

No. A09-64

OFFICE OF
APPELLATE COURTS

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State of Minnesota
In Supreme Court

Al Franken,

Petitioner,

vs.

Timothy Pawlenty, as Governor, and Mark Ritchie, as Secretary of State,

Respondents,

and

Norm Coleman,

Intervenors.

**REPLY BRIEF OF AL FRANKEN IN SUPPORT OF PETITION FOR
ORDER TO ISSUE CERTIFICATE OF ELECTION**

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I. INTRODUCTION

By the time this matter is argued, Minnesota will have been without its full complement of representation in the United States Senate for more than a month. The United States Senate has been unable to operate with full membership. There is no dispute that these conditions, contrary to the face of the United States Constitution and statutes, exist because Respondents have withheld the appropriate certificate to which the candidate elected by voters on November 4 and certified as the winner by the State Canvassing Board on January 5 is at least provisionally entitled.

Respondents Governor Tim Pawlenty and Secretary of State Mark Ritchie and Intervenor-Respondent Norm Coleman (hereinafter, collectively “Respondents”) make two arguments in support of continued delay in certification. First, they contend that one statutory clause supports their decision to withhold the certificate pending the election contest. Second, they argue that withholding the certificate does not infringe on the United States Constitution. They are wrong on both counts.

First, the clause on which they rely, in Minn. Stat. § 204C.40, subd. 2, provides for a delay in the issuance of a certificate only in circumstances where a recount has not already occurred and where “a court of proper jurisdiction” will “finally determine[] the contest.” Here, a state court cannot ever finally resolve the contest, because such authority is reserved to the Senate. Nothing in Respondents’ briefs contradicts that conclusion.

Second, Respondents’ assertion that the delay they have imposed does not infringe on the Constitution is belied by the plain reality: Having examined the credentials of and seated two Senators from every other state in the nation, the United States Senate still has

not been able to examine the credentials of and seat the second Senator from Minnesota. It is already past the date set by federal constitution and statute, and at the snail's pace at which Intervenor is putting on his election contest this situation could continue for months.

In the interest of full representation for Minnesotans, and because state and federal law so require, Petitioner Al Franken respectfully asks this Court to issue an Order, pursuant to Minn. Stat. § 204B.44, requiring Governor Pawlenty and Secretary Ritchie promptly to prepare and countersign a certificate of election and deliver the certificate to the President of the United States Senate.

II. ANALYSIS

A. Minnesota Election Law Does Not Preclude the Issuance of An Election Certificate Pending a State Election Contest

1. Respondents offer no precedent or analysis to contradict the conclusion that a state court cannot *finally* determine a contest for the election of U.S. Senator.

Respondents rest their position almost entirely on one clause in § 204C.40, subd. 2: “an election certificate shall not be issued until a court of proper jurisdiction has finally determined the contest.” They contend that this phrase prohibits a certificate from being issued to Senator-elect Franken, even on an interim basis. But Respondents offer no precedent, or even argument, to demonstrate that a state court *can* “finally determine” a contest for the election of U.S. Senator—and no such support exists.

It is incontrovertible that, under both state statute and federal law, a state court in Minnesota cannot finally determine a contest for the election of a U.S. Senator. Section 209.12, which governs election contests for federal congressional elections, provides that “the only question to be decided by the court is which party to the contest received the

highest number of votes legally cast at the election.” *Id.* “Evidence on any other points specified in the notice of contest . . . must be taken and preserved by the judge trying the contest, or by some person appointed by the judge for that purpose; *but the judge shall make no findings or conclusion on those points.*” *Id.* (emphasis added). Compare Minn. Stat. § 209.02 (in contests involving many of Minnesota’s non-federal offices, a reviewing court does have authority to finally determine all points specified in an election contest including: (1) “an irregularity in the conduct of an election or canvass of votes”; (2) “the question of who received the largest number of votes legally cast”; and (3) “deliberate, serious, and material violations of the Minnesota Election Law.”).¹

In other words, and as explained in more detail in Senator-elect Franken’s opening brief, when a contest concerns a congressional office, there is necessarily no final determination of the contest in state court; there is simply no court of proper jurisdiction capable of reaching a determination as to all the contest’s specified points. See Minn. Stat. § 209.12 ; *Odegard v. Olson*, 264 Minn. 439, 119 N.W.2d 717, 719, 721 (1963).² Intervenor

¹ In the election contest, Intervenor Coleman appears, despite the difference between §§ 209.02 and 209.12, to have convinced the contest court to adjudicate what the statute describes as “irregularit[ies] in the conduct of an election or canvass of votes” and “violations of Minnesota Election Law,” and not just “the largest number of votes legally cast.” However, he concedes that the state courts have no jurisdiction over “systemic inconsistencies, evidence of willful and material violations of election law and related issues.” Contestants’ Memorandum of Law in Opposition to Motion to Dismiss, p. 5, n. 2 (January 17, 2009).

² See also *Derus v. Higgins*, 555 N.W.2d 515, 518 (Minn. 1996)(acknowledging, in the analogous context of state-senator contests, “that the constitutionality of the role assigned the judicial branch with regard to legislative election contests by Minn. Stat. c. 209 is open to question”); see also *id.* at 519 (Page, J., concurring specially) (“To the extent that Minn. Stat. § 209.10 purports to grant [authority to resolve a primary election contest on its merits] to the judicial branch of government, it is unconstitutional.”).

Coleman contends that the state court can determine whether a vote was “legally cast” and can make judgments about a number of issues presented in a contest petition. Coleman Br. at 7. But the ability to determine legally cast votes in no way allows for final adjudication on all issues under Chapter 209, under the plain language of state law and, as Respondents recognize, under the Constitution—as the Senate is the sole judge of the election returns and qualifications of its Members. *See id.* at 8; *see also* State Br. at 5. In short, Respondents fail to refute the premise that the state court lacks authority to determine finally a contest.

2. Because a court cannot finally determine this contest, the language of § 204C.40, subd. 2, upon which Respondents and Coleman rely, simply does not apply, and Subdivision 1 governs.

Because a state court cannot finally determine this Senate contest, the language of § 204C.40, subd. 2 regarding delay simply does not apply. Both the plain language of the statute and the case law make clear: a certificate should only be withheld in circumstances where a court of proper jurisdiction can finally determine the contest. Minn. Stat. § 204C.40, subd. 2 (“an election certificate shall not be issued until a court of proper jurisdiction has finally determined the contest”); *Odegard*, 119 N.W.2d at 719, 721.

Without offering any legal authority to contradict this analysis, Respondents and Coleman contend it cannot be so. They reason that Subdivision 2’s language regarding delay in certification must apply to federal congressional candidates because that provision does not expressly exempt them—while it does exempt state legislators. *See* State Br. at 6 (citing Minn. Stat. § 204C.40, subd. 2 (“This subdivision shall not apply to candidates elected to the office of state senator or representative.”)). But the lack of an additional exemption does

nothing to alter the limitations of the statute, that there is no court of “proper jurisdiction” that can “finally determine” a contest for United States Congress. *See id.*

Moreover, the fact that the Minnesota Legislature exempted itself actually supports Senator-elect Franken’s argument that the interpretation advanced by Respondents unduly impairs the United States Senate’s constitutional authority, *see infra* Part II.B: The Legislature’s self-exemption indicates a recognition of the conflict between withholding a certificate and the legislature’s constitutional authority to determine the qualifications of its own Members. *See* Minn. Const. Art. IV, § 6 (“Each house shall be the judge of the election returns and eligibility of its own members.”); Minn. Stat. § 209.10, subd. 6 (“This chapter does not limit the constitutional power of the [state] house of representatives and the senate to judge the election returns and eligibility of their own members.”); *Scheibel v. Pavlak*, 282 N.W.2d 843, 847 (Minn. 1979) (the very justification for this authority is “to resist encroachment” by other branches of government).

Not only do Respondents ignore the clear import of § 209.12, and the limited jurisdiction of a state court in a congressional contest, but they also give short shrift to Subdivision 1 of § 204C.40, which requires an election certificate to issue on demand to any federal candidate who has been declared elected by the State Canvassing Board. *See id.* (“for every state and federal candidate declared elected by . . . the State Canvassing Board,” “the secretary of state *shall* prepare a certificate”; “[e]xcept as otherwise provided in this section, the secretary of state . . . shall deliver an election certificate *on demand* to the elected candidate” (emphasis added)). Respondents ignore the statute’s express discussion of Senate candidates. *See id.* (“In an election for United States senator, the governor shall prepare an

original certificate of election, countersigned by the secretary of state, and deliver it to the secretary of the United States Senate.”). They ignore the enactment of the automatic administrative recount, which the Legislature chose as a better option than a judicially-supervised recount in elections as close as this one; which fills the time available to Minnesota to complete its election process consistent with the constitutional calendar; and which concluded with a State Canvassing Board declaration of election. And, they discount the fact that Subdivision 1 very clearly anticipates the circumstance where contests occur *after* State Canvassing Board action and the issuance of a certificate: “In case of a contest, the court may invalidate and revoke the certificate as provided in chapter 209.” *Id.* The basis for Respondents’ argument that Subdivision 1 should be disregarded is that Subdivision 2 more specifically applies to the timing of election contests. *See* Coleman Br. at 5. But this logic is circuitous: Because the delay provision does not apply to federal congressional contests in which a court cannot make a final determination, Subdivision 2 is *not* more specific; indeed, it is inapposite.

B. Continued Delay is Contrary to the Constitution and Statutes of the United States

What is more, Respondents fail to counter the very real constitutional problems posed by their interpretation. As Respondents concede, the United States Senate is the “sole judge of the election returns and qualifications of its members, exclusive of every other tribunal, including the courts.” *Odegard*, 119 N.W.2d at 719 (citing U.S. Const. Art. I, § 5, cl. 1). The State cannot, Respondents acknowledge, usurp that authority. *See* Coleman Br. at 10; State Br. at 10. Nonetheless, Respondents contend that, by refusing to issue a certificate, the State does not delay the seating of a full Senate and frustrate the Senate’s ability to

exercise its independent authority to judge the election returns and qualifications of its members. Coleman Br. at 10; *see also* State Br. at 9-10. They are mistaken, and they all but ignore the federal calendar imposed by Constitution and statute. Their position both relies on a misreading of statutes and case law and ignores the very real burden imposed by further delay.

First, Respondents discount the numerous federal constitutional and statutory provisions that obligate Minnesota to structure and operate its election system so as to provide its citizens full representation in a timely fashion. Examining each provision in isolation, Respondents argue that the text of the provisions does not, in so many words, require the state to certify two Senators by a certain date. *See* Coleman Br. at 12-13; State Br. at 9. But taken together, Article I, Sections 3 and 4, Amendments XVII and XX, and 2 U.S.C. §§ 1, 1a & 1b, make clear that two Senators per state are to be seated by January 3rd, or on a date set by Congress, and that state officials have an obligation to certify the election of their congressional representatives in a timely fashion. *See also* *Bush v. Gore*, 531 U.S. 98, 109 (2000) (recognizing the importance of states' structuring their process to meet the federal calendar). Respondents Pawlenty and Ritchie have failed to do so, and their failure becomes more consequential with each passing day.³

³ Respondents Pawlenty and Ritchie's argument that the federal mandate of 2 U.S.C. §§ 1a and 1b does not apply because a Senator has not yet been "chosen" makes little sense. State Br. at 9 n.3. The voters made their choice on November 4, 2008; over two months passed and, on January 5, after weeks of meticulous hand recounting, the State Canvassing Board certified the voters' choice.

Likewise, Respondent Coleman's argument that states have reasonable discretion when conducting vacancy elections is beside the point, *see* Coleman Br. at 13 (citing Laura E. Little,

Second, Respondents incorrectly contend that *Odegard*, 119 N.W.2d at 719—in which this Court declined to delay the issuance of a certificate of election—is inapposite, because it was decided under an earlier statute. It is true that *Odegard* was decided before the passage later that year of Minn. Stat. § 209.12, which was a direct response to *Odegard* and sets forth a mechanism by which a party can obtain a limited judicial recount in a congressional race. But the Court’s ruling was constitutional, as well as statutory: “[W]e must come to the conclusion that s 204.32, subd. 2, has no application to a contest in the United States Senate or House of Representatives. *Our courts are divested of jurisdiction by U.S. Const., art. I, s 5.*” 119 N.W.2d at 720 (emphasis added); *see also id.* at 719. Respondents offer no reason why, in light of *Odegard*’s reliance on Article I of the U.S. Constitution, the enactment of Minn. Stat. § 209.12 affects its holding on the same constitutional question presented here. Nor do they point to any language in § 209.12, or the legislative history, that indicates a legislative intent to undercut the Court’s holding as to issuance of the certificate of election. Rather, the only support Respondents provide for their conclusion that *Odegard* is no longer good law is a concurrence written by Justice Knutson—and joined by no other Justice. *See* State Br. at 8; Coleman Br. at 11.

Finally, Respondents erroneously contend that further delay in the issuance of the certificate would not unconstitutionally infringe on or frustrate the Senate’s function. To support this dubious proposition, they cite two cases, *Roudebesh v. Hartke*, 405 U.S. 15 (1972) and *McIntyre v. Fallabay*, 766 F.2d 1078, 1086 (7th Cir. 1985), which hold that a state re-

An Excursion Into the Uncharted Waters of the Seventeenth Amendment, 64 Temp. L. Rev. 629, 634 (1991)). The Franken-Coleman election was not a vacancy election.

determination of which candidate received the most votes does not usurp the Senate's authority. *See* State Br. at 10; Coleman Br. at 10. But whether Minnesota can proceed with a recount of who got the most votes is *not* what is at stake in this Petition. An intense statewide recount has happened, and was almost completed in time to meet the federal calendar. Moreover, Senator-elect Franken has not sought to enjoin the ongoing contest. Rather, he simply asks for a certificate to issue so that the Senate is not frustrated in its function while the state contest continues.

In fact, the issuance of a certificate pending state proceedings is precisely what occurred in the very cases upon which Respondents rely. In *Roudebush*, the apparent winning candidate of a U.S. Senate race was issued a provisional certificate of election by the Governor pending a state board recount and a court challenge to that recount. The Senate administered the oath of office to the candidate and seated him while the litigation continued in state and federal court. 405 U.S. at 18. Similarly, in *McIntyre*, the Secretary of State of Indiana issued a certificate of election to the apparent winning candidate of a federal congressional race. The House then undertook its own contest proceedings while the recount proceedings unfolded in the state courts; during the entire period, however, the apparent winner was in possession of a state certificate. 766 F.2d at 1080. Thus, contrary to Respondents' arguments, these cases in no way stand for the proposition that a certificate need not issue: In both cases, the certificate did issue prior to the state court proceedings. *See also* Franken Opening Br. at 16 n. 6 (collecting authority demonstrating history of states issuing election certificates prior to the resolution of related election contests).

The failure to issue a certificate, even on an interim or conditional basis, at this point in the process—after the completion of the recount and after the State Canvassing Board’s certification—significantly frustrates the Senate’s exercise of its own authority. For as long as Respondents Pawlenty and Ritchie refuse to issue the certificate, the Senate is deprived of the information and credentials it normally relies upon to seat Senators-elect, even on a provisional basis subject to contest. Thus, the impact from Respondents’ actions is far greater than was the impact from the (non-binding) state recounts that occurred *after* the candidates had already been certified in *Roudebesh* and *McIntyre*.

It is now clear that the impact from Respondents’ actions is even greater than had been anticipated when this action was filed, for the delay is likely to be considerable. Counsel for Coleman has told the three-judge court presiding over the contest that Coleman wants the court to examine up to 11,000 absentee ballots individually; at a minimum he intends to introduce into evidence approximately 5,000 ballots and related materials. Election officials will need to be called with respect to most if not every ballot. Even if there is limited testimony and only a few minutes is spent examining each absentee ballot envelope and related materials (such as application and registration), the trial would outlast the winter.

Consequences of this sort illustrate why prompt issuance of a certificate stands on such strong policy grounds, as the Minnesota Legislature recognized as to itself, and as the courts have recognized as to all legislatures. In short, “[w]hile it is not [a court’s] role to examine the wisdom of a disposition that appears so clearly in the text and history of the Constitution, we may observe that it makes eminent practical sense. The pressing legislative demands of contemporary government have if anything increased the need for quick,

decisive resolution of election controversies.” *Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986) (Scalia, J.); *see also Derus*, 555 N.W.2d at 518, 519 (acknowledging, in the analogous context of state-senator contests, the considerable impact of protracted state contests on the legislature’s authority).

III. CONCLUSION

Respondents’ refusal to issue the election certificate is based on an interpretation of Minn. Stat. § 204C.40 that is contrary to Minnesota law, federal statute, and the United States Constitution. For the reasons set forth above, and in his opening brief, Senator-Elect Franken respectfully requests that this Court issue an Order, pursuant to Minn. Stat. § 204B.44, requiring Governor Pawlenty and Secretary Ritchie to promptly prepare and countersign a certificate of election and deliver the certificate to the President of the United States Senate.

Dated: January 28, 2009

Respectfully submitted,

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