

IN THE DISTRICT COURT OF IOWA IN AND FOR POLK COUNTY

KAYLA KOETHER, in her individual capacity as the Democratic Nominee for the Iowa House of Representatives District 55,

Plaintiff,

vs.

PAUL PATE in his official capacity as Iowa Secretary of State; BENJAMIN STEINES in his official capacity as County Auditor for Winneshiek County, Iowa,

Defendants.

CASE NO. _____

**PETITION FOR TEMPORARY
INJUNCTION AND WRIT OF
MANDAMUS**

COMES NOW, Plaintiff and for her Petition states upon information and belief:

PARTIES AND JURISDICTION

1. Plaintiff Kayla Koether is the Democratic Party's nominee for the Iowa House of Representatives District 55, including Winneshiek, Clayton and Fayette Counties.
2. Defendant Paul Pate is the Secretary of State for the State of Iowa, serves as the State Commissioner of Elections, and supervises Iowa's county auditors in the administration of Iowa's election laws and administrative rules pursuant to Iowa Code § 47.1.
3. Benjamin Steines is County Auditor for Winneshiek County, Iowa, and serves as the Winneshiek County Commissioner of Elections, and is responsible for administration of Iowa's election laws and administrative rules pursuant to Iowa Code § 47.2.
4. Jurisdiction is proper with this Court as the parties are citizens of Iowa and venue is proper because Defendant Paul Pate in his official capacity as Iowa Secretary of State is a state agency located in Polk County, Iowa and is the commissioner of all state elections. (collectively "Election Official Defendants").

BACKGROUND

5. This action concerns the November 2018 general election, and the failure of Election Official Defendants to count all of the validly cast absentee ballots in House District 55.

6. Any registered voter may vote in the General Election by absentee ballot. IOWA CODE § 53.1.

7. “In order for the ballot to be counted, the return envelope must be received in the commissioner’s office before the polls close on Election Day or be clearly postmarked by an officially authorized postal service or bear an intelligent mail barcode traceable to a date of entry into the federal mail system not later than the day before the election and received by the commissioner not later than noon on the Monday following the election.” IOWA CODE § 53.17(2) (emphasis added).

8. Absentee ballots are counted by the absentee and special voters precinct board (“ASVP Board”) under the direction of the county auditor. IOWA CODE § 53.23(2).

9. The ASVP Board reconvenes and reviews any ballots that are received after the initial count and determines their eligibility. IOWA CODE § 50.22.

10. The ASVP Board reports vote totals to the county supervisors to canvass. IOWA CODE § 50.22(4).

11. The county supervisors conduct a canvass of the vote to certify the totals. IOWA CODE § 50.24(3).

12. Prior to the canvass adjourning, the canvass board shall “contact the chairperson of the special precinct board before adjourning and include in the canvass any write-in votes tallied and recorded by the special precinct board or any absentee ballots which were received after the polls closed in accordance with section 53.17 and which were canvassed by the special

precinct board after election day.” IOWA CODE § 50.24 (2).

13. On or after Election Day, November 6, 2018, but prior to the canvass of the votes, the Winneshiek County Auditor received thirty-three absentee ballots returned via the United States Postal Service. Exhibit 1, Affidavit of Kayla Koether ¶ 4.

14. Twenty-nine of the ballots were received on November 7, 2018. Exhibit 1 ¶ 5.

15. Two of the thirty-three ballots arrived during the canvass. Exhibit 1 ¶ 6.

16. The fact that these ballots were received the day after the election makes it highly probable that they were mailed prior to “the day before the Election,” since mail travels from Winneshiek County to Waterloo and then returns to Winneshiek for delivery. This process, typically takes two days. Exhibit 1 ¶ 7.

17. All thirty-three ballots contained an intelligent mail barcode, but not a stamp canceling postmark. Exhibit 1 ¶ 9-10; Exhibit 2, Affidavits of Liam Murphy and Janet Alexander, and image of Liam’s ballot.

18. Since the ballots did not contain a stamp canceling postmark, the Election Official Defendants have refused to count the ballots. Exhibit 1 ¶ 9.

19. Post office policy states that stamp canceling postmarks are not required be placed on postage paid mail, as is used with absentee ballots. Additionally, ballots are too thick to run through the stamp canceling postmark machine. Exhibit 3, 1-1.3 Postmarks, USPS, Nov. 28, 2018, https://about.usps.com/handbooks/po408/ch1_003.htm.

20. The intelligent mail bar code contains information regarding when a mail piece was placed into the custody of the United States Postal Service. Exhibit 4, 1-1.3 Intelligent Mail, USPS, Nov. 28, 2018, https://about.usps.com/postal-bulletin/2010/pb22277/html/info_005.htm.

21. Both the Winneshiek County Auditor and the Iowa Secretary of State have

refused to obtain the information from the United States Postal Service. Exhibit 1 ¶ 8.

22. The post office in Waterloo, Iowa is the distribution center for Winneshiek County and has the ability to read the intelligent mail bar code. Exhibit 1 ¶ 7.

23. The difference in the vote count between Ms. Koether and her opponent is only nine votes. Exhibit 1 ¶ 14.

24. The thirty-three voters have a constitutional right to have their votes counted if they were returned in accordance with the deadline set out in Iowa law.

25. In Fayette County, Election Officials, through the ASVP Board, counted twenty-five ballots received on or after Election Day, approximately twelve of which did not contain stamp canceling postmarks and were not checked for dates on which they were placed into the federal mail system. Exhibit 1 ¶ 13.

26. The thirty-three voters in Winneshiek County have the same right to have their vote counted in the Iowa House District 55 election as the voters in Fayette County, but have not been given that opportunity. Exhibit 1 ¶ 11, 13.

27. A writ of mandamus is appropriate for this District Court to order the Election Official Defendants to carry out their duties as imposed by Iowa law. IOWA CODE § 661.1; See also *Schwarz Farm Corp. v. Board of Sup'rs of Hamilton County*, 196 N.W.2d 571 (Iowa 1972) (holding the purpose of mandamus is to compel a person to perform acts where they are obligated to do so under the law).

28. This District Court has authority to order Defendant Election Officials to perform their legal responsibilities. See *Bredt v. Franklin Cty.*, 227 Iowa 1230, 290 N.W. 669 (1940) (stating a district court had the authority to issue a writ to a county official); *Zellmer v. Smith*, 221 N.W. 220 (1928) (stating a district court has the authority to issue a writ to compel an officer

of the state to perform and official duty).

**COUNT 1:
TEMPORARY INJUNCTION**

29. Plaintiff incorporates herein the allegations of paragraphs one through twenty-nine above.

30. The Iowa Secretary of State has scheduled a meeting to certify the Iowa House District 55 election on Monday, December 3, 2018. Exhibit 1 ¶ 16.

31. Plaintiff will be irreparably harmed if the election is certified without the thirty-three absentee ballots being investigated and counted.

32. Plaintiff is entitled to relief which includes restraining the Election Official Defendants from certifying the House District 55 election results until all ballot issues are adjudicated.

33. Pursuant to I.R.C.P. 1.1502, Plaintiff requests that the Court enter a Temporary Injunction restraining the Iowa Secretary of State from certifying the election.

34. Pursuant to I.R.C.P. 1.1508, a bond in the instance case should be waived.

35. Pursuant to I.R.C.P. 1.1504, the undersigned attorney certifies that no petition or application for the same relief has been filed and refused by any court of competent jurisdiction.

WHEREFORE, Plaintiff prays the Court issue an immediate temporary Writ of Injunction, without a hearing, enjoining and restraining the Iowa Secretary of State from certifying the results of the Iowa House District 55 election.

**COUNT 2:
WRIT OF MANDAMUS TO OBTAIN INFORMATION FROM THE UNITED STATES
POSTAL SERVICE**

36. Plaintiff incorporates herein the allegations of paragraphs one through thirty-five

above.

37. Election Official Defendants' duties include administering Iowa's elections in accordance with Iowa law.

38. Elections Official Defendants are required to perform the following duties:

If the postmark is illegible, missing, or dated on or after election day, the commissioner shall attempt to verify the absentee ballot's entry into the federal mail system by using the [intelligent mail barcode] Tracing information for the ballot. The commissioner shall provide all of the materials to the board.

Iowa Admin. Code 721—21.14(2)(b).

39. This duty is not discretionary.

40. Iowa Code does not define intelligent mail barcode.

41. The barcodes on the thirty-three absentee ballots contain intelligent mail barcodes that contain information regarding when the ballots were placed into the federal mail system. Exhibit 1 ¶ 10.

42. The Election Official Defendants refuse to obtain the information from the United States Postal System thereby abrogating their responsibilities to facilitate elections and intentionally disenfranchising voters. Exhibit 1 ¶ 8-9.

43. Equal Protection must be afforded to citizens and classes of citizens who are similarly situated. *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (citations omitted)). The counties are similarly situated because they are voting in the same election and the votes in question in both Winneshiek and Fayette County will affect the same election. *See Varnum*, 763 N.W.2d at 883.

44. Despite requests to the Election Official Defendants, they continue to refuse to obtain the information. Exhibit 1 ¶ 8-9.

45. As a result of their refusal, Plaintiff has sustained damage and may sustain damages in the future. Exhibit 1 ¶ 14-15.

46. Without reviewing the information in the intelligent mail barcodes, the outcome of the election will be uncertain since thirty-three votes are not considered and the difference in the total votes between the two candidates is only nine votes.

47. The intelligent mail barcodes are reused every thirty to forty-five days and if the information is not obtained, the results of the election will be open to challenge for election misconduct by the Election Official Defendants. Exhibit 1 ¶ 12.

48. Plaintiff has no other plain, speedy, or adequate remedy.

49. This Court may enter a temporary order to prevent damage or injury to Plaintiff until the action is decided. IOWA CODE § 661.16.

WHEREFORE, Plaintiff prays for an emergency hearing regarding this claim and an emergency writ of mandamus requiring Election Officials Defendants to immediately obtain the date the thirty-three ballots entered into the federal mail system before it is lost and for all other appropriate orders; and for a judgment for Plaintiff's costs.

**COUNT 3:
WRIT OF MANDAMUS TO COUNT THE ABSENTEE BALLOTS PLACED INTO THE
MAIL SYSTEM PRIOR TO ELECTION DAY**

50. Plaintiff incorporates herein the allegations of paragraphs one through forty-nine above.

51. Election Official Defendants' duties include administering Iowa's elections in accordance with Iowa law.

52. Elections Official Defendants are required to perform the following duties:

If the postmark or IMb Tracing information indicates that an absentee ballot was

received by the deadline specified in Iowa Code chapter 53, the ballot shall be included for canvass by the absentee and special voters precinct board (board).

If the board concludes that the IMb Tracing information verifies that the absentee ballot entered the federal mail system by the deadline specified in Iowa Code chapter 53, the absentee ballot shall be counted.

Iowa Admin. Code 721—21.14(2)(a & g).

53. This duty is not discretionary.

54. The Election Official Defendants refuse to count the absentee ballots. Exhibit 1 ¶ 9.

55. Despite requests to the Election Official Defendants, they continue to refuse to obtain the information and then count the ballots.

56. As a result of their refusal, Plaintiff has sustained damage and may sustain damages in the future. Exhibit 1 ¶ 14-15.

57. Plaintiff has no other plain, speedy, or adequate remedy.

WHEREFORE, Plaintiff prays for an emergency writ of mandamus requiring Election Officials Defendants to count the votes after conformation that the ballots were placed in the federal mail system by the deadline in Iowa law and for all other appropriate orders; and for a judgment for Plaintiff's costs.

/s/ Shayla McCormally

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