

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

CASE TYPE: CIVIL/OTHER

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Aaron Paul,

Court File No. 70-CV-24-17210

Hon. Tracy Perzel

Contestant,

v.

**CONTESTEE BRAD TABKE'S  
RESPONSE BRIEF**

Brad Tabke,

Contestee.

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## I. INTRODUCTION

Contestant Aaron Paul (“Contestant”) is asking to redo the 2024 general election for House District 54A, which he lost by a margin of 14 votes because 20 ballots were inadvertently discarded before they were counted. Paul asserts that the failure to count the 20 ballots makes it impossible to know which candidate received the most votes. He is wrong; the evidence introduced at trial conclusively demonstrates that Representative Brad Tabke won the election and the contest fails as a result.

At trial, the Court received extensive evidence explaining in step-by-step detail how Scott County was able to identify, with certainty, the individual voters who cast the 20 uncounted ballots. The Court also heard from twelve of these voters who testified under oath regarding how they cast their ballots in the race for House District 54A; six voted for Representative Tabke and six voted for Aaron Paul. The remaining eight uncounted ballots, regardless of who they were cast for, cannot change the result and there is no legitimate question as to who won the election.

Contestant suggests that the Court should ignore the evidence confirming that Representative Tabke won the election and instead send the matter to a special election where the outcome will be decided by a much smaller pool of voters. Contestant relies on cases where courts from across the country have concluded that irregularities in the conduct of the election make it impossible to know the true outcome of the election. Each case is readily distinguishable on the dispositive issue in this contest. In each case cited by Contestant it was not possible to determine whether or how the irregularities affected the outcome of the election. Here, it is not only possible to determine whether the failure to count 20 ballots from Shakopee Precinct-10 affected the outcome of the election, the evidence at trial conclusively proves that Representative Tabke won the election.

Contestant failed to meet his burden and this Court should enter findings of fact and conclusions of law recommending that the Minnesota House of Representatives affirm that Representative Tabke won the 2024 general election and take no further action relating to this contest.

## **II. FACTUAL BACKGROUND**

The general election for House District 54A was held on November 5, 2024. The certified results of the election, following a hand recount of the ballots, show that incumbent Representative Brad Tabke received 10,979 votes and challenger Aaron Paul received 10,965 votes, a margin of 14 votes. Ex. 5 at AP00142. A total of 21,980 ballots were counted in the election. *Id.*

During the process of preparing for the canvass of the election results, Scott County discovered that 21 more absentee ballots had been marked as “accepted” in the Statewide Voter Registration System (“SVRS”) than were counted and included in the election results. Tx. 77:14-79:25 (J. Hanson). This included one uncounted absentee ballot from Shakopee Precinct-12A and 20 uncounted absentee ballots from Shakopee Precinct-10. Ex. 3 at AP00103; Tx. 80:1-15 (J. Hanson). The County noted that it may not be unusual for a one-ballot discrepancy to occur in a single precinct where a voter may have chosen not to cast their ballot after having checked-in and did not investigate the discrepancy in Shakopee Precinct-12A. Ex. 3 at AP00103; Tx. 21:16-22:10 (J. Hanson). The 20-ballot discrepancy for Precinct-10 was unusual and the County undertook an investigation, led by its Elections Administrator Julie Hanson, to determine the cause. Ex. 3; Tx. 73:11-74:10 (J. Hanson).

Using the data in the SVRS, Scott County was able to determine that the uncounted absentee ballots for Precinct-10 originated from the early voting location administered by the City of Shakopee at City Hall. Ex. 3 at AP00103-04; Tx. 80:19-81:9 (J. Hanson). Specifically, the County was able to determine that the City of Shakopee had accepted 329 absentee ballots for

Precinct-10 at its early voting location but only 309 ballots had been counted and included in the election results. Ex. 3 at AP00103-04; Tx. 81:13-82:2 (J. Hanson). Upon discovering this fact, the County asked the City of Shakopee to search for the missing ballots including checking the “write-in drawer” of the tabulator machine. Tx. 26:20-28:5 (J. Hanson). The City was unable to locate the uncounted ballots. Tx. 50:15-23 (J. Hanson). Separately, the County opened the transfer case the City used to return ballots to the County and confirmed through several hand counts that there were only 309 ballots in the case. Ex. 3 at AP00103; Tx. 81:19-25 (J. Hanson).

As part of its investigation, Scott County received a spreadsheet from the City of Shakopee which reflected the number of ballots that had been accepted at the early voting location and a running total of the ballots which had been counted by the tabulator machine. Ex. 3 at AP00104; Ex. 202; Tx. 82:25-84:4; (J. Hanson); Tx. 165:19-167:8, 170:8-20 (K. Gamble). The spreadsheet included a page titled “AB Count from 9/20 – 10/17” which included the ballots accepted from September 20 through October 17. Ex. 202 at 4; Tx. 170:8-171:12 (K. Gamble). This is the so-called “envelope voting” period where voters place their completed ballots into a secrecy envelope and signature envelope and deposit them into a secured box for subsequent review and counting. Tx. 23:1-25 (J. Hanson); Tx. 164:4-18 (K. Gamble). Each day, the election judges at the Shakopee early voting location counted the envelopes which had been completed by the voters and confirmed that they matched the number of completed absentee ballot applications for that day. Tx. 170:8-24 (K. Gamble). The spreadsheet shows that a total of 1,124 ballots were cast at the Shakopee early voting location during the envelope voting period. Ex. 202 at 4; Tx. 85:17-86:14 (J. Hanson); Tx. 171:8-12 (K. Gamble).

A separate page in the spreadsheet titled “DB Applications and Machine Counts” shows the number of absentee ballots that were cast at the Shakopee early voting location from October



18 through November 4. Ex. 202 at 3; Tx 165:19-167:8 (K. Gamble). This is the so-called “direct balloting” period where voters deposit their ballots directly into the tabulator machine. Tx. 24:9-25 (J. Hanson); Tx. 164:4-18 (K. Gamble). The spreadsheet shows the number of completed applications for each day and a running total of the ballots counted through the City’s tabulator machine. Ex. 202 at 3; Tx. 165:19:-167:8 (K. Gamble). The election judges did not record the daily count on the tabulator machine until Monday, October 21. Tx. 168:4-169:6 (K. Gamble). Accordingly, election judge Kay Gamble determined the machine count for the end of the day on October 18 by subtracting the number of ballots submitted through the direct voting method on October 21 (208 ballots) from the end-of-day machine count on October 21 (1,587 ballots). Ex. 202 at 3; Tx. 86:15-87:3; Tx. 168:4-169:6 (K. Gamble). The election judges recorded the end-of-day machine counts on each day from October 21 through November 4. Tx. 169:7-14 (K. Gamble)

The “AB Count from 9/20 – 10/17” page of the spreadsheet shows that 1,124 ballots had been cast through the end of the “envelope voting” period and the “DB Applications and Machine Counts” page shows that 276 ballots were cast on the first day of “direct balloting” on October 18. Ex. 3 at 3-4. Accordingly, a total of 1,400 ballots should have been run through the City’s tabulator machine by the end-of-day on October 18. However, the spreadsheet reflects that only 1,379 ballots had been tabulated, a discrepancy of 21 ballots. Ex. 202 at 3; Tx. 85:17-86:11 (J. Hanson); Tx. 171:8-172:4 (K. Gamble); Tx. 193:20-194:25 (C. Petersen). This means that the 21 uncounted ballots must have been cast on or before October 18, 2024. Tx. 85:17-86:11 (J. Hanson).

Scott County’s investigation determined that the City’s daily absentee ballot counts as reflected on the spreadsheet were accurate through October 17. Tx. 95:2-5 (J. Hanson). The County was able to reach this conclusion through a comparison of the absentee ballot applications,

signature envelopes, and data contained in the SVRS as well as interviews of Scott County election judges including Kay Gamble and Rocky Swearingin. Ex. 9; Tx. 27:20-30:18, 84:8-15, 95:2-16 (J. Hanson). Most significantly, Mr. Swearingin described the process the City of Shakopee used on October 17 to “accept” absentee ballots and to prepare to run the ballots through the tabulator machine. Tx. 92:20-95:16 (J. Hanson).

Mr. Swearingin explained to Election Administrator Julie Hanson—and testified at trial—that the Shakopee absentee ballot board, consisting of Mr. Swearingin and two other election judges, met on the morning of October 17 to review the absentee ballots received by the City which had not yet been accepted. Tx. 95:17-96:17 (J. Hanson); Tx. 239:1-240:14 (R. Swearingin). Once this process was completed, the ballots, which remained sealed in their envelopes, were returned to the City’s absentee ballot room where they were later marked as “accepted” in the SVRS and securely stored. Tx. 95:17-96:17, 99:9-100:3 (J. Hanson); Tx. 239:1-240:4 (R. Swearingin). The absentee ballot board then began the process of opening envelopes to prepare the ballots for counting. Tx. 96:17-97:4 (J. Hanson); Tx. 240:15-21 (R. Swearingin).

At the start of this process, election judge Kay Gamble provided the absentee ballot board with a yellow sheet of note paper that listed the number of ballots they should have for each precinct. Tx. 93:7-22 (J. Hanson); Tx. 241:4-246:6 (R. Swearingin); Tx. 172:23-173:14, 174:12-15 (K. Gamble). The members of the absentee ballot board counted the envelopes for each precinct to confirm the numbers matched the list provided by Ms. Gamble. Tx. 93:7-22 (J. Hanson); Tx. 241:4-246:6 (R. Swearingin). The absentee ballot board began with Shakopee Precinct-1 and noticed that the numbers did not match due to the fact that Ms. Gamble had included spoiled ballots in the expected totals. Tx. 241:4-246:6 (R. Swearingin); Tx. 174:18-175:1 (K. Gamble). Ms. Gamble provided a revised sheet that included only the number of absentee ballots for the

Shakopee early voting location that had been designated as “accepted” in the SVRS as of the close of business on October 16. Tx. 241:4-246:6 (R. Swearingin); Tx. 172:23-174:7, 174:18-175:24 (K. Gamble). The counts for Shakopee Precinct-1, and all other precincts, matched the totals included in Ms. Gamble’s revised list. Tx. 94:15-95:5 (J. Hanson); Tx. Tx. 241:4-246:6 (R. Swearingin); Tx. 174:18-175:9 (K. Gamble).

Once the absentee ballot board had counted the envelopes, they opened the outer signature envelopes and separated them from the inner secrecy envelopes. Tx. 243:7-244:4 (R. Swearingin). Every signature envelope contained a secrecy envelope. *Id.* The absentee ballot board then opened the secrecy envelopes and removed the ballots that had been completed by the voters. *Id.* Every secrecy envelope contained a ballot. *Id.* The ballots were then securely stored until they were run through the City’s tabulating machine at the end of the day on October 18. Tx. 243:7-19; 246:10-24 (R. Swearingin).

The ballots which the absentee ballot board reviewed for acceptance on the morning of October 17 were not opened by the absentee ballot board that day. Tx. 96:1-97:4 (J. Hanson); Tx. 175:17-24 (K. Gamble) (noting that the absentee ballot board accepted ballots after the report was run on the morning of October 17). Instead, these ballots, together with the ballots that were received throughout the day on October 17, were opened through a separate process on the morning of October 18. Tx. 100:4-9 (J. Hanson). A total of 99 ballots for the Shakopee early voting location—including 20 ballots from Precinct-10—were accepted on either October 17 or 18 and would have been opened and prepared for counting on October 18. Ex. 9; Tx. 100:4-102:6 (J. Hanson). These ballots were opened by former Shakopee City Clerk Lori Hensen acting by herself. Tx. 101:19-103:2 (J. Hanson); Tx. 176:17-177:23 (K. Gamble) (testifying that she observed Ms. Hensen opening ballots on the morning of October 18).

The County requested that the City provide the empty secrecy envelopes for all ballots received at the Shakopee early voting location but was informed that they had been discarded. Ex. 2 at AP00104; Tx. 37:19-24 (J. Hanson). It appears that Ms. Hensen never removed the 20 ballots for Precinct-10 which were accepted by the City of Shakopee on October 17 and 18 from their secrecy envelopes and that the ballots were discarded with the envelopes. Ex. 2 at AP00104-05; Tx. 52:14-21 (J. Hanson). This is the only plausible explanation that has been advanced to explain the source (and subsequent loss) of the 20 uncounted ballots from Shakopee Precinct-10. Tx. 103:4-10; 105:10-18 (J. Hanson).

The County was able to identify the voters who cast the 20 uncounted ballots using data in the SVRS database. Tx. 105:19- 106:13 (J. Hanson). Specifically, the County was able to run a report identifying 87 voters who cast their ballots for Shakopee Precinct-10 at the Shakopee early voting location using the envelope voting process. Ex. 9; Tx. 88:21-90:3,105:19-106:13 (J. Hanson). Forty of these ballots were cast through the health care facility voting process and the ballots were not accepted until October 30 as reflected on the report. Ex. 9; Tx. 90:4-91:23 (J. Hanson). This leaves 47 voters who cast ballots for Shakopee Precinct-10 at the Shakopee early voting location during the “envelope voting” period which ended on October 17. Ex. 9; Tx. 91:24-92:5 (J. Hanson). Of these, only twenty voters had their absentee ballots accepted on October 17 or October 18. Ex. 9; Tx. 105:19-106:13 (J. Hanson). These individuals are identified as “Voter 1” through “Voter 20” in the copy of the SVRS report which was introduced at trial. Ex. 9; Tx. 105:19-106:13 (J. Hanson).

A total of 1,362 ballots were cast by voters in Shakopee Precinct-10. Ex. 206; Tx. 65:4-66:18 (J. Hanson). Of these, 731 were cast for Representative Tabke, 534 were cast for Aaron Paul, and 94 were cast for neither candidate. Ex. 10; Tx. 65:4-66:18 (J. Hanson). It is unlikely

that 20 uncounted ballots from Precinct-10, which Representative Tabke won by a margin of 14%, would have changed the outcome of the election. Indeed, the expert testimony of Dr. Aaron Rendahl indicates that there is only a 0.0051% chance that 20 randomly selected ballots from Shakopee Precinct-10 would net at least 14 additional votes for Aaron Paul. Ex. 207 at 3-4; Tx. 264:25-266:3 (A. Rendahl).

There is no need to wonder, however, whether the uncounted 20 ballots would have changed the result had they been counted. Six of the affected voters called by Representative Tabke testified at trial that they cast ballots for Brad Tabke. Tx. 214:22-217:2 (Voter 5); Tx. 210:6-213:9 (Voter 9); Tx. 218:23-221:13 (Voter 11); Tx. 231:15-233:24 (Voter 12); Tx. 224:20-226:11 (Voter 18); Tx. 227:19-230:10 (Voter 20). And six of the affected voters called by Contestant testified at trial that they cast ballots for Aaron Paul. Tx. 201:9-203:2 (Voter 4); Tx. 156:6-157:19 (Voter 10); Tx. 132:8-133:12 (Voter 14); Tx. 138:13-140:14 (Voter 15); Tx. 153:11-154:21 (Voter 16); Tx. 143:20-145:4 (Voter 17). This leaves only eight uncounted ballots from Shakopee Precinct-10 and it is impossible for those votes to overcome the 14-vote margin between Representative Tabke and Aaron Paul. *See* Tx. 269:18-270:12 (A. Rendahl) (noting that there is no scenario where the outcome could change if at least four of the 20 (or 21) uncounted ballots were cast of Representative Tabke); Tx. 290:16-291:5 (T. Brunnell) (same).

### **III. ARGUMENT**

An election contest “may be brought over an irregularity in the conduct of an election or canvass of votes, over the question of who received the largest number of votes legally cast, ... or on the grounds of deliberate, serious, and material violations of the Minnesota Election law.” Minn. Stat. § 209.02. Contestant brings this election contest on all three grounds, each of which fails.

First, Contestant asserts that there is a “question of who received the largest number of votes legally cast.” That may have been a possibility when the contest was initiated, but the evidence at trial proves conclusively that Representative Tabke received the largest number of votes legally cast and, therefore, won the election.

Second, Contestant asserts that the election should be set aside due to irregularities in its conduct. Although there is no dispute that there were irregularities—20 absentee ballots are not discarded without being counted unless there is some irregularity in the conduct of the election—Contestant failed to demonstrate that the irregularities affected the outcome of the election as has been required in all election contests initiated on this ground for well over 100 years.

Finally, Contestant asserts that a new election should be held due to “deliberate, serious, and material violations of the Minnesota Election Law.” This assertion—which is a mere repackaging of Contestant’s assertion that there were irregularities in the conduct of the election—fails because, as the Minnesota Supreme Court has held, the results of an election will not be invalidated due to a violation of Minnesota election law by a third party who is neither the candidate nor the candidate’s agent. The contest also fails on this ground because Contestant failed to demonstrate that there has been any “deliberate” violation of Minnesota election law and, like the other grounds, because the evidence in this election contest proves that any violation *did not* affect the outcome of the election.

**A. The contest fails on the question of which candidate received the most votes legally cast because the evidence conclusively proves that Representative Tabke won the election.**

Throughout his brief, Contestant asserts that it is impossible to know with certainty who won the election because the number of uncounted ballots from Shakopee Precinct-10 exceeds the 14-vote margin between the candidates. According to Contestant, a new election is required due to “the inescapable uncertainty as to what happened here—exactly how many ballots were lost;

exactly who they were cast by; and the lack of any evidentiary foundation to tie either of these items to concrete cast ballots....” Contestant’s Br. at 20. This assertion ignores the evidence in this case which addresses each of these points and leaves no room for doubt that Representative Tabke won the election. Specifically, the record demonstrates that 20 ballots from Shakopee Precinct-10 were inadvertently discarded before they were counted,<sup>1</sup> that the individuals identified by the Scott County as Voter 1 through Voter 20 cast the uncounted ballots, and that six of the twenty voters cast ballots for Representative Tabke and six others—called by Contestant—cast ballots for Aaron Paul.

The Court heard testimony from Scott County Elections Administrator Julie Hanson regarding the step-by-step process the County followed to determine how the uncounted ballots had come to be discarded and to identify the individuals who cast the ballots. Ms. Hanson’s testimony regarding her investigation was corroborated by election judges Kay Gamble and Rocky Swearingin who testified regarding actions taken by the City of Shakopee election officials on the key dates of October 17 and 18. Ms. Hanson testified that she has not identified any other plausible explanation for when or how the 20 uncounted ballots were lost. *See* Tx. 105:10-18. She further testified that she does not have any doubt based on reason or common sense or that is not fanciful or capricious, that the twenty individuals identified by Scott County are, in fact, the voters who cast the 20 uncounted ballots from Shakopee Precinct-10. *See* Tx. 106:17-107:9. Put differently, Ms. Hanson has no reasonable doubt that the individuals identified as Voter 1 through Voter 20 by the County are the individuals who cast the uncounted ballots. *See* 10 MNPRAC. CRIMJIG

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<sup>1</sup> The record also demonstrates that one more ballot for Shakopee Precinct-12A was accepted than was included in the final tally. The reason that ballot was not counted and its ultimate fate is immaterial to the outcome of this election contest because the evidence demonstrates that the result of the election would not change if there were 21 rather than 20 uncounted ballots.

3.02 (“Proof beyond a reasonable doubt is such proof as ordinarily prudent people would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.”).

The Court also heard testimony from twelve of the twenty voters who cast the uncounted ballots. Six of the voters testified that they cast their ballots for Representative Tabke and six others testified that they cast their ballots for Aaron Paul.<sup>2</sup> This is sufficient to put to rest any question regarding which candidate received the most votes in this election.<sup>3</sup> There are only eight (or possibly nine) uncounted ballots for which there is no evidence as to how they were cast. Even if all of them were cast for Aaron Paul, Representative Tabke would win the election by six (or possibly five) votes.

Contestant does not address any of this evidence in his brief and instead insists that we should proceed in an artificially imposed vacuum of information, pretending as though we cannot

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<sup>2</sup> Courts have heard testimony from voters identifying the candidates for whom they cast their ballots to determine the outcome of election contests. The Minnesota Supreme Court, in *Hanson v. Emanuel*, explained that the trial court heard testimony from individuals who cast ballots in the election but admittedly were not qualified to vote in the election and relied upon that testimony to reduce the vote totals for the candidates for whom the illegal votes were cast. 297 N.W. 749, 755 (Minn. 1941); *see also Ganske v. Ind. Sch. Dist. No. 84*, 136 N.W.2d 495, 408, (Minn. 1965) (discussing ability to obtain testimony regarding how ineligible voters cast their ballots); *Nelson v. Bullard*, 194 N.W. 308, 312 (Minn. 1923) (“It is competent to show by circumstantial evidence for whom an illegal ballot was cast.”). It is likewise appropriate for this Court to consider voter testimony to determine for whom they voted on their legally cast ballots.

<sup>3</sup> Contrary to Contestant’s assertion, Representative Tabke never urged the Court to rely upon the statistical unlikelihood that the uncounted ballots would change the outcome of the election to resolve this contest. Rather, Representative Tabke provided this information for helpful context and to demonstrate that—as the evidence has confirmed—it is exceedingly unlikely that the failure to count 20 ballots from Shakopee Precinct-10 affected the result of the election.



know how an outcome determinative number of the uncounted ballots were cast in this race.<sup>4</sup> This is not only contrary to the evidence, it fails to satisfy Contestant's burden of proving either that he received the most votes or that it is impossible to determine which candidate received the most votes in the election. The Minnesota Supreme Court's analysis in *Berg v. Veit* is instructive.

In *Berg*, the race for Clearwater County Commissioner was separated by just four votes and the contestant introduced evidence that 20 votes were cast in the town of Itasca by persons who were not residents of the town and, thus, were not eligible to vote in the election. 162 N.W. 522, 522-23 (Minn. 1917). The contestant argued that, because there was no evidence tending to show for whom the illegal votes were cast, they should be deducted pro rata from the votes counted for the town of Itasca which would net him an additional 12 votes and tip the result in his favor. *Id.* at 523. The Court rejected this argument noting that the contestant bears the burden of proving that the candidate declared elected by the canvassing board did not receive a majority of the legal votes. *Id.* Because the contestant based his contest on the fact that illegal votes were cast, "it [was] incumbent upon him to show that enough of such votes were cast for the contestee to change the outcome." *Id.* Ultimately, the Court rejected contestant's argument for a pro rata reduction in the votes from the town of Itasca because he "made no attempt to show for whom the illegal votes were cast, nor to show that he was unable to do so" and noted that even if the individual voters refused to testify, contestant "could have presented the best available evidence which tended to show for whom the voter probably voted." *Id.*

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<sup>4</sup> Somewhat confusingly, Contestant asserts that there is insufficient evidence to identify the 20 voters who cast the uncounted ballots from Shakopee Precinct-10 yet he called six of those individuals at trial and elicited testimony that they voted for Aaron Paul.

In this case, Contestant Aaron Paul bears the burden of proving that the failure to count the 20 ballots from Shakopee Precinct-10 changed the outcome of the election.<sup>5</sup> Similar to *Berg*, Contestant cannot satisfy his burden by simply asserting that there is no way of knowing who cast the twenty uncounted ballots or whether those ballots would have changed the outcome of the election. Rather, Contestant must present evidence demonstrating that it is not possible to know how the uncounted ballots were cast; a burden which he simply cannot sustain on this record. To the contrary, the evidence demonstrates the opposite—the evidence proves who the voters are *and* for whom they voted.<sup>6</sup>

In sum, the Contest fails on the question of which candidate received the most votes legally cast because the evidence at trial permits no conclusion except that Representative Tabke won the election.

**B. The contest fails on the ground of irregularities in the conduct of the election because the irregularities did not affect the outcome.**

The Minnesota Supreme Court recently addressed the pleading standard in election contests holding that the “in addition to alleging irregularities in the conduct of the election or a violation of election laws, there must be a ‘plain statement showing that the contestant is entitled to a decree changing the declared result of the election.’” *Bergstrom v. McEwen*, 960 N.W.2d 556, 563 (Minn. 2021) (quoting *Christenson v. Allen*, 119 N.W.2d 35, 40-41 (Minn. 1963)). This is not a new requirement but rather has been the law in Minnesota for over 150 years. *Bergstrom*, 960

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<sup>5</sup> As discussed *infra*, Contestant’s citation to *In re Contest of Election in DFL Primary*, 344 N.W.2d 826 (Minn. 1984) (“*DFL Primary*”), does not alleviate his burden in this matter.

<sup>6</sup> The legislature can prescribe standards of proof for statutorily-created causes of action such as an election contest. *See Seeley v. Sobczak*, 281 N.W.2d 368, 370 (Minn. 1979). When the legislature has not prescribed a standard for statutorily-created causes of action, “this is regarded as a signal that the legislature intended the preponderance of the evidence standard” to apply. *State v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993).

N.W.2d at 563-64; *Hahn v. Graham*, 225 N.W.2d 385, 286 (Minn. 1975) (“It has been the rule in this state for well over 100 years that violation of a statute regulating the conduct of an election is not fatal to the election in the absence of proof that the irregularity affected the outcome or was the product of fraud or bad faith.”); *Janeway v. City of Duluth*, 68 N.W. 24, 25 (Minn. 1896) (allegations of irregularities in the election were framed in “the most general terms” and the contestant had “not alleged in what manner” those irregularities “affected the result.”).

It is axiomatic that, if the notice of contest must allege that the irregularities affected the outcome of an election in order to state a claim upon which relief may be granted, the Contestant must prove that such irregularities in fact affected the outcome in order to prevail in the contest. This is consistent with the Minnesota Supreme Court’s conclusion in *Berg v. Veit*, and the longstanding “policy of the state to give effect to the votes of legal voters regardless of irregularities in the election.” *Clayton v. Prince*, 151 N.W. 911, 912 (Minn. 1915).

*In re Contest of Election in DFL Primary Election*, cited by Contestant does not ease his burden. 344 N.W.2d 826 (Minn. 1984). That case involved an allegation that the winning candidate violated the Fair Campaign Practices Act by falsely implying that she was the party-endorsed candidate.<sup>7</sup> *Id.* at 828-31. The Minnesota Supreme Court acknowledged that, in the context of an alleged violation of Minn. Stat. § 210A.12, the contestant “is not required to affirmatively show an effect on the outcome of the election” because this burden of proof “would effectively thwart the enforcement of the Fair Campaign Practices Act.” This exception does not

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<sup>7</sup> *In re Contest of Election in DFL Primary Election* was the third in a series of contests involving alleged violations of Minn. Stat. § 210A.12 which has subsequently been recodified at Minn. Stat. § 211B.02. In the first case, *Schmitt v. McLaughlin*, the Minnesota Supreme Court noted that the Fair Campaign Practices Act provided for the penalty of removal. 275 N.W.2d 587, 591 (Minn. 1979). This was again noted in *Matter of Ryan* where the Court further discussed the circumstances in which it would be unjust to invoke the penalty of removal for a violation of the Fair Campaign Practices Act. 303 N.W.2d 462, 467-68 (Minn. 1981).

change the requirement, restated just three years ago in *Bergstrom*, that in all other contexts, a contestant must demonstrate that the irregularities in the conduct of the election affected the outcome. As discussed above, Contestant cannot satisfy this burden because the evidence in the contest confirms that the failure to count the 20 ballots from Shakopee Precinct-10 did not affect the outcome and that Representative Tabke won the election.

Contestant asserts that *In re Contest of Election of Vetsch* is the “most historically similar Minnesota case” in support of his argument that he is entitled to a new election notwithstanding his failure to prove that the irregularities affected the outcome of the election. Contestant Br. at 18 (citing *Vetsch*, 71 N.W.2d 652 (Minn. 1955)). *Vetsch* is the exception in Minnesota election case law and the dissimilarities with the instant case are striking. *Vetsch* involved a contested election for Houston County Sherriff and egregious violations of election law in La Crescent village that called into doubt the validity of all votes cast in the village. *Vetsch*, 71 N.W.2d at 658-60. The irregularities included the improper appointment of the election board; improper handling of ballots by the village clerk; the unauthorized issuance of absentee ballots; the failure to take, administer and indicate proper oaths; unauthorized and ineligible persons filling in as judges and clerks; the intermixing of clerk and judge functions; the failure to count ballots before issuing receipts; and the inadequate maintenance of the election register. *Id.* at 659. Most troubling of all, however, was the fact that there was one more ballot voted than the number of persons listed in the election register and that there were 59 ballots—which should have been unvoted, blank ballots—missing from the La Crescent village precinct. *Id.* at 656, 659. The record also shows that, by the time the election officials in La Crescent village reported their results, they were aware of the results in all of the other precincts in the County and the contestant noted that “because a switch of 41 votes would have been all that was needed to change the total county vote, it would

have been a simple matter for someone to have marked a sufficient number of the 59 blank ballots with the desired results and to have disposed of the original ballots cast. *Id.* at 659. The cloud of suspicion grew even darker because the La Crescent village election manager, who was unaware of the laws governing the election, was an old political rival of the contestant and friend of the contestee. *Id.* at 655, 659. In the face of this unique set of facts, the Minnesota Supreme Court concluded that the votes from La Crescent village should be invalidated due to “the cumulative effect of the numerous serious violations which occurred” that “cast doubt and suspicion upon the election and impeach the integrity of the vote.” *Id.* at 660.

To be sure, there were irregularities in the manner in which the City of Shakopee administered the in-person absentee voting process at City Hall as was laid bare by the investigative efforts of the Scott County Elections Administrator and the testimony presented to this Court. But this investigation and testimony also eliminates any lingering doubt or suspicion regarding the breadth of the irregularities or the results of the election. The circumstances which led the Minnesota Supreme Court to conclude in *Vetsch* that “so great an opportunity for fraud exists as to impeach the integrity of the ballot,” 71 N.W.2d at 658-59, simply are not present here.

The other cases Contestant cites in support of the proposition that “new elections are frequently the relief granted in election contests nationwide” are readily distinguishable on the dispositive issue of this case: is it possible to determine whether and how the irregularity in the conduct of the election affected the outcome? The *Bencomo* case from Arizona, for example, arose from the fact that the voters were provided ballots which instructed them to vote for up to two candidates even though the consent decree pursuant to which the election was conducted provided that each voter “will be entitled to cast only one vote for the candidate of his or her choice.” *Bencomo v. Phoenix Union High Sch. Dist. No. 210*, No. CV-90-00369-PHX-GMS, 2024 WL

5090208, \*1 (D. Ariz. Dec. 12, 2024). This issue was raised with the court prior to the election but the court concluded that no pre-election remedy was practical. *Id.* When addressing the post-election remedy, the court noted that the provision limiting voters to one vote “is an election limitation designed to protect minority voters” and the erroneous ballots “simply make it impossible to declare, with any confidence, who the winners of a legally conducted election would be or that the mistake was not consequential.” *Id.* at \*3.

Similarly, the First Circuit Court of Appeals upheld a district court decision that Rhode Island’s retroactive invalidation of absentee ballots after they had been cast violated the voters’ constitutional rights and ordered a new election as a remedy for this conduct which invalidated approximately 10% of the total votes cast in a closely contested primary election. *Griffin v. Burns*, 570 F.2d 1065, 1075-80 (1st Cir. 1978). The case of *Nickelson v. Whitehorn* involved an election with a one-vote margin in which at least six ineligible votes were identified. 375 So.3d 1132, 1140-41 (La. App. 2 Cir. 2023). The Louisiana Court of Appeals affirmed the trial court’s conclusion that, because the Louisiana Constitution includes the guarantee of a secret ballot, it was impossible to determine for whom the illegal votes had been cast. *Id.* at 1137, 1140-41; La. Const. Art. II, § 2 (“In all elections by the people, voting shall be by secret ballot.”). Minnesota has no such constitutional guarantee and Minnesota courts have relied upon voter testimony in analogous cases to determine whether the alleged irregularities affected the outcome of the election. *See* Note 2, *supra*; Minn. Const. Art. VII, § 5 (“All elections shall be by ballot except for such town officers as may be directed by law to be otherwise chosen.”).

*Franks v. Hubbard* involved a contest in which 142 absentee ballots were cast without being placed in an executed ballot envelope as required under Missouri law. 498 S.W.3d 862, 865 (Mo. Ct. App. 2016). The Missouri Court of Appeals affirmed the decision to order a new election

in light of the Missouri precedent stating that an invalidly cast absentee ballot constitutes a legal fraud. *Id.* at 868-69 There is no comparable provision of Minnesota election law implicated here. Finally, Contestant relies upon the Superior Court of Connecticut’s decision ordering a new election after four ballots were invalidated in a race separated by only one vote. *Brown v. Clemons*, FBT-CV-22-5049450, 2022 WL 6694967, at \*1-3 (Ct. Super. Ct. Oct. 4, 2022). Crucially, the court stated that “[t]here is no evidence on which the court can conclude that these four ballots were not among the 1,144 votes counted in favor of [the winning candidate] and therefore, the court must infer that these four ballot were among the 1,144 votes that were so counted.” *Id.* at \*3. Here, of course, the Court has the evidence necessary to determine that at least six of the uncounted ballots were cast for Representative Tabke thus eliminating the uncertainty which compelled the Connecticut Superior Court to order a new election.<sup>8</sup>

Ultimately, each of the cases cited by Contestant are premised on the conclusion that the irregularities in the conduct of the election make it impossible to know the true outcome. Such a conclusion is at odds with the evidence in this matter which makes clear not only that the irregularities did not affect the outcome of the election, but also that Representative Tabke was the winner. Allowing a new election in this circumstance would run counter to Minnesota’s longstanding policy “to give effect to the votes of legal voters regardless of irregularities in the

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<sup>8</sup> *DFL Primary* is inapposite. That case involved an alleged violation of the Fair Campaign Practices Act where the court imposed the penalty of removal from office which is specifically authorized in the Act. *DFL Primary*, 344 N.W.2d at 83; *see also Schmitt*, 275 N.W.2d at 591 (discussing penalty of removal). The *Gasaway v. Kemp* and *Medley v. Iron County* cases cited by Contestant, Br. at 17, are unpublished decisions from the state courts of Georgia and Missouri which are not widely available. However, the parenthetical descriptions included in Contestant’s own brief indicate that these case address defects in the ballot which, like the ballots in *Bencomo*, make it impossible to know what the outcome would have been in an election with proper ballots.

election,” *Clayton*, 151 N.W. at 912, particularly in light of the historically lower voter turnout for special elections as compared to general elections for the same legislative seat.<sup>9</sup>

Contestant has failed to sustain his burden of proving that the irregularities in the conduct of the election affected the outcome and his contest fails as a result.

**C. The contest fails on the ground of “deliberate, serious, and material” violations of Minnesota election law because the provision does not apply to this contest, because Contestant failed to prove there was a “deliberate” violation, and because any violation did not affect the outcome of the election.**

Contestant’s claim that he is entitled to a new election due to “deliberate, serious, and material” violations of Minnesota election law fails, at the outset, because this ground for an election contest does not allow for forfeiture of a nomination due to the actions of a third party who is neither the candidate nor the candidate’s agent. This limitation was articulated in *Derus v. Higgins* which involved a claim that the Star Tribune published “a false and misleading article creating the impression that [contestant] was somehow connected with dishonest conduct” in violation of the Fair Campaign Practices Act. 555 N.W.2d 515, 515-16 (Minn. 1996). The Minnesota Supreme Court held that “to the extent the allegations of wrongdoing with regard to the

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<sup>9</sup> The following table shows the number of votes cast in the five most recent special elections for the Minnesota House of Representatives as well as the immediately preceding general election for the same house district. All of the election results are available at: <https://www.sos.state.mn.us/elections-voting/election-results> (last visited December 27, 2024).

| District | Special Election |               | General Election |              |
|----------|------------------|---------------|------------------|--------------|
|          | Votes            | Date          | Votes            | Date         |
| 27B      | 2,073            | Mar. 19, 2024 | 18,093           | Nov. 8, 2022 |
| 52B      | 6,618            | Dec. 5, 2023  | 22,592           | Nov. 8, 2022 |
| 30A      | 3,126            | Feb. 4, 2020  | 18,854           | 2018         |
| 60A      | 2,149            | Feb. 4, 2020  | 17,843           | 2018         |
| 11B      | 5,220            | Mar. 19, 2019 | 15,327           | 2018         |



conduct of this third party only implicate the [Fair Campaign Practices] Act, the remedies provided therein are exclusive” and “no justiciable claim for relief [under Minn. Stat. § 209.02] has been asserted.” *Id.* at 517. For this reason, contests relating to election official’s violations of election laws proceed on the ground of “an irregularity in the conduct of the election” rather than the ground of “deliberate, serious, and material violations of the Minnesota Election Law.” *Compare Clayton*, 151 N.W. 911; *Berg*, 162 N.W. 522; *In re Special Election in School Dist. No. 68*, 237 N.W. 412 (Minn. 1931); *Green v. Ind. Consol. School Dist. No. 1*, 89 N.W.2d 12 (Minn. 1958); *Vetsch*, 71 N.W.2d 652 (involving election officials’ violations of election laws); *with Effertz v. Schimelpfenig*, 291 N.W. 286 (Minn. 1940); *Moulton v. Newton*, 144 N.W.2d 706 (Minn. 1966); *Scheibel v. Pavlak*, 282 N.W.2d 843 (Minn. 1979); *Schmitt*, 275 N.W.2d 587; *Matter of Ryan*, 303 N.W.2d 462, *DFL Primary*, 344 N.W.2d 826 (involving election law violations by candidates).

Even if Contestant could repackage his claim relating to irregularities in the conduct in the election as a claim relating to deliberate, serious, and material violations of Minnesota Election Law, his claim fails for several reasons. First, Contestant has not proven that a “deliberate” violation of Minnesota election law occurred. A violation is “deliberate” where it is “intended to affect the voting at the election.” There is no evidence to support a finding that the inadvertent discarding of the uncounted ballots was intended to affect voting at the election.<sup>10</sup> And Contestant’s inflammatory assertion that the destruction of ballots in this matter “may well rise to the level of being a criminal offense” finds even less support in the record. *See* Contestant’s Br. at 13. The action of damaging a ballot is criminal only if it was done intentionally, *State v. Shane*,

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<sup>10</sup> Contestant’s strained attempt to shoehorn his allegations regarding the manner in which the election was conducted into a claim relating to a deliberate, serious, and material violation of Minnesota election law lends further support to the conclusion that this is not an appropriate ground for this election contest.

883 N.W.2d 606, 610 (Minn. Ct. App. 2016), and there is nothing to suggest such an intentional action occurred here. Tx. 195:1-4 (C. Petersen) (testimony by the Assistant City Administrator that she has not learned of any information that causes her to believe that the ballots were intentionally destroyed).

Moreover, Contestant's claims on the ground of deliberate, serious, and material violations of Minnesota election law fail because the evidence at trial demonstrates that the failure to count the 20 absentee ballots from Shakopee Precinct-10 before they were inadvertently discarded did not affect the outcome of the election and that Representative Tabke, in fact, received the most votes legally cast.<sup>11</sup>

**D. This Court's jurisdiction in this matter is narrowly constrained and the Court should deny Contestant's requests for relief which exceed its legal authority.**

The courts' authority to address election contests is tightly constrained by the constitutional directive that "[e]ach house [of the legislature] shall be the judge of the election returns and eligibility of its own members." Minn. Const. Art. IV, § 6. The laws regulating election contests for legislative offices "are predicated on this principle of legislative authority" and proscribe that after the courts have issued a decision the record is transmitted to the legislature which will make the ultimate determination in the contest. *Scheibel*, 282 N.W.2d 848. Accordingly, the courts lack the jurisdiction to issue a final binding decision and their orders in legislative election contests are purely advisory. *Id.* More relevant for this matter, the trial judge in a legislative election contest "acts, in effect, as an agent of the legislative body involved" to hear and direct the recording of evidence, make findings and conclusions, and submit the record and recommendations to the

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<sup>11</sup> As explained above, *In re Contest of Election in DFL Primary Election*, which involved an alleged violation of the Fair Campaign Practices Act, does not absolve Contestant of his burden of proving that the alleged violations of election law affected the outcome of the election.

legislature. *Id.* at 850. Given this narrow role and the ultimate authority of the legislature, the courts must be careful not to overstep their constitutional and statutory authority.<sup>12</sup>

The Court should be wary of Contestant’s invitation to go further than the law allows. For instance, Contestant asks the Court to “declare that the election for House District 54A is invalid and that a vacancy in House District 54A exists” and to “order a new election.” Notice of Contest at 12; Contestant’s Br. at 21. The Court lacks the authority to take any of these actions. As explained in *Scheibel*, the legislature makes the ultimate determination in election contests and, therefore, this Court cannot “declare” that the election is invalid and that a vacancy exists in the office of Representative for House District 54A or “order” a new election. Rather, this court must limit itself to making findings of fact and conclusions of law and submitting its recommendations to the Minnesota House of Representatives.

#### IV. CONCLUSION

The evidence introduced at trial conclusively demonstrates that the fact that 20 ballots were inadvertently discarded before they were counted did not affect the outcome of the election for House District 54A and that Representative Tabke received the most votes legally cast. The election contest fails in the face of these facts and Representative Tabke respectfully requests that the Court issues findings of fact and conclusions of law recommending that the Minnesota House of Representatives affirm that Representative Tabke won the 2024 general election and take no further action relating to this contest.

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<sup>12</sup> The recently decided case of *Wikstrom v. Johnson*, Case No. 62-CV-24-7378 (Dec. 20, 2024 2d. Judicial District) in which the Ramsey County District Court ordered that candidate Curtis Johnson is “enjoined from taking the oath of office” and that the “[t]he seat for Minnesota House of Representatives District 40B shall be filled according to law”, does not support Contestant’s assertion that this Court may similarly disregard the constitutional limits on its authority in legislative election contests. *See* Contestant’s Br. at 9.

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