

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

vs.

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

Defendant.

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

**DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER**

INTRODUCTION

The State submits this Memorandum in response to the Plaintiffs' Motion for a Temporary Restraining Order.

FACTS

Plaintiffs essentially raise four issues which arise from the following fact situations:

1. A voter who has registered by mail to vote, and who has never voted before in Minnesota in a federal election, shows up to the poll on election day to vote. The election judges determine that the voter is properly registered to vote.

2. A voter who has registered by mail to vote, and who has never voted before in Minnesota in a federal election, shows up to the poll on election day to vote. The election judge determines that the registration is incomplete for any number of reasons.

3. A Native American shows up to the poll to register, and who, as part of the registration procedure, wants to use a photographic tribal identification card issued by a tribe which is recognized by the United States government and which lists the Native American's address. The Native American, however, does not live on the tribal reservation.

4. A Native American who shows up to the poll to register, and who, as part of the registration procedure, wants to use a photographic tribal identification card issued by a tribe which is recognized by the United States government. The Native American may live on or off the reservation but his address is not listed on the tribal identification card. The Native American offers to produce, in addition to the tribal ID card, a document recognized by the State as verifying proof of residency, such as a utility bill.

The Plaintiffs argue that the State has interpreted and applied its laws to the above fact situations in a manner inconsistent with HAVA and the Equal Protection provisions of the Minnesota and United States Constitutions.

LAW AND ARGUMENT

I. HAVA AND MINNESOTA LAW.

In response to shortcomings in the national electoral system revealed by the 2000 election, Congress enacted the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq.* Among other things, HAVA establishes a procedure by which individuals may register to vote by mail. *Id.* § 15483(b). With respect to a voter who has registered by mail, HAVA sets forth the documentation which must be presented by the voter when he or she casts a vote. With regard to individuals who vote in person, HAVA states that the individual must:

(I) Present[] to the appropriate State or local election official a current and valid photo identification; or

(II) Present[] to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, pay check, or other government document that shows the name and address of the voter ...

42 U.S.C. § 15483(b).

It is possible that an individual who attempts to register by mail does not successfully register. For example, he may neglect to provide all the required information. As a result, his registration would be considered incomplete. Minnesota Statutes, section 201.061, subdivision 1a addresses the situation where a person submits an incomplete application to register by mail. That section allows an incomplete application to be “completed” by one of four methods:

- (1) presenting to the auditor more than 20 days before the election a document authorized for election day registration in section 201.061, subdivision 3;
- (2) registering in person before or on election day;
- (3) if voting by absentee ballot or by mail, following election day registration procedures for absentee voters is described in section 203B.04, subdivision 4; or
- (4) providing proof of residence by any of the methods authorized for election day registration in section 201.061, subdivision 3.

Minn. Stat. § 201.061, subd. 1a (2004).

Minnesota Statutes, section 201.061, subdivision 3 establishes the procedure to be followed with respect to individuals who register at the polls on election day. That section states that an individual may register by appearing in person at a polling place in the precinct where he maintains residence, complete a registration application, make an oath and provide proof of residence. The statute indicates that an individual may prove residence by, among other things:

- (1) presenting a driver’s license or Minnesota identification card issued pursuant to section 171.07;
- (2) presenting any document approved by the secretary of state as proper identification;

(4) having a voter who is registered to vote in the precinct sign an oath in the presence of the election judge vouching that the voter personally knows that the individual is a resident of the precinct. A voter who has been vouched for on election day may not sign a proof of residence oath vouching for any other individual on that election day.

For tribal band members living on an Indian reservation, an individual may prove residence for purposes of registering by presenting an identification card issued by the tribal government of a tribe recognized by the Bureau of Indian Affairs, United States Department of the Interior, that contains the name, street address, signature, and picture of the individual. The county auditor of each county having territory within the reservation shall maintain a record of the number of election day registrations accepted under this section.

Minn. Stat. § 201.061, subd. 3 (2004).

In accordance with the discretion afforded her by Minnesota Statutes, section 201.061, subdivision 3(2), the Secretary of State enacted rules which allow additional types of proof of residence. Minnesota Rules, part 8200.5100, subpart 2 states that an eligible voter may prove residence by presenting one of the photo identification cards listed in Item A and one of the additional proofs of residence listed in Item B, as follows:

A. The following documents are acceptable photo identification cards under this subpart if they contain the voter's name and photograph:

- (1) a Minnesota driver's license or identification card;
- (2) a United States passport;
- (3) a United States military identification card; or
- (4) a student identification card issued by a Minnesota post-secondary educational institution.

B. An original bill for gas, electric, telephone, cable television, solid waste, water or sewer services is acceptable as an additional proof of residence under this subpart if:

- (1) the bill shows the voter's name and current address in the precinct;
and
- (2) the due date of the bill is within 30 days before or after the election.

Minn. Rules pt. 8200.5100, subp. 2.

Plaintiffs allege that certain of Minnesota's identification standards are inconsistent with HAVA and that certain of the standards violate the due process and equal protection clauses of Article II of the Minnesota Constitution and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs' claims are addressed below.

When deciding a motion for injunctive relief, a court must consider: (1) the moving party's probability of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) the public interest in the issuance of the injunction. *See Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d, 109, 114 (8th Cir. 1981). "None of these factors by itself is determinative; rather in each case the four factors must be balanced to determine whether they tilt toward or away from granting a preliminary injunction." *West Publ'g Co. v. Mead Data Cnt., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986) *cert. denied* 479 U.S. 1070 (1987).

II. PLAINTIFFS MUST SHOW THAT THEY ARE LIKELY TO PREVAIL ON THE MERITS.

Plaintiffs bear the heavy burden of proving a substantial likelihood of success on the merits before a temporary restraining order may be issued. The Defendant does not believe that Plaintiffs have carried this burden on all their claims.

A. Minnesota Law and Rules are not Inconsistent with HAVA.

Plaintiffs claim that the identification standards under Minnesota Statutes, section 201.061, subdivision 3 and Minnesota Rules part 8200.5100 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. This is not correct.

First, HAVA specifically states:

The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the federal requirements under this title or any law described in section 906.

42 U.S.C. § 15484.

Minnesota's laws are not inconsistent with HAVA. Indeed, with regard to individuals who have successfully registered to vote by mail, Minnesota law does not require individuals to provide any type of identification in addition to that required by HAVA.

With respect to an individual who attempted to register by mail but whose application is incomplete, Minnesota Statutes, section 201.061, subdivision 1a establishes the process to be followed when the individual seeks to vote. Plaintiffs do not appear to challenge the basic structure of Minnesota Statutes section 201.061, subdivision 1a, which provides that if a county auditor is unable to verify the voter's driver's license or social security information, the voter must provide additional evidence. If the county auditor cannot verify a voter's information in a mail registration, Plaintiffs and the Defendant appear to agree that it is appropriate for the State to require the voter to provide additional evidence. The only issue here is what type of evidence is required.

HAVA does not specifically address the documentation which must be provided at a polling place by a person whose application to register by mail was incomplete. As a result, Minnesota's approach, which simply allows a person to register at the polls or provide proof of residence, is not inconsistent with HAVA.

B. The Provisions of Minn. Stat. § 201.061, subd. 3 and Minnesota Rules Part 8200.5100, subp. 2 Raise Questions Under the Due Process and Equal Protection Provisions of the Minnesota Constitution and the United States Constitution.

Plaintiffs allege that Minnesota laws and rules violate their right to vote and their rights to due process and equal protection under the First and Fourteenth Amendments to the United States Constitution and Article II of the Minnesota Constitution. First, the Plaintiffs allege that the law impermissibly distinguishes between tribal IDs that are possessed by tribal members living on a reservation and those possessed by members living off the reservation. Second, Plaintiffs allege that the rules adopted by the Secretary impermissibly distinguish between photo IDs issued by Indian tribes and other equivalent forms of photo identification.

1. Minnesota Statutes section 201.061, subdivision 3.

Minnesota Statutes section 201.061, subdivision 3 specifically authorizes the use of a tribal identification card to establish residency for purposes of election day registration, provided that the card includes the person's address. That statute, however, limits the use of such identification cards to tribal band members who live *on* a reservation. If the holder of the card lives off the reservation, however, the statute does not authorize a tribal identification card with an address to be used as a form of identification. Plaintiffs allege that this restriction on the use of tribal identification cards unconstitutionally discriminates between tribal members who live on a reservation and tribal members who live off a reservation.

Ordinarily, the first step in an equal protection analysis is to determine whether the challenged classification must satisfy strict scrutiny or merely the rational basis standard. A restriction that either dilutes the effectiveness of some citizens' votes or denies the franchise to citizens who are otherwise qualified by residence and age, "receive[s] close scrutiny from the Court." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626, 89 S.Ct. 1886, 23 L.Ed.2d

583 (1969). When reviewing a statute that denies "some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable." *Id.* at 627-28, 89 S.Ct. 1886.

By the same token, where only the ability to vote by absentee ballot, and not the right to vote generally, has been at issue, the United States Supreme Court has applied rational basis analysis. See *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). In *McDonald*, the Court concluded that an Illinois statute that denied unconvicted jail inmates absentee ballots did not restrict the inmates' right to vote, but rather only restricted the inmates' claimed right to an absentee ballot, because there was no evidence that jail officials would not provide another means for the inmates to vote. Because the fundamental right to vote was not at issue, the Court declined to apply strict scrutiny and required only that the statute "must bear some rational relationship to a legitimate state end." *Id.* at 809, 89 S.Ct. 1404.

The issue presented by Plaintiffs appears to be whether there is a rational basis in permitting members who live on a reservation to use a tribal ID, but not permitting members who live off the reservation from using the same ID. It is unknown whether, at the time section 201.061, subdivision 3 was enacted, there was any legislative debate as to the basis for distinguishing the authenticity of a tribal ID as it applies to members off the reservation. The only explanation the State can determine is that the permitted use of the "on reservation" tribal ID was requested by representatives of certain tribes. The State acknowledges that there is heightened scrutiny given to laws that have the effect of preventing individuals from exercising the right to vote. The State believes, however, that the recognition of an "on reservation" tribal

ID does not inhibit “off reservation” tribal members from voting but simply enables “on reservation” tribal members to exercise their right to vote.

III. MINNESOTA RULES PART 8200.5100, SUBPART 2.

As noted above, Minnesota law authorizes certain forms of documents to authenticate a voter’s identity and residence, such as a drivers license, a voucher by a registered voter in that precinct, or a tribal ID card if it contains the voter’s address on the card. The statute also authorizes the Secretary of State to approve other types of documentation. Accordingly, the Secretary of State adopted Minnesota Rule 8200.5100, subpart 2, which identifies other documents that can be used for registration. This rule requires the applicant to produce two documents -- one from Part A of the rule and one from Part B of the rule. The documents in Part A are to substantiate the identity of the voter, while the documents in Part B are to substantiate the residency of the voter. While the rule allows various types of photographic identification cards to be used under Part A, such as student identification cards, passports, and the like, it does not authorize a tribal identification card to be used.

The State acknowledges that Minnesota Statutes, section 201.061, subdivision 3 recognizes a tribal ID with an address to be sufficient for purposes of identification and residency if the voter resides on a reservation. The Plaintiffs state, however, that many tribal IDs do not have addresses, just like student identification cards, passports, or military IDs, all of which are accepted under Part A of the rule. Accordingly, while a tribal ID with an address is sufficient on its own to meet the identification and residency authentication requirements to register a voter, a tribal ID without an address is not sufficient under the rule to meet the identification requirements for voter registration.

The Plaintiffs allege that there is no rational basis to authorize some types of photo IDs (with no address) to be provided with a utility bill, but to not authorize the use of a tribal identification card. Minnesota IDs, student IDs and military IDs are all recognized. As noted previously, the State does not have any legislative history to distinguish tribal IDs that have an address from tribal IDs that do not have an address. The legislature has determined, however, that tribal IDs must contain an address to be an acceptable form of identification. Further, the State does not believe that Minnesota Rules part 8200.5100, subpart 2 deprives a Native American who does not have an address on a tribal ID card of the right to vote. Rather, Minnesota law provides a Native American who does have an address on his tribal ID card with an additional means to register to vote.

CONCLUSION

States have long been primarily responsible for regulating federal, state, and local elections. *See Storer v. Brown*, 415 U.S. 724, 730 (1974). Regulations enacted by State have covered a broad range of issues and have included registration and eligibility requirements. *Id.* The purpose of the identification requirements challenged by the Plaintiffs is to prevent voter fraud and protect the integrity of the voting process. The laws challenged by the Plaintiffs are intended to provide a framework by which voters provide evidence that they are who they claim they are and that they live where they claim to live. These laws, intended to enable Minnesotans to vote, serve the public interest in that citizens can look with confidence at an election process which insures that all votes cast by qualified voters are counted. *See Bay County Democratic*

Party v. Land, 2004 WL 2345560 (E.D.Mich.), citing *Bush v. Gore*, 531 U.S. at 109. These general principles must be considered when evaluating Plaintiffs' claims.

Dated: October 29, 2004

Respectfully submitted,

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