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November 18, 2010

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HAND-DELIVERED

Honorable Mark Ritchie
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Honorable Paul H. Anderson
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25 Rev. Dr. Martin Luther King Jr. Blvd.
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Honorable David R. Stras
Minnesota Judicial Center
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St. Paul, MN 55155

Honorable Denise D. Reilly
Hennepin County Government Center
300 South 6th Street
Minneapolis, MN 55487

Honorable Gregg E. Johnson
Ramsey County Courthouse
15 W. Kellogg Blvd.
St. Paul, MN 55102

**Re: Recommended Revisions to Proposed Recount Plan and Administrative Recount
Procedures for the General Election, November 2, 2010**

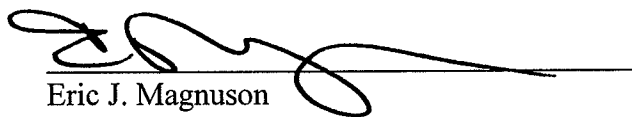
Dear Members of the Minnesota State Canvassing Board:

Enclosed with this letter you will find a letter we submit for your consideration prior to the Board's meeting on November 23. We were directed by Ms. Beth Fraser of the Secretary of State's Office that we should submit this correspondence to you directly, as opposed to submitting it through the Secretary of State's Office because until the Board meets, it is not duly constituted. We have provided a copy to counsel for Mr. Dayton, and to the Attorney General's Office, as well as to Ms. Fraser.

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Very truly yours,

Briggs and Morgan, PA



Eric J. Magnuson

EJM/kd
Enclosure
cc via email: Charles Nauen
Ken Raschke
Beth Fraser (via U.S. Mail)



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**Re: Recommended Revisions to Proposed Recount Plan and Administrative
Recount Procedures for the General Election, November 2, 2010**

Dear Members of the Minnesota State Canvassing Board:

The undersigned represents Tom Emmer and Emmer for Governor. I write regarding the meeting of the Minnesota State Canvassing Board ("MSCB") scheduled for November 23, 2010 at 10:00 a.m. I respectfully request leave to address in person the MSCB at its meeting regarding certain recommended revisions to the Proposed Recount Plan ("Recount Plan") and Administrative Recount Procedures ("Recount Procedures") for the General Election, November 2, 2010 as proposed by the Minnesota Secretary of State's Office.

Specifically, Tom Emmer and Emmer for Governor requests that Rule 8 of the Recount Plan and Recount Procedures as proposed by the Secretary of State be amended to confirm that the determination of whether challenges to ballots are meritorious or frivolous shall be solely made by the MSCB and not Recount Officials, county election officials or employees/representatives of the Minnesota Secretary of State's office.

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In addition, we request that the Recount Plan and Procedures as proposed by the Secretary of State be amended to specifically request the local recount officials to reconcile the number of ballots to be counted with the number of signatures present on the election register (both pre-registered voters and same-day registrants), as required by Minn. Stat. 204C.20, subd. 1.

PRESERVING A RECORD OF ALL CHALLENGES

Rule 8 of the Recount Procedures as proposed by the Secretary of State directly contradicts the Secretary of State's own rules. Proposed Rule 8 provides the following (in pertinent part):

8. If during the sorting, a candidate's representative disagrees with the recount official's determination of for whom the ballot should be counted and whether there are any identifying marks on the ballot, he or she may challenge the decision of which of the three piles the Table Official has placed a ballot and must describe why the decision is being challenged. A challenge must be made in accordance with Minnesota Statutes, section 204C.22. Challenges may not be made for an entire precinct or group of ballots. Challenges may not be automatic or frivolous. A frivolous challenge includes a challenge that is based on an identifying mark other than a signature or identifying number written on the ballot, or a name written completely outside a write-in space. The absence of election judge initials on a ballot cannot be the basis of a challenge. The Table Official will reexamine the ballot to determine into which pile it should be placed. If either candidate's representative does not agree with the Table Officials' final determination and the challenge has not been found to be frivolous, the ballot will be placed in one of two new piles of challenged ballots... (all emphasis added)

Minnesota Rules 8235.1100 provides:

8235.1100 CANVASSING BOARD.

The recount official shall present the summary statement of the recount and any challenged ballots to the canvassing board...The canvassing board shall rule on the challenged ballots and incorporate the results into the summary statement. (emphasis added).

Minnesota Rules 8235.0800, Subpart 2 provides in pertinent part:

During the sorting, a candidate or candidate's representative may challenge the ballot if he or she disagrees with the recount official's determination of for whom the ballot should be counted and whether there are identifying marks on the ballot.

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At a recount of a ballot question, the manner in which a ballot is counted may be challenged by the person who requested the recount or that person's representative. Challenges may not be automatic or frivolous and the challenger must state the basis for the challenge pursuant to Minnesota Statutes, section 204C.22. Challenged ballots must be placed into separate piles, one for ballots challenged by each candidate. A challenge is frivolous if it is based upon an alleged identifying mark other than a signature or an identification number written anywhere on the ballot or a name written on the ballot completely outside of the space for the name of a write-in candidate. (emphasis added)

Minnesota Rules 8235.0800, Subpart 4 provides "After the count of votes for all precincts has been determined during that day of counting, the challenged ballot envelope must be sealed and kept secure for presentation to the canvassing board."

Proposed Rule 8 implies that a Recount Official may determine what constitutes a frivolous challenge, by the language "and the challenge has not been found to be frivolous", and provides only that challenges not deemed frivolous will be separated into discrete piles for later review by the MSCB. **This language clearly negates the singular authority of the MSCB to "rule" on all challenged ballots under Minnesota Rules 8235.1100 and 8235.0200, subpart 2.**

Additionally, proposed Rule 8 incorrectly interprets a frivolous challenge to "include" a challenged based on an incorrect type of identifying mark. However, language added to Minnesota Rules 8235.0800, Subpart 2 by the Minnesota Secretary of State in 2010 uses the word "is", not the word "includes". Therefore, proposed Rule 8 mis-states the Secretary of State's Rules; accordingly, the term "includes" must be changed to "is".

Tom Emmer and Emmer for Governor urge the MSCB to revise Rule 8 as follows:

8. If during the sorting, a candidate's representative disagrees with the recount official's determination of for whom the ballot should be counted and whether there are any identifying marks on the ballot, he or she may challenge the decision of which of the three piles the Table Official has placed a ballot and must describe why the decision is being challenged. A challenge must be made in accordance with Minnesota Statutes, section 204C.22. Challenges may not be automatic or frivolous. A frivolous challenge includes is a challenge that is based on an identifying mark other than a signature or identifying number written on the ballot, or a name written completely outside a write-in space. The absence of election judge initials on a ballot cannot be the basis of a challenge. The Table Official will reexamine the ballot to determine into which pile it should be placed.

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If either candidate's representative does not agree with the Table Officials' final determination and the challenge has not been found to be frivolous, the ballot shall be placed in one of two new piles of challenged ballots for presentation to the State Canvassing Board... (strikeout and additions noted)

BEFORE THE RECOUNT COMMENCES, A RECONCILIATION OF THE VOTE MUST BE CONDUCTED IN EVERY PRECINCT IN THE STATE AS REQUIRED BY MINNESOTA LAW

One of the clear statutory duties of the MSCB is to "prepare a report that states ... the number of individuals voting in the state and in each county." Minn. Stat. § 204C.35, subd. 3. At the November 23 meeting, the MSCB will have before it the county canvassing board reports delivered by county auditors. However, as indicated below, a number of precinct summary statements apparently were *not* prepared in accordance with law, due to failure of election judges to count polling roster signatures on election night. Therefore, these summary statements should not be relied on by the MSCB in preparing its report of the number of individuals voting in the state or in certifying the "correctness" of such report.

Moreover, the statutory scope of the recount is "the number of votes validly cast for the office to be recounted." Minn. Stat. § 204C.35, subd. 3. Determination of the total number of "validly cast" votes to be recounted is significant in ensuring that the MSCB's report is "correct."

State law requires judges on election night to determine the proper number of ballots to be counted and, if necessary, conduct a reconciliation before producing a summary statement of results to the county auditor that, among other things, identifies "the number of individuals who voted at the election in the precinct." Minn. Stat. §§ 204C.20, subd. 1 and 204C.24, subd. 1(c). That process ensures that the number of ballots actually counted equals the number of voters who have signed the polling roster plus the voters who signed and registered on election day.

State law has long recognized that it is possible that more ballots may be cast than the number of voters signed in and legally registered to vote. This is an anticipated event that state law requires local election judges to address on election day. If there are more ballots cast than the number of registered voters who sign in, the law requires the number of ballots counted from the precinct to be reduced to equal the number of voters who signed in and registered through a prescribed procedure (*i.e.*, "reconciliation"). See Minn. Stat. § 204C.20, subd. 2. This assures that there are no more ballots counted in an election than there were properly verified registered voters casting ballots in the polling place on election night.

Thus, election judges are required as a matter of law to (1) conduct a reconciliation in every precinct in the state, (2) randomly withdraw any excess ballots that are found (starting first with

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any ballots that do not contain the initials of election judges), and (3) withdraw any other excess ballots in the vote count as required by Minn. Stat. § 204C.20, subd. 2.

However, it has come to the attention of Tom Emmer and Emmer for Governor that in a number of precincts across the state, the procedure mandated by Minn. Stat. Sec. 204C.20, subd. 1 was not followed. This information resulted in Tom Emmer filing a petition with the Minnesota Supreme Court pursuant to Minn. Stat. § 204B.44 seeking an order from that Court directing the MSCB to conduct a state-wide determination of the proper number of ballots to be counted and, if necessary, reconciliation, in accordance with Minn. Stat. § 204C.20, prior to its certification of the correctness of the 2010 election results, and requiring all county canvassing boards and local election officials to participate and assist in the determination of the proper number of ballots to be counted and any reconciliation as requested by the State Canvassing Board. A copy of that petition and the supporting affidavits are attached to this request.

Those affidavits establish that, in many precincts, the number of ballots to be counted was not determined in accordance with Minn. Stat. § 204C.20, because the “names in the election register” were not counted on election night when election judges prepared the summary statements. The number of votes to be counted was, in some cases, determined by counting unsigned voter receipts, as opposed to “signed voter’s certificates” or “the number of names entered in the election register,” as required by Minn. Stat. § 204C.20, subd. 1.

Because it is not clear that the Minnesota Supreme Court will rule on the Petition prior to the adoption of a recount plan, Tom Emmer and Emmer for Governor urge the MSCB to revise the Recount Plan and Administrative Recount Procedures to include direction to the local recount officials statewide to determine the proper number of ballots to be counted (by determining the number of persons signing the polling rosters on election night) and, if necessary, conducting a reconciliation pursuant to Minn. Stat. § 204C.20. This reconciliation must occur before the MSCB prepares its report of the number of persons voting on election day and before the administrative recount commences; otherwise, the votes re-counted may not be limited to all “validly cast” votes. Rather, the recount may include ballots that, as a matter of law, should not be part of the vote count. *See* Minn. Stat. § 204C.20, subd. 2 (“[w]ithdrawn ballots shall not be counted but shall be preserved...”) and Minn. Stat. § 204C.20, subd. 4 (“when the final count of ballots agrees with the number of ballots to be counted, those ballots not counted shall be attached to a certificate made by the election judges which states why the ballots were not counted”).

The statutorily-required process can be accomplished before the recount commences with minimal time and effort if the MSCB requests local election officials to work with their local election judges to count the number of signatures on the polling rosters (both pre-registered voters and same-day registrants), conduct any necessary reconciliation, and report to the MSCB

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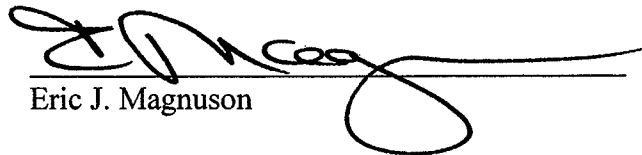
any changes to the vote totals contained within summary statements previously forwarded by county auditors to the MSCB.

In the alternative, the roster counting and withdrawal/reconciliation process can be conducted during the recount, with minimal additional delay, at each counting table before ballots are actually reviewed, placed in piles and counted. While Minn. Stat. §204C.35 provides that “[o]nly the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process” this Board can request that the election officials do the ballot counting in recognition that the summary statements may not be accurate and in order to avoid the matter becoming subject of an election contest or request that the roster counting be performed by the Secretary of State’s Office.

Under either alternative, the MSCB would be ensuring that the statutorily-required process has been completed statewide before the election/recount results are certified by the MSCB as “correct”.

I plan to appear at the November 23 meeting of the MSCB, and will be prepared to discuss these requests further.

Sincerely,



Eric J. Magnuson

EJM/wp