated that, over the weekend of December 27-28, and prior to a meeting with the Deputy Secretary of State and the Recount Official scheduled for Monday, December 29, at 10:00 a.m., the two candidates would try to reach agreement on which ballots on the local officials' lists would be opened and counted. The Protocol further specified that ballots other than those on the local officials' lists would be considered only if the two candidates reached agreement on them, and notified the local officials of those additional ballots by 3:00 p.m. that day. This deadline was required so that local officials could prepare for "regional meetings" scheduled to commence the next day, December 30, at which the local officials and the candidates' representatives would review any ballots and any related documentation (such as voter registration cards or absentee ballot applications) relating to those ballots not previously agreed to by all three parties. (*Id.*, ¶ 8.)

By letter sent on Saturday, December 27, 2008, at 9:15 a.m., the Franken Parties proposed that the two candidates waive objections to the local officials' lists, waive the right to propose additions to the lists, and agree that *all of the* ballots on the lists could be opened and counted. (*Id.*, ¶ 9, Ex. B.) This proposal would have allowed the Secretary of State to move promptly to open and count the ballots identified by the local officials.

Petitioners did not respond. On the morning of Sunday, December 28, 2008, counsel for the Franken Parties, David Lillehaug, left messages for Petitioners' attorneys Fritz Knaak and Tony Trimble. That afternoon, both attorneys finally responded and flatly declined the Franken offer but refused to say more other than that a Coleman proposal would be forthcoming. (*Id.*, ¶ 10.)

It was not until 11:01 p.m. that Sunday night that Petitioners made their first and—to that point, only—proposal, which was to concede (but only conditionally) that a selected set of only 136 ballots had been erroneously rejected. The proposal purported to be an “initial listing,” and was conditioned upon and “subject to verification and review by the campaigns and county officials at the appropriate regional sorting locations.” (*Id.*, ¶ 11, Ex. C.) Furthermore, Petitioners stated that they wanted to add certain unidentified additional ballots, not on local officials' lists, for opening and counting. In the proposal, Petitioners referred to the Protocol as “the procedures agreed to by all parties on December 24, 2008,” and recognized that the Protocol required that any additions to the local officials' lists, be proposed, agreed to, and communicated to local officials by 3:00 p.m. on Monday, December 29, by adding: “We are also finalizing that list to be available for communication to local election officials by 3:00 p.m. tomorrow.” (*Id.*)

In response to Petitioners' list of 136 ballots, which was only 10% of the ballots identified on election officials' lists, Secretary of State Mark Ritchie sent an email at 9:29 a.m. the next day, asking whether additional names would be provided. Petitioners' response was terse: "Will advise." (*Id.*, ¶ 13, Ex. D.)

Thirty minutes later, as required by the Protocol, the Franken Parties' attorneys appeared at the State Office Building at 10:00 a.m. on Monday, December 29, for a meeting with officials from the Secretary of State's Office and Petitioners' attorneys. (Hamilton Aff., ¶ 14.) The purpose of the meeting was to negotiate an agreed-upon list of erroneously rejected absentee ballots that could then be presented to the counties. The counties could then forward the undisputed ballots to the Secretary of State. (*Id.*) Rather than negotiate, however, Petitioners simply reiterated their rejection of the Franken Parties' proposal to count all of the ballots identified by election officials as wrongfully rejected and indicated that they had a new proposal that was not yet complete. They advised that the proposal would be to count only an unidentified portion of the approximately 1350 ballots on the local officials' lists. In addition, they intended to propose that "hundreds" of ballots not on local officials' lists be added for re-review by election officials and the parties. Petitioners refused to provide any information about how their list of additional ballots was being compiled, pursuant to what criteria, or the reasons for delaying the production of the list until the very last moment. The meeting then recessed. The Deputy Secretary of State reminded Petitioners of the 3:00 p.m. deadline and directed the parties to return at 2:45 p.m. (*Id.*, Ex. E.)

Petitioners' attorneys appeared at the reconvened meeting shortly after 3:00 p.m.¹ At 3:08 p.m., Petitioners' office emailed to the Franken Parties a list of 654 ballots to be reviewed by election officials and the parties. (*Id.*, Ex. F.) All of the proposed additions had already been reviewed by local officials pursuant to the Protocol, and they had concluded that they were *not* erroneously rejected. These officials' decisions should be presumed to be correct, absent solid evidence to the contrary, yet Petitioners provided no evidence, much less compelling evidence, that any ballot on its list of 654 was rejected erroneously. Indeed, for the vast majority of these 654 ballots, Petitioners suggested only that the ballots be reviewed for "possible" error. Again, Petitioners would not explain how they had compiled the list, much less show that the reasons given by election officials for rejection of the ballots were erroneous.²

Upon cursory examination, Petitioners' list was a highly selective, cherry-picked list of rejected absentee ballots from areas in which Petitioner Coleman had received large vote margins on Election Day.³ Because it appeared that the list was an effort to

¹ Contrary to the summary included with Mr. Trimble's Affidavit, at no time did the parties agree tacitly or otherwise to extend the 3:00 p.m. deadline.

² Indeed, even now Petitioners appear to concede that there is no evidence with respect to about 90% of the 654. They state: "From the face of the ballot envelopes themselves, it appears that at least 67 of these [654] were in fact improperly rejected." (Trimble Affidavit, ¶ 4.) Moreover, it is not possible to confirm Mr. Trimble's statement with respect to even these 67 ballots because his affidavit does not specifically identify a single one of them.

³ The proposed 654 additions come primarily from areas where the votes already counted have heavily favored Coleman. For example, 94 are from Dakota County, which Coleman won by 8%. 64 are from the City of Plymouth, which Coleman won by 12%. Outer suburbs and exurbs where Coleman won by more than 20% are heavily

“game” the system, because it was untimely and because of the extreme burden it placed on local officials who had already been burdened with identifying and collecting material for regional review sessions that were—at that point—commencing in less than 24 hours, the Franken Parties objected to the list in its entirety. (*Id.*, ¶ 15.)

The Franken Parties then suggested that the parties agree, at least, to count: (a) the Coleman campaign’s initial list of 136 absentee ballots; (b) 130 ballots from Duluth that had been improperly rejected for lack of or incorrect signature dates (which is not a legal requirement); and (c) a list of 91 ballots in rural counties prepared by Deputy Secretary of State Gelbmann. (Hamilton Aff., ¶ 15.) Petitioners rejected the proposal out of hand. When Mr. Gelbmann again asked if the campaigns would agree to his list, so that rural auditors would not need to travel, Petitioners responded only that they would respond “later.” The meeting then adjourned without agreement. (*Id.*)

Later, in violation of the Protocol, Petitioners pressed the counties to add the ballots on Petitioners’ list of 654 proposed additions, to the counties’ lists of ballots rejected in error. At 4:29 p.m. on December 29, without agreement by the Franken Parties, Petitioners emailed to local officials the list of proposed additions. (*Id.*, ¶ 16, Ex. G.) Immediately, Mr. Gelbmann notified Petitioners that the proposed additions were precluded by the Protocol. (*Id.*, ¶ 17, Ex. H.) As a practical matter, it would be impossible for the local officials to deal with more than 600 new ballots at regional meetings to begin the next day. Later that evening, the Franken Parties objected to the

represented: 32 from Scott County; 31 from Carver County; 23 from Sherburne County; and 15 from Wright County. (Hamilton Aff., ¶ 19, Ex. G.)

proposed additions and advised local officials that they did not consent to opening and counting any of the ballots on the new list. (*Id.*, Ex. I.) Most local officials concluded that Petitioners' proposed additions were untimely. Not surprisingly, where local officials decided to re-review these ballots, the parties once again failed to agree that those ballots had been rejected in error. (*Id.*, ¶¶ 18, 22.)

After Petitioners rejected the Franken Parties' offer to waive additions and objections and to accept the local officials' lists, by letter timely sent on December 28, the Franken Parties requested that Petitioners agree that 85 ballots be added to the local officials' lists. (*Id.*, ¶ 20, Ex. J.) Petitioners did not respond. Unlike Petitioners' untimely proposal, the Franken Parties request was supported by affidavits from the voters themselves, or, in the case of voters whose ballots were rejected for lack of registration, evidence from the Secretary of State's database that the voters were, in fact, registered. In each instance, the affidavits had been prepared and submitted to local officials and the Coleman campaign in the weeks leading up to December 24, the date of the Protocol. Not one of them was submitted after that date.⁴ (*Id.*)

⁴ Thus, Petitioners' transparent attempt to cast the Franken Parties' proposal to count these ballots in the same light as the 654 "potential" ballots that Petitioners seek to add fails. The two situations are markedly different. The Franken Parties' proposal was made timely, was made repeatedly, and was supported by affidavits demonstrating that the ballots were, in fact, erroneously rejected. In contrast, Petitioners' cherry-picked list of 654 ballots was provided at, literally, the very last moment, in violation of the Protocol, and in a manner that made it practically impossible for the already overburdened local election officials to respond. Even more remarkably, Petitioners have never provided evidentiary foundation for the hundreds of ballots they speculate "might" have been improperly rejected.

Pursuant to the Protocol, regional reviews of the ballots on the local officials' lists commenced at 9:00 a.m. on Tuesday, December 29, 2008, and continued on Wednesday, December 30, and Friday, January 2, 2009. (*Id.*, ¶ 21.) As of noon today, almost all of the approximately 1350 ballots on the local officials' lists had already been reviewed, with less than ten remaining to be reviewed by the close of business on January 2, 2009. (*Id.*) The parties have agreed that more than 800 of the wrongly rejected absentee ballots on election officials' lists will be opened.

It is difficult to overstate the amount of time, energy, and resources that has been devoted by the counties to re-review the 12,000 rejected absentee ballots, to compile lists of those believed to be rejected in error, and to arrange for the regional meetings to review those absentee ballot envelopes and related materials. Both campaigns have devoted an enormous amount of time, energy, and resources to prepare lawyers and campaign staff, on extraordinarily short notice, to review these materials responsibly—all in reliance on this Court's Orders and the agreed-upon Protocol. (*Id.*, ¶ 23.)

The recount and canvass is finally nearing completion. The Secretary of State's Office has notified the parties that the opening and counting of the absentee ballots that local officials and the two campaigns have agreed were rejected in error will commence at 9:00 a.m. on Saturday, January 3, 2009. (Hamilton Aff., ¶ 24.) This notification complies with the December 18 Order and the December 24 Order, which require that the ballots be counted not later than January 4, 2009. The State Canvassing Board is scheduled to reconvene on Monday, January 5, 2009, to consider any challenges to the

newly-opened ballots, complete its canvass, and declare the result of the U.S. Senate election. (*Id.*, ¶ 25.)

ARGUMENT

I. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONERS' MOTION.

Petitioners' motion must be denied because the Court lacks jurisdiction over the proceeding. The original Petition in this matter was filed pursuant to Minn. Stat. § 204B.44. That statute is one of several that carefully carve out jurisdiction in the judicial branch to correct specific "errors and omissions" of participants in elections on an expedited basis. Because the Court's jurisdiction arises pursuant to statute, and not from its inherent appellate jurisdiction to review decisions of lower courts, statutory requirements must be strictly followed. *See* Minn. Const. art. VI, § 2 (court has "original jurisdiction in such remedial cases as are prescribed by law, and appellate jurisdiction in all cases."); *see, e.g., Blixt v. Civil Service Board*, 297 Minn. 504, 505, 210 N.W.2d 230, 231 (1973) ("Failure to both serve and file the petition for review within the time provided by statute deprives the district court of jurisdiction.").

The statute that governed the Petition filed in this matter requires the court to immediately schedule a hearing and issue an order directed to the party charged with the error. The statute then specifically provides: "The court shall issue its findings and a *final order* for appropriate relief as soon as possible after the hearing." Minn. Stat. § 204B.44 (emphasis added.) Thus, the statute contemplates that the matter will conclude with the issuance of a "final order." In this case, the Court issued its final order on

December 18, 2008. At that point, the matter concluded and the Court lost continuing jurisdiction. Accordingly, it no longer has jurisdiction to entertain motions seeking to alter its “final order.”

Any argument that the Court may entertain jurisdiction over the motion as an application for rehearing should be rejected. Although the Rules of Civil Appellate Procedure allow rehearing in the Supreme Court, an application for rehearing must be timely filed. Such a motion must be brought within ten days of filing of the Court’s order. Minn. R. Civ. App. P. 140.01. This period may be enlarged only pursuant to an order issued within the ten-day period. *Id.* In this case, the ten-day period expired on December 29, 2008, two days before the present motion was filed. Thus, even if Petitioners had styled their motion as a request for rehearing, it would have to be dismissed as untimely. Petitioners’ motion should, accordingly, be dismissed.

II. PETITIONERS’ EFFORT TO HAVE THE COURT REWRITE THE PROTOCOL THAT WAS AGREED TO AND FOLLOWED IN GOOD FAITH SHOULD BE REJECTED.

Petitioners’ motion should also be denied on substantive grounds for three reasons. First, although they attempt to cast the issue framed by their motion as involving inconsistent standards, their real complaint is that the Court’s December 18 Order requires that all three parties—election officials, the Franken Parties and Petitioners—agree before a rejected absentee ballot may be counted, and two of the three parties have not agreed to count rejected ballots that Petitioners want counted. But this is the standard that the Court imposed, and it must be followed. Any complaints about ballots as to which no agreement was reached can be, and indeed must be, raised in another forum.

Second, Petitioners' proposal would unnecessarily delay the outcome of the election in a manner that would not result in the counting of any additional valid votes. Third, Petitioners' complaint about the process to which they agreed comes far too late. After agreeing to the Protocol and participating in it, they cannot in fairness be permitted to assert after-the-fact objections to stall the completion of the recount and canvass. Petitioners' motion is barred by principles of equitable estoppel and laches.

A. The Court Directed Election Officials, the Secretary of State, Petitioners and the Franken Parties to Agree in Good Faith as to Which Rejected Absentee Ballots Should Be Counted; Now That They Have Done So, the Process Should Be Allowed to Reach its Conclusion.

The Court's December 18 Order required the parties to arrive at a process for determining which rejected absentee ballots should be counted by consent, and the parties did so by way of the Protocol. Local election officials all over the state have devoted a great deal of time, energy and resources on a very compressed schedule over the holiday season to comply with this process, which is now largely complete. That process must be allowed to reach a conclusion.

Indeed, Petitioners should be the *last* to criticize the process since it was created as a direct result of their demands. In their first Petition in this Court, Petitioners argued that the Court could not order election officials to count rejected absentee ballots. The Court accepted Petitioners' argument and concluded that it had no authority to order

officials to count any ballot. (Slip op. at 2.) Instead, those ballots could be counted only pursuant to the tripartite agreement of “county election officials and the parties.”⁵ (*Id.*)

Pursuant to the Court’s Order, the parties negotiated and arrived at a Protocol for reaching agreement on as many ballots as possible in the expedited fashion established by the Court. This procedure has been successful; a majority of the ballots identified as improperly rejected by election officials will be counted by agreement of the parties. Not even Petitioners contend otherwise. Accordingly, Petitioners’ request to shut down and *change* the process now that the end is in sight should be rejected and the process allowed to draw to a close in accord with the Court’s Order and the Protocol.

Although Petitioners complain about the exclusion of their proposed 654 additions to the Court-ordered review process, their complaint has nothing to do with any alleged flaw in that process; their complaint stems in large measure from their own untimely actions. The process required election officials to review all of the rejected absentee ballots to determine whether any had been wrongfully rejected. After conducting that review, election officials created lists that totaled approximately 1350 ballots that they believed had been wrongfully rejected. All of the remaining ballots that were not placed on the lists have already undergone repeated review by election officials in this process and have been determined to have been properly rejected pursuant to Minnesota law.

The parties, including Petitioners, arrived at a Protocol that allowed the two campaigns to add ballots to the election officials’ lists of approximately 1350 wrongly

⁵ The consensual resolution of disputes over “obvious errors” in the counting or recording of votes is permitted by Minn. Stat. § 204C.38.

rejected ballots, so long as the additions were proposed, *agreed to by both candidates*, and communicated to local officials by December 29 at 3:00 p.m. Petitioners failed to meet the deadline not only because they submitted their list after 3:00 p.m. on December 29, but also because the ballots on their list had not been shown to the Franken Parties prior to that time, let alone agreed to by both candidates as required by the Protocol. Indeed, rather than participate in discussions over any potential additions to the list, Petitioners instead simply refused to engage in such discussions throughout the weekend and waited until the last moment to reveal their carefully selected, cherry-picked list of absentee ballots, at a time when consideration, discussion or agreement over that list was a virtual impossibility. Given the amount of work required to “re-review” more than 600 ballots that have already twice undergone review by election officials, and Petitioners’ own delay, that deadline is more than fair and should be enforced.

Petitioners’ argument that exclusion of their proposed additional ballots might disenfranchise voters, similarly, cannot withstand scrutiny. There is no fundamental reason why officials should have to spend significant additional time reviewing these ballots a third time simply because Petitioners “might” have questions about them. Indeed, unlike the Franken Parties who supported their proposed additions of wrongfully rejected ballots with affidavits and supporting documentation from voters (and submitted those materials long in advance of the deadlines to allow local election officials time to consider them), Petitioners have presented not an iota of evidence to support a claim that even a single one of those more than 600 ballots was rejected wrongfully.

Moreover, this Court's Order did not include a provision permitting parties to cause election officials to re-review any ballots that they had already determined were properly rejected. The Court directed that the process begin with the identification by local election officials of previously rejected absentee ballots that they believed had been wrongfully rejected. (Slip op. at 3.) Then the Franken Parties and Petitioners were required to determine whether they agreed with the election officials' assessment. The Court did not suggest that the campaigns could require election officials to "re-review" ballots not on their initial list. The Court should decline Petitioners' invitation to revisit this issue and impose yet another burden on the local officials who, by and large, have performed tirelessly and admirably under great stress during a holiday season in which every governmental office in the state faces a budget crisis.

Similarly, Petitioners' complaint about "inconsistent standards" is simply a futile attempt to fit the recount process into a *Bush v. Gore* paradigm that has no application here. In reviewing rejected absentee ballots, election officials were instructed to apply the clear, uniform standards set out in Minnesota statutes. At no time during the negotiation of the Protocol did Petitioners propose that election officials (or the candidates, for that matter) needed more specific or detailed instructions regarding the applicable standards. Rather, Petitioners were content to allow all of the participating parties to use their own judgment about whether they should consent to counting a ballot. (And if Petitioners really believed that the local officials and the Franken Parties were applying inconsistent standards, Petitioners had the ultimate self-help remedy: refuse to consent to the opening and counting of the ballots that they considered were not being

treated uniformly.) Petitioners' complaint about "standards" simply has no application where the defining standard, as imposed by this Court, is the parties' "consent."⁶

Petitioners' complaints about the process notwithstanding, it is undisputed that *all* of the ballots have been reviewed by election officials at least twice to determine whether they were wrongly rejected: once on Election Day and at least once in connection with the Protocol. Many elections officials have reviewed the ballots multiple times. These rejected absentee ballots almost certainly must be the most scrutinized in the history of free elections.

At bottom, Petitioners must recognize that the Order reflects their own demand that arguments about rejected absentee ballots be resolved in an election contest. Based on Petitioners' arguments, the Court held that if agreement could not be reached with respect to any ballot, the remedy must lie in an election contest. (Slip op. at 4, ¶ 4.) Given the prior proceedings, and the clear dictates of this Court's December 18 Order, Petitioners' complaint that any particular ballot must be counted or not counted must be resolved in another forum.

⁶ In any event, Petitioners make no showing of any disparate treatment, much less disparity of a constitutional dimension. The single possibility of disparate treatment cited by Petitioners is with respect to signature mismatches. Yet the Court has not been provided with examples of any ballots that have received disparate treatment. Evaluating whether a voter's signature is "genuine," as required by Minn. Stat. § 203B.12, and the evidence used to make such a determination, is, moreover, a singularly appropriate decision for local election officials and, if Petitioners disagreed with those decisions with respect to any of these ballots, it was entirely within Petitioners' power to object. Having failed to do so, Petitioners can hardly complain now.

B. Petitioners' Proposal Would Unnecessarily Delay Determination of the Election Outcome without Serving any Practical Purpose.

Petitioners' dissatisfaction with the outcome of the Protocol created pursuant to the December 18 Order does not warrant restarting the process on the eve of its conclusion given the significant delay that would result. As this Court observed, "the compelling need to move forward to a conclusion requires the imposition of a deadline for completion of the process." (Slip op. at ¶ 3.) The Court initially imposed a December 31 deadline, which by agreement was extended to *no later than* January 4, 2009. That date is now upon us. At this point, to start the process over and to add hundreds more ballots to be re-reviewed that Petitioners alone claim *might* have been wrongfully rejected would needlessly delay the result.

This delay is particularly unwarranted in the circumstances of the instant proceeding because election officials have already decided the ballots were *not* wrongfully rejected twice before. Under the December 18 Order, the ultimate criterion for counting the ballots is "agreement" of all parties. Even if the ballots are reviewed a third time, it is highly unlikely that (i) election officials will change their previous two determinations that the ballots were properly rejected and agree to count them; and (ii) the Franken Parties will also agree with this result. Indeed, in the instances where officials agreed to re-review the ballots at Petitioners' request, no additional ballots were added to the list of wrongfully rejected ballots to be counted. (*Id.*, ¶¶ 18, 22)

Thus, Petitioners' insistence that the recount be delayed to permit them to add ballots to be re-reviewed is, at best, a quixotic quest. The only result of granting

Petitioners' motion would be to delay the enfranchisement of hundreds of voters whose ballots should have been counted already. There is no reason to do so and every reason to avoid that result.

C. Petitioners are Estopped from Seeking to Change the Process on the Eve of Its Conclusion.

Once again, Petitioners raise complaints about the fairness of a procedure ordered by the Court and negotiated by the parties only after having waited to see its likely outcome. They did not complain about the process when the Court issued its order and when the parties negotiated the Protocol, and they did not complain while the parties—at great expense—carried it out. As a result, their motion is now barred by principles of estoppel and laches.

As the Franken Parties explained the last time Petitioners sought to change the agreed-upon process for counting votes after it was completed, estoppel bars their argument. Under well-established principles of estoppel, “a party that has taken one position in litigating a particular set of facts [is precluded] from later reversing its position when it is to its advantage to do so.” *Bauer v. Blackduck Ambulance Ass'n, Inc.*, 614 N.W.2d 747, 749-50 (Minn. Ct. App. 2000); *see also Ferraro v. Camarlinghi*, 75 Cal. Rptr. 3d 19, 59 (Cal. Ct. App. 2008) (noting applicability of judicial estoppel doctrine to “quasi-judicial administrative proceedings”). Courts uniformly condemn attempted manipulation “by chameleonic litigants who seek to prevail, twice, on opposite theories.” *Levinson v. U.S.*, 969 F.2d 260, 264 (7th Cir. 1992); *see also Minnesota*

Vikings Football Club, Inc. v. Metro. Council, 289 N.W.2d 426, 430-31 (Minn. 1979).

Thus, Petitioners must be held to their agreement.

Similarly, laches bars Petitioners' after-the-fact complaints about the Protocol for counting erroneously rejected absentee ballots. Laches is an equitable doctrine applied to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002). This Court has repeatedly applied the doctrine in election cases, because prejudice to the opposing party resulting from delay in such cases is particularly great. *See, e.g., Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008) ("Given petitioners' unreasonable delay in asserting the interpretations of the constitution and election statutes that they espouse here, and balanced against the significant potential prejudice to respondents, to other election officials, to Justice Gildea and potentially to other candidates, and to the electorate, we conclude that it would be inequitable to grant the relief sought by petitioners with respect to the primary ballot even if we were to conclude that their arguments had merit."); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952) (declining to consider the merits of a ballot challenge because "the petitioner ha[d] not proceeded with diligence and expedition in asserting his claim"). Here, Petitioners unreasonably delayed in raising their claim and as a result, even if it had merit (which it does not), it is barred.

Importantly, Petitioners are not left without a remedy with respect to any ballot they claim should be counted. They have urged this Court that an election contest is the best forum for resolving evidentiary issues about ballots, and their lawyers are reported to


have told the media after this Court's December 24 ruling that if their candidate is not declared the winner there will, in fact, be an election contest. Thus, granting the present motion apparently will not avoid a contest if Franken is declared the victor. Moreover, this Court held in its December 18 Order that an election contest was the *only* remedy for a party who sought to count a ballot as to which there was not agreement by the parties. In accord with its December 18 Order, this Court should deny Petitioners' motion.

CONCLUSION

The 2008 general election was held two months ago this coming Sunday. The Senate will swear in its new members next Tuesday, less than four days from now. During the last two months local elections officials, county canvassing boards, the State Canvassing Board, and others have devoted enormous time and effort to complete the recount and canvass in a fair and timely fashion. It is time for that process to come to an end. It is time for erroneously rejected ballots to be opened and counted. It is time for the State Canvassing Board to declare the result. Petitioners' Motion for an Emergency Order should be denied.

Dated: January 3, 2009

Respectfully submitted,



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