

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA**

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American Civil Liberties Union of Minnesota,  
National Congress of American Indians, and  
Bonnie Dorr-Charwood, Richard Smith and  
Tracy Martineau,

**Case No.** 04-CV-4653 (JMR/FLN)

Plaintiffs,

vs.

Mary Kiffmeyer, in her official capacity as  
Secretary of State for the State of Minnesota,

Defendant.

**PLAINTIFFS'  
MEMORANDUM IN  
SUPPORT OF PLAINTIFFS'  
MOTION FOR A  
TEMPORARY RESTRAINING  
ORDER**

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Pursuant to Fed. R. Civ. P. 65, Plaintiffs the American Civil Liberties Union of Minnesota (“ACLU-MN”), the National Congress of American Indians (“NCAI”), Bonnie Dorr-Charwood, Richard Smith and Tracy Martineau (collectively the “Plaintiffs”), seek a temporary restraining order to (1) prevent Mary Kiffmeyer, the Minnesota Secretary of State (hereafter the “Secretary”) from enforcing Minn. Stat § 201.061, Minnesota Rule 8200.5100, and directives issued by the Secretary to the extent that they are inconsistent with 42 U.S.C. § 15483, subd. (b) and the United States and Minnesota Constitutions, and (2) to require the Secretary to issue immediate and prominent notice to County Auditors, Election Officials and Election Judges, telling them what forms of proof of identity are acceptable on election day for first-time federal voters who registered by mail and others voters desiring to register on election day. A proposed Order and the proposed form of the notice to be provided by the Secretary are provided

herewith.

## **BACKGROUND**

Federal law, specifically the Help America Vote Act, 42 U.S.C. § 15483, subd. (b) (2002) (“HAVA”), establishes identification requirements for individuals registering or attempting to register to vote by mail who have not previously voted in a particular state for federal office, specifically listing what forms of identification are sufficient at the polling place on election day for such mail registrants. Minnesota Statutes and Rules, and directives issued by the Secretary regarding what forms of identification are sufficient at the polling place for individuals registering to vote by mail who have not previously voted in Minnesota for federal office, are inconsistent and more restrictive than the requirements established by HAVA. Plaintiffs have brought this conflict, and the failure by the Secretary to abide by governing federal law, to the attention of the Secretary, who has refused to abide by HAVA. Accordingly, Plaintiffs are forced to seek a temporary restraining order which would restrain the Secretary from enforcing the Minnesota Statutes and Rules, and the Secretary’s own directives which are contrary to HAVA, and require the Secretary to provide prompt and prominent notice to all election officials and election judges regarding the forms of identification that must be accepted as sufficient on election day for individuals who registered or attempted to register by mail and who have not previously voted in Minnesota for federal office.

Plaintiffs also assert a second federal claim against the Secretary relating to voter registration. The United States and the Minnesota Constitutions prohibit discrimination and ensure that citizens are not denied due process and the equal protection of the laws. Minnesota Statutes and Rules and directives issued by the Secretary violate the due

process and equal protection rights of American Indians desiring to register to vote on election day who did not attempt to register by mail: (1) by accepting photo tribal identification from federally-registered tribes, complete with name, street address and signature, only from American Indians living on the reservation, and not from American Indians with such identification living elsewhere in Minnesota; and (2) by not allowing photo tribal identification from federally-registered tribes without a current address to be used together with a current utility bill as sufficient proof of residence and identity, while accepting multiple other forms of photo identification without a current address, including certain student identification cards, as sufficient when presented with a current utility bill. The Plaintiffs have advised the Secretary of these constitutional infirmities, but the Secretary has refused to take any steps to cure them. Accordingly, Plaintiffs are forced to seek a temporary restraining order restraining the Secretary from enforcing the Minnesota Statutes and Rules, and directives issued by the Secretary which are contrary to the United States and Minnesota Constitutions, and requiring the Secretary to provide prompt and prominent notice to all election officials and election judges regarding the forms of tribal identification that must be accepted as sufficient on election day in any county in Minnesota.

### **THE PARTIES**

The American Civil Liberties Union of Minnesota (“ACLU-MN”) is a private, non-partisan, membership-supported organization. Its reason for existence is to safeguard the rights and liberties preserved by the Minnesota and United States Constitutions, including the right to vote. The ACLU-MN, through its Greater Minnesota Racial Justice Project, has been engaged in 2004 in helping American Indians residing in

Minnesota to register to vote. The ACLU-MN sues on its own behalf and on behalf of its members and beneficiaries who have attempted to register to vote by mail. *See* Complaint, ¶ 3.

Plaintiff National Congress of American Indians (“NCAI”) is a non-profit association organized under the laws of Oklahoma. NCAI is the oldest and largest national organization representing the interests of American Indians. NCAI’s membership includes 250 Indian tribes and their members, which account for approximately 72% of all enrolled tribal members in the United States. NCAI’s membership includes eight of the eleven Indian tribes in Minnesota, including the Mille Lacs Band of Ojibwe and the Red Lake Band of Chippewa Indians. NCAI’s membership also includes individual American Indians residing in Minnesota who are not members of a tribe represented by NCAI. NCAI’s mission is to serve its members by advancing the interests of tribal self-government, and assisting tribal governments with a broad range of federal policy issues affecting tribal governments. NCAI assists its tribal governmental members and their individual tribal members in participating fully in the electoral process. This assistance includes organization of the Native Vote 2004 Campaign which is an extensive national non-partisan effort to mobilize the American Indian and Alaska Native vote in collaboration with regional organizations, local tribal governments, and centers serving Indian populations, including Indian urban centers. Through the Native Vote 2004 Campaign NCAI assists local tribal governments, such as the Mille Lacs Band of Ojibwe, in coordinating and operating local voter registration drives to inform tribal members of their voting rights. NCAI sues on its own behalf and on behalf of its members who are federally-recognized Indian tribes in the State of Minnesota and/or

their individual tribal members. *Id.*, ¶ 4.

Plaintiff Bonnie Dorr-Charwood (“Dorr-Charwood”) is a natural person, an enrolled member of the Mille Lacs Band of Ojibwe, a federally-recognized Indian tribe located within the territorial boundaries of the State of Minnesota, and a citizen of Hennepin County who resides at 5212 36<sup>th</sup> Ave., S., Minneapolis, MN 55417. Her only form of picture identification is a tribal member identification card issued by the Mille Lacs Band of Ojibwe, which includes her current address and signature. *Id.*, ¶ 5.

Plaintiff Richard Smith (“Smith”) is a natural person, an enrolled member of the Fond du Lac Band of Lake Superior Chippewa, a federally-recognized Indian tribe located within the territorial boundaries of the State of Minnesota, and a citizen of Carlton County who resides at Fond du Lac Homes No. 6, Cloquet, MN 55720, and whose only form of picture identification is a tribal member identification card issued by the Fond du Lac Band of Lake Superior Chippewa. Smith’s tribal identification card includes his name, picture and signature. *Id.*, ¶ 6.

Plaintiff Tracy Martineau (“Martineau”) is a natural person, an enrolled member of the Fond du Lac Band of Lake Superior Chippewa, a federally-recognized Indian tribe located within the territorial boundaries of the State of Minnesota, and a citizen of Carlton County who resides at 8213 Belich Street, Cloquet, MN 55720, and whose only form of picture identification is a tribal member identification card issued by the Fond du Lac Band of Lake Superior Chippewa. Martineau’s tribal identification card includes her name, picture and signature. *Id.*, ¶ 7.

Defendant Mary Kiffmeyer is the Minnesota Secretary of State and is the administrator in the State of Minnesota with regard to the conduct of elections and

registration of voters. *Id.*, ¶ 8.

## ARGUMENT

### **A. Plaintiffs Are Entitled to a Temporary Restraining Order.**

In determining whether to grant a temporary restraining order, courts consider four factors:

- (1) the threat of irreparable harm to the movant;
- (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
- (3) the probability that movant will succeed on the merits;  
and
- (4) the public interest.

*Dataphase system, Inc. v. C.L.System, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) at 114.

The Eighth Circuit has emphasized that consideration of these four factors does not require mathematical precision, and should be flexible enough to encompass the particular circumstances of each case. *See Id.* at 113. “At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” *Id.*

#### **1. Irreparable harm.**

The United States Supreme Court has stated that:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

*Burson v. Freeman*, 504 U.S. 191, 199 (1992). If Secretary Kiffmeyer is not restrained from enforcing Minn. Stat. § 201.061 and Minnesota Rule 8200.5100 and the directives,

Dorr-Charwood, Smith, Martineau and others will be denied the right to vote, and once the election has occurred, that right cannot effectively be re-instated. If the individual Plaintiffs and members and beneficiaries of the organizational Plaintiffs are denied the right to vote, they will be irreparably harmed.

**2. The state of the balance between the harm to Plaintiffs and the injury that granting the restraining order will inflict on other parties.**

The Minnesota Supreme Court has stated that the state has a compelling interest in preserving the orderliness and integrity of the election process. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 730 (Minn. 2003). The State, in addition to the Plaintiffs, has a compelling interest in preserving the integrity of the election process by complying with HAVA and the United States and Minnesota Constitutions. In this case, there would be no injury and little hardship to the Secretary if this Court promptly grants a temporary restraining order, in part requiring the Secretary to issue notice to prevent the violations that are set to occur on election day.

**3. Success on the Merits.**

**a. HAVA claims.**

Federal law establishes identification requirements for individuals registering to vote by mail who have not previously voted in a particular state for federal office. Specifically, HAVA provides that a mail registrant who votes in person may present the following forms of identification to the appropriate state or local election official as sufficient evidence of identity and address: (1) a current and valid photo identification **or** (2) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. 42 U.S.C. § 15483,

subd. (b).

Under Minn. Stat. § 201.061, subd. 1a (2004), an individual with incomplete registration by mail who votes in person may “provide proof of residence by any of the methods authorized for election day registration in section 201.061, subd. 3.”

Subdivision 3 sets forth the following methods of providing proof of residence for election day registration: (1) presenting a driver’s license or Minnesota identification card, (2) presenting “any document approved by the secretary of state as proper identification, (3) presenting a current valid student identification card that meets certain standards or a current student fee statement that contains the student’s valid address together with a picture identification card, or (4) having a voter who is registered to vote in the precinct vouch that he personally knows that the individual is a resident of the precinct. Minn. Stat. § 201.061, subd. 3. This Statute is inconsistent with HAVA.

Subdivision 3 (2) of § 201.061 references “any document approved by the secretary of state as proper identification.” A rule promulgated by the Minnesota Secretary of State provides that an individual may present the following forms of identification to the appropriate state or local election official as sufficient evidence of name and address for purposes or registration on election day: (1) a current and valid photo identification or (2) a driver’s license, passport, military or student identification that does not have a current address **together** with a recent utility bill showing the current address of the voter. Minnesota Rule 8200.5100. This Rule is inconsistent with HAVA.

By an Update dated August 27, 2004, the Secretary advised election officials and judges that “[i]dentification may be required” for mail registrants who “have never voted in a federal election in MN” and that the identification required for such individuals “is

the same as the Election Day Registration identification. (See . . . next page.)” *See* Complaint Ex. A. On the next page of the Update, the following forms of identification for Election Day Registration are listed:

- A. An ID with CURRENT NAME AND ADDRESS in the precinct. This includes:
- Minnesota driver’s license or learner’s permit or receipt for either
  - Minnesota identification card or receipt
  - Student identification card
  - Student fee statement
  - Student registration card
  - Prior registration listed on roster at former address in precinct
  - Authorized Tribal ID
  - Notice of late registration sent by city clerk or county auditor
- B. One of the following ID’s listed below, with a CURRENT utility bill:
- Minnesota driver license or Minnesota identification card with a former address
  - U.S. Passport
  - U.S. military ID
  - MN student photo ID

The Utility bill must be:

- cable TV, electric, gas, phone, water, garbage, or sewer, and
- due within 30 days of the election, and
- have the voter’s name and current address in the precinct.

. . . [describing vouching process]

*Id.*

The Update and the list therein violates HAVA for covered mail registrants because it does not specify for such mail registrants that any “current and valid photo

identification” is sufficient identification, with or without address (which would include tribal identification), and does not specify that “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter” is sufficient identification, even in the absence of photo identification. 42 U.S.C. § 15483, subd. (b). The Secretary has likewise issued an Election Judge Guide (pp. 16-17), which repeats the Update list of authorized proof of identity, and nowhere contains information specifying what form of identification is sufficient for mail registrants covered by HAVA. *See* Complaint Exhibit B.

The identification standards under Minn. Stat. § 201.061, subd. 3 and Minnesota Rule 8200.5100, as set forth in the Secretary’s Update and Election Judge Guide, are more restrictive than and inconsistent with the standards set forth in HAVA for individuals registering or attempting to register by mail who have not previously voted for federal office in Minnesota. The Minnesota standards violate HAVA for covered mail registrants because Minnesota does not specify for such mail registrants that any “current and valid photo identification” is sufficient identification, with or without address (which would include tribal identification), and does not specify that “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter” is sufficient identification, even in the absence of photo identification. 42 U.S.C. § 15483, subd. (b).

Under Art. I, section 4 of the United States Constitution, and the Supremacy Clause, the identification standards under Minn. Stat. § 201.061, subd. 3 and Minnesota Rule 8200.5100, to the extent that they do not permit all of the identification methods set forth in HAVA, are inconsistent with and are superseded by HAVA. *See also Sandusky*

*County Democratic Party v. Blackwell*, 2004 WL 2378007, \*1 (6<sup>th</sup> Cir. Oct. 23, 2004) (rights created by HAVA are enforceable under 42 U.S.C. § 1983); *The League of Women Voters v. Blackwell*, 2004 WL 2359988, \*4 (N.D. Ohio 2004) (finding that plaintiffs can maintain a claim for violation of HAVA under the Supremacy Clause and 28 U.S.C. § 1331).

**b. Equal protection claims arising out of the First and Fourteenth Amendments.**

“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). The right to vote also is protected in the manner of its exercise. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.* at 104-105. *See, e.g. Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665.

In *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983) the United States Supreme Court established a balancing test for evaluating whether a state election law creates an unconstitutional burden on voting and associational rights. A court must balance:

[T]he character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

*Burdick v. Takushi*, 504 U.S. 428, 434 (1992), (citing *Anderson*, 460 U.S. at 789). When state election laws are “severe” restrictions on those rights, the analysis will be one of

strict scrutiny and the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289 (1992).

Here the Secretary has engaged in arbitrary line drawing by: (1) depriving American Indians living off-reservation from qualifying to register to vote and exercising their right to vote in the same manner as American Indians from federally-registered tribes living on a reservation; and (2) by permitting certain forms of photo identification to be used by Minnesota citizens, including an item such as a student identification card, together with an utility bill to register to vote, but arbitrarily failing to recognize a tribal identification card as a valid photo identification card to be used in conjunction with an utility bill, thereby depriving American Indians from being able qualifying to register to vote and exercise their right to vote in the same manner as other citizens in the State of Minnesota. As noted above and as alleged in the Complaint, the individual Plaintiffs named in this suit do not possess other forms of photo identification other than their tribal identification cards. The Secretary’s actions will deprive these individuals, and others similarly situated, of their right to vote on November 2, 2004.

The Secretary cannot provide any compelling or even rational basis for causing such an unconstitutional burden on Plaintiffs fundamental right to vote. By enacting Minn. Stat. 160.151, subd. 3 (4), the Minnesota state legislature has clearly expressed its intent that tribal identification cards be permitted for use by American Indians living on a reservation.. There is no rational reason, much less a compelling one, that such identification cards may be used by those American Indians living on a reservation but not for those living off a reservation. Plaintiff Dorr-Charwood fails to understand why her tribal identification card may not be used to vote in Minneapolis while a fellow tribal

member with a tribal identification card containing the exact same information may use her tribal identification card to register to vote if she lives on a reservation. The tribal identification card should be considered valid and proper identification whether the individual lives on or off a reservation.

Further, Minnesota law permits the Secretary of the State to approve other documents as proper identification. Minn. Stat. § 201.061, subd. 3(2). Plaintiffs fail to understand why student identification cards and other forms of federally-issued identification cards may be considered “proper identification” to demonstrate a person’s identity coupled with an utility bill, but tribal identification cards issued by federally-recognized Indian tribes that do not contain a current address cannot be used by American Indians together with a utility bill in the same manner. There is no compelling or even rational justification that the State can make for discriminating against American Indians living off a reservation or for discriminating against American Indians who possess tribal identification cards as their form of photo identification. Plaintiffs Smith and Martineau have tribal photo identification cards that do not contain a current address, which they and others similarly situated currently cannot use together with a current utility bill to register to vote on election day.

In short, Defendant's actions and Minnesota law unconstitutionally deny the individual Plaintiffs and members and beneficiaries of the other Plaintiffs the equal protection of the laws.

#### 4. **Public Interest.**

“The right to vote \*\*\* is a fundamental and personal right essential to the preservation of self-government.” *Erlandson v. Kiffmeyer*, 459 N.W.2d 724, 730 (Minn.

2003) (citing *State ex rel. South St. Paul v. Hetherington*, 61 N.W.2d 737 (Minn. 1953)). The public interest in protecting the right to vote could not be greater. The United States' entire foundation of democracy is based on the right to participate in government by voting. All other public governmental interests stem from participation in government through the right to vote. Plaintiffs merely seek for Defendant Kiffmeyer to abide by the United States and Minnesota Constitutions and HAVA. There is great public interest in having elected officials obey the laws.

### **CONCLUSION**

For all of the foregoing reasons, Plaintiffs ask this Court to grant their motion for a temporary restraining order (1) restraining Secretary Kiffmeyer from enforcing Minn. Stat § 201.061, Minnesota Rule 8200.5100, and directives issued by the Secretary to the extent that they are inconsistent with 42 U.S.C. § 15483, subd. (b) and the United States and Minnesota Constitutions, and (2) requiring the Secretary to provide immediate and prominent notice to all County Auditors, Election Officials and Election Judges within Minnesota advising them what proof of identity must be accepted by first-time federal voters registering by mail and also by those registering to vote on election day. A copy

of such notice is provided herewith.

Dated: October 28, 2004

DORSEY & WHITNEY LLP

By s/Timothy E. Branson

Timothy E. Branson (#174713)

Skip Durocher (# 208966)

Robin M. Wolpert (#0310219)

Angela M. Hall (#311066)

50 South Sixth Street, Suite 1500

Minneapolis, MN 55402-1498

Telephone: (612) 340-2600

ATTORNEYS FOR ACLU-MN, NCAI,  
and BONNIE DORR-CHARWOOD

Of Counsel:

Teresa Nelson (#0269736)

American Civil Liberties Union of Minnesota

450 North Syndicate Street

Suite 230

St. Paul, MN 55104

Telephone: (651) 645-4097