

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Minnesota Voters Alliance, Minnesota
Majority, Minnesota House of Representative
Steve Drazkowski, Minnesota House of
Representative Ernie Leidiger, Minnesota
House of Representative Mary Franson and
House of Representative Jim Newberger,

Court File No.: _____

Petitioners,

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION
OF MINNESOTA**

v.

State of Minnesota and Secretary of State
Mark Ritchie, in his official capacity, or his
successor,

Respondents.

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INTRODUCTION¹

The American Civil Liberties Union of Minnesota (“ACLU-MN”), is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil rights and liberties. It is the statewide affiliate of the American Civil Liberties Union and has more than 8,500 members in Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and by state and federal laws. Since its founding, the ACLU-MN has engaged in constitutional and voting rights litigation, both directly and as *amicus curiae*, in a wide variety of cases.

While the ACLU-MN takes no position on whether the Secretary of State was authorized to set up an online voter registration system, if the Court determines that the Secretary of State was not authorized to do so, the ACLU-MN opposes Petitioners’ request that the registrations of voters who availed themselves of the opportunity to register to vote online should be stricken from the voter rolls. It is the position of the ACLU-MN that in the event the Court determines the Secretary of State lacked authority to accept voter registrations online, the proper remedy is for this Court to order that the Secretary of State forward each online voter registration application to the county auditor of the county where the voter resides pursuant to Minnesota Statute § 201.061, subd. 1.

ISSUES PRESENTED

1. Where a registrant has provided the Secretary of State all information statutorily required to register to vote, and has in good faith delivered the registration application in an online format specified by the Secretary of State, may the registrant’s registration be revoked if

¹ Counsel certify that this brief was authored in whole by listed counsel and the *amicus curiae*. No person or entity made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the American Civil Liberties Union of Minnesota, which moved for leave to participate as *amicus* on December 4, 2013.

the Court finds that the Secretary of State did not have proper authority to permit online voter registration?

2. If the Court finds that the Secretary of State created and accepted an online voter registration application without statutory authorization, is the proper remedy as to the online registrants to require the Secretary of State to forward their voter registration applications to the county auditor of the county in which each registrant resides?

BACKGROUND

I. MINNESOTA VOTER REGISTRATION REQUIREMENTS

To vote in Minnesota, an eligible² voter must be registered to vote. MINN. STAT. § 201.018, subd. 2 (2013). An eligible voter may register in advance of an election by completing and submitting a voter registration application at least 20 days prior. *Id.* § 201.054, § 201.061, subd. 1. Minnesota Statute § 201.071 requires that the form of all voter registration applications be approved by the Secretary of State and contain spaces for the following information:

1. Voter's first, middle, and last name, and voter's previous name, if any;
2. Voter's current address, and voter's previous address, if any;
3. Voter's date of birth;
4. Voter's municipality and county of residence;
5. Voter's telephone number, if provided by the voter;
6. Date of registration;
7. Current and valid Minnesota driver's license or state identification number, or if the voter has no valid Minnesota driver's license or state identification, the last four digits of the voter's Social Security number; and
8. Voter's signature.

Id. § 201.071, subd. 1. The application must also include a certification that a voter meets the eligibility criteria to vote and include check boxes for the following questions: "(1) Are you a citizen of the United States?" and "(2) Will you be 18 years old on or before election day?" *Id.*

Although the form must include space for the above-mentioned information, § 201.071 expressly provides that a voter registration application is *not* deficient so long as it contains the

² Every United States citizen over the age of 18 who has lived in the state for 20 days preceding the election is eligible to vote with the exception of individuals convicted of a felony whose rights have not been restored, individuals declared incompetent or individuals under guardianship if the court had revoked his or her right to vote. MINN. STAT. § 201.014 (2013).

following: name, address, date of birth, current and valid Minnesota driver's license or Minnesota state identification number or last four digits of the voter's Social Security number, and a signature. *Id.* Minnesota law mandates that “[n]o eligible voter may be prevented from voting unless the voter’s registration application is deficient or the voter is duly and successfully challenged in accordance with Section 201.195 or 204C.12.” *Id.* at subd. 3.

Minnesota law provides that an eligible voter registering in advance of election day may deliver his or her completed voter registration application by “submitting it in person or by mail to the county auditor of that county or to the Secretary of State’s Office.” *Id.* § 201.061, subd. 1. Mail registration is defined as an application delivered to the Secretary of State, county auditor, or municipal clerk by the U.S. Postal Service or a commercial carrier. *Id.* If a registration application is “improperly addressed or *delivered*” the provision provides the application “shall be forwarded within two working days after receipt to the county auditor of the county where the voter maintains residence.” *Id.*

II. SECRETARY RITCHIE’S ONLINE VOTER REGISTRATION APPLICATION

On September 26, 2013, Secretary of State Mark Ritchie began offering a voter registration application in an online format. The Online Voter Registration Form (hereinafter “Online Application”) requires the registrant to provide the same information as required by the paper application, submitted in two electronic forms. *Voter Registration Application Step 1 of 2*, Office of the Minnesota Secretary of State (Nov. 26, 2013), <https://mnvotes.sos.state.mn.us/VoterRegistration/VoterRegistrationStep1.aspx>. Form one contains two check boxes required by § 201.071, subd. 1 to confirm that the registrant is a U.S. Citizen and will be 18 years old by election day. *Id.* Form two requires the registrant to complete an electronic form containing the eight information fields required by § 201.071 and to certify that the registrant meets the eligibility criteria to vote. *Id.* at *Step 2 of 2*, <https://mnvotes.sos.state.mn.us/VoterRegistration/>

VoterRegistrationStep2.aspx. Online registrants provide their signature electronically pursuant to the Uniform Electronic Transactions Act and must acknowledge that the electronic signature is their legally binding signature. Online Application at *Step 2 of 2*; see MINN. STAT. § 325L.07(d) (2013) (“If a law requires a signature, an electronic signature satisfies the law.”). Once submitted, an Online Application goes through the same verification process as paper applications, and if approved, the online registrant is added to the statewide voter registration list.³ See MINN. STAT. § 201.061, subd. 1.

ARGUMENT

I. ONLINE REGISTRANTS SHOULD NOT BE REQUIRED TO RE-REGISTER IF THIS COURT HOLDS THAT ONLINE REGISTRATION WAS INSTITUTED WITHOUT PROPER AUTHORITY.

The Minnesota Constitution and Minnesota law protect voters who register electronically in good faith from being disenfranchised if this Court finds Secretary Ritchie lacks the proper authority to accept online delivery of voter registration applications. Minnesota courts have long refused to disenfranchise eligible voters because of errors made by government officials interpreting or implementing Minnesota election laws. Moreover, Petitioners only challenge the method of delivery for voter registration applications and not the adequacy of the registration applications themselves. Verified Pet. Writ of Quo Warranto 1-3, ¶¶ 17-33. Minnesota’s voter registration statute supplies no statutory authority for preventing the online registrants, whose registration applications are not legally deficient and whose eligibility has not been challenged, from voting.

³ MINN. STAT. § 201.021 establishes that “[t]he interactive computerized statewide voter registration list constitutes the official list of every legally registered voter in the state.”

A. The Minnesota Constitution and Established Minnesota Law Direct That Online Registrants Should Not Be Disenfranchised by an Error of the Secretary of State.

The right to vote is enshrined and protected in two Articles of the Minnesota Constitution. The Bill of Rights of the Minnesota Constitution, Article 1 § 2, provides that “[n]o member of this state shall be disenfranchised.” Minn. Const. art. 1, § 2. Article 7 provides the authority to create and implement election laws governing the franchise. Minn. Const. art. 7, § 1; *see McEwen v. Prince*, 147 N.W. 275, 276-77 (Minn. 1914). The Minnesota Constitution “secures to every person possessing the qualifications prescribed therein the right to vote.” *Fitzgerald v. Morlock*, 120 N.W.2d 339, 345 (Minn. 1963) (construing Minn. Const. art. 7, § 1).

In furtherance of these constitutional principles, Minnesota courts have long held that errors made by government officials implementing or construing election laws should not be allowed to disenfranchise eligible voters. In cases going back almost to the state’s founding, courts have made a “clear distinction between the provisions and prohibitions in the election laws which are personal to the elector and those which apply to election officers over whose conduct he has no control.” *Sheehan v. Franken*, 767 N.W. 2d 453, 462 (Minn. 2009); *e.g.*, *Fitzgerald*, 120 N.W.2d at 339; *Johnson v. Swenson*, 119 N.W.2d 723 (Minn. 1963); *Grimsrud v. Johnson*, 202 N.W. 72 (Minn. 1925); *Truelsen v. Hugo*, 91 N.W. 434 (Minn. 1902); *Hankey v. Bowman*, 84 N.W. 1002 (Minn. 1901); *Pennington v. Hare*, 62 N.W. 116 (Minn. 1895); *Taylor v. Taylor*, 10 Minn. 107 (Minn. 1865). These cases establish the rule that a voter’s personal adherence to election requirements is mandatory; his or her vote may be properly rejected if the voter fails to comply with the requirements of election law. *Sheehan*, 767 N.W. 2d at 462 (Minn. 2009) (citing *Fitzgerald*, 120 N.W.2d at 345). But if the voter complies in good faith with the law, that voter’s right to vote cannot be defeated by reason of “irregularities, ignorance,

inadvertence, or mistake, or even intentional wrong on the part of the election officers.” *Id.* (quoting *Fitzgerald*, 120 N.W.2d at 345).

The Minnesota Supreme Court has applied this rule to prevent eligible voters from being disenfranchised in a variety of circumstances. The issue most often arises in the context of disputed election results. *See Johnson*, 119 N.W.2d at 725-28 (holding ballots numbered and marked by election officials in violation of MINN. STAT. § 204.11, subd. 3 should be counted); *Grimsrud*, 202 N.W. at 73 (holding ballots prepared by a clerk and not marked as official ballots as required by law should be counted). Courts have applied this principle to a broader set of election-related challenges. In *Hankey v. Bowman*, the court upheld a Minnesota Governor’s creation of three election districts and sustained the results of the election even after ruling the Governor did not have statutory authority to establish the election districts in the first place. 84 N.W. at 1004-05. The court held that the Governor established the districts under the color of authority, and voters should not be disenfranchised by setting aside the election. *Id.*

While Minnesota courts have not directly addressed the context of voter registration, this constitutionally-derived rule should be applied broadly to Minnesota election laws regulating the franchise. *See Grimsrud*, 202 N.W. at 73 (“The right of franchise is an esteemed privilege of a citizen which should not be taken away or be denied, unless the statute regulating its exercise clearly indicates that the voter who has not complied with its essential prerequisites must be barred.”). Moreover, the Minnesota Attorney General has provided guidance in line with the Minnesota Supreme Court’s holdings. A 1962 Minnesota Attorney General Advisory Opinion addressed a question similar to the one at issue here: what happens to the registration of voters who registered pursuant to a procedure established by a city’s registration commissioner, if that procedure was found to be unauthorized under the law. Op. Atty. Gen., 183Q, Oct. 24, 1962. The Attorney General stated that, “[i]n view of the fact that the voters in question here acted in good

faith, in reliance upon persons acting under color of law, their names should not be summarily excluded from the registration list.” *Id.*

Well-established precedent provides clear direction to this Court in the event that it accepts Petitioners’ argument that the online registration applications were improperly delivered and that Secretary Ritchie did not have the statutory authority to accept electronically delivered applications. *See Verified Pet.* 2-3. Consistent with the prior holdings of Minnesota courts that ballots cast in good faith may not be disregarded, the online registration applications delivered by eligible voters in good faith should not be cast aside. If any error is found with the Secretary’s authority to create and accept online voter registration applications, it is not because the registrants failed to comply with the registration rules. *Cf., Sheehan*, 767 N.W. 2d at 462 (Minn. 2009) (absentee ballots properly excluded because the absentee voters failed to comply with the requirements of the absentee ballot law). The error would be clearly attributable to Secretary Ritchie, a fact Petitioners concede. *Verified Pet.* at ¶ 44 (“The sole responsible party for this illegality would be the Secretary of State.”).

An eligible voter who used the Online Application to successfully register has complied in good faith with Minnesota election law. *See MINN. STAT. § 201.* Petitioners do not dispute that the Online Application requires registrants to provide every piece of information required by statute, nor that online registrants complied with the mandatory requirements of providing a name, address, birthdate, valid Minnesota license, identification number or last four digits of his social security number, and a signature. *See Verified Pet.; MINN. STAT. § 201.071, subd. 3.* Moreover, even if this Court finds that Secretary Ritchie did not have the statutory authority to accept electronic signatures, online registrants relied in good faith on the express stipulation in the Online Application that registrants were providing their “legally binding signature.” *See Online Application at Step 2 of 2.*

Petitioners contest Secretary Ritchie's interpretation of the method by which voter registration applications must be delivered under Minnesota Statute § 201.061 but do not dispute the adequacy of the registration applications submitted through the online system. *See Verified Pet.* at ¶¶ 17-33. Secretary Ritchie, Minnesota's top election official, concluded that he has the statutory authority to accept voter registration applications delivered via the internet. Akin to the Minnesota Governor in *Hankey v. Bowman*, Secretary Ritchie acted under the color of law to set up the online registration application system. *See* 84 N.W. at 1004-05. If the Court finds Secretary Ritchie does not have the proper authority to implement online voter registration, then this Court should follow *Hankey*; the constitutional officer's erroneous misapplication of Minnesota election law should not defeat the online registrants' right to vote. *See Hankey*, 84 N.W. at 1004-05; *Sheehan*, 767 N.W. 2d at 462.

The same statutory provision that Petitioners rely on to challenge the online registration system contains a remedy for online registrants if this Court finds no authority for the Secretary of State's electronic registration system. Minnesota law requiring that an "improperly...delivered registration application shall be forwarded...to the county auditor of the county where the voter maintains residence" unambiguously applies in this case. MINN. STAT. § 201.061, subd. 1. Petitioners themselves state that "Section 201.061 embodies...the specific mandatory direction governing the delivery of voter registration applications." *Verified Pet.* at ¶ 29.

If the Petitioners succeed in convincing this Court that electronic transmission is an improper delivery method for voter registration applications, then this Court should follow the remedy prescribed by § 201.061 for improperly delivered registration applications. *See* MINN. STAT. § 201.061, subd. 1. Secretary Ritchie should be directed to forward the voter registration applications of each online registrant to the county auditor of the county where each registrant resides. *See id.* The county auditor should be required to accept the voter registration applications

thus forwarded so that each online registrant will be registered in compliance with Minnesota law. *See id.* (“A registration that is received no later than 5:00 p.m. on the 21st day preceding any election shall be accepted.”).

B. There Is No Statutory Authority for Revoking the Registration of Online Registrants.

This Court has no authority under Minnesota election law to take the online registrants off the state’s voter registration list or prevent online registrants from voting. Minnesota law provides only two reasons for preventing an eligible voter from voting: a deficient voter registration application or a successful challenge to the voter’s eligibility or residence in accordance with law. MINN. STAT. § 201.071, subd. 3. Neither reason is present in this case.

Here the registrants’ online applications were not deficient and Petitioners do not allege them to be deficient; the online voter registration applications contained all the information required by law to vote. *See id.* § 201.071, subd. 1, 3. Likewise, the online registrants have not been duly and successfully challenged based on their residency or eligibility to vote. *See id.* at subd. 1.

What Petitioners challenge here is not the adequacy of the online registrants’ voter registration applications but the “*methods of delivery* for voter registration applications.” Verified Pet. at 2 (emphasis added). Petitioners contend that Secretary Ritchie does not have the statutory authority to expand the delivery method for voter registration applications beyond those expressly listed in § 201.061: in person, U.S. mail, commercial carrier. *Id.* at 2, 8-16; *see* MINN. STAT. § 201.061, subd. 1.

However, even if this Court agrees with Petitioners and finds no statutory authority for online voter registration, the improper delivery of a registration application is not a legal justification for removing an online registrant from the registration rolls. *See id.* § 201.071, subd. 3. Because the online registrants’ voter registration applications are neither deficient nor have the

voters been lawfully challenged, the plain and unambiguous language of § 201.071 prohibits this Court from preventing the online registrants from voting. *See id.* Taking the online registrants off the voter rolls would do just that.

II. TAKING THE ONLINE REGISTRANTS OFF THE VOTER ROLLS WOULD VIOLATE 42 U.S.C. § 1971.

Federal civil rights law prohibits the Secretary of State from removing the online registrants from the statewide voter registration list because of an error relating to their voter registration applications, when the error is not material to determining whether the registrants are qualified to vote. The method of delivering a registration application is not material to a voter's eligibility to vote under Minnesota law.

Federal law prohibits denying the right to register and vote based on errors or omissions that are not material to determining a voter's eligibility. Civil Rights Act of 1957, 42 U.S.C.

§ 1971(a)(2)(B). The law provides that no person acting under color of law shall:

deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

Id. The statute defines “vote” broadly to include “all action necessary to make a vote effective including, but not limited to, registration. . .” *Id.* § 1971(e).

While this law was originally adopted to deal with practices that disenfranchised minority voters, the provision can and has been applied to a broader set of government actions that work to deny individuals the right to register to vote. *See Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006) (disclosure of social security numbers is not “material” to a voter registration system under § 1971(a)(2)(B)); *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270-71 (W.D. Wash. 2006) (state law making registration contingent on a voter's name matching to the

Social Security Administration or Department of Licensing databases likely violated § 1971(a)(2)(B)).

Here, the removal of the online registrants from the voter registration list would meet all of the criteria for a violation of 42 U.S.C. § 1971(a)(2)(B). First, the Secretary of State at the direction of this Court would be acting under color of law to deny the right of each online registrant to remain registered, a prerequisite of voting. *See id.* Second, the names of the online registrants would be removed from the statewide registration system because of “an error or omission on any record or paper relating to...registration,” namely that their registration records were created or updated by an improperly delivered registration application. *See id.*

Third, the “error or omission” of improper delivery of a voter registration application is not material to determining whether the online registrant was eligible to vote under Minnesota law. “Material” is not defined in § 1971. *See Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1174 (11th Cir. 2008) (opining that the term “material” could mean something between minimally relevant and outcome-determinative). But the Minnesota legislature has already delineated what is “material” to a person’s eligibility to vote, a deficient voter registration application or a successful challenge to the voter’s eligibility or residence. *See MINN. STAT. § 201.071, subd.1, 3.* Any other errors in a registration application must not keep an eligible voter from voting. *See id.* Whether the Online Application was an improper method of delivering the voter registration application is not material to determining whether the online registrants were qualified to vote.

The remedy Petitioners seek would deny the online registrants the right to be registered and to vote because of the Secretary of State’s decision to accept electronic delivery of voter registration applications, an error not material to determining whether a voter is eligible to vote under Minnesota law. Petitioners’ requested remedy would violate federal civil rights law. .

CONCLUSION

If this Court finds that the Secretary of State did not have proper statutory authority to implement online voter registration the proper remedy would be to order all electronically submitted registration applications be forwarded to the county auditor where each online registrant resides. Any remedy that removes the online registrants from voting rolls would be in violation of the Minnesota Constitution, Minnesota law, and federal law and must be rejected by this Court.

Dated: December 4, 2013

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