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MINNESOTA HOUSE OF REPRESENTATIVES  
ETHICS COMMITTEE

In the Matter of the House District 54A Election Contest

**RESPONDENT BRAD TABKE'S BRIEF**

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**I. INTRODUCTION**

Respondent Representative Brad Tabke won the 2024 general election for House District 54A by 14 votes. The results of the election were confirmed through a manual recount, an exhaustive investigation by Scott County election officials, and an election contest filed in the Scott County District Court. It is now time for the Minnesota House of Representatives to follow the evidence and the law and confirm that Representative Tabke won the election and is entitled to his seat in the Minnesota House representing the residents of House District 54A.

As the Committee is aware, Scott County's post-election procedures revealed that 20 ballots for Shakopee Precinct-10 which were cast at the City's early voting location were discarded before they were counted. According to Petitioner, this error renders the entire election inconclusive, but this assertion requires the Committee to (1) ignore the extensive evidence presented to the district court which conclusively identified the individuals who cast the 20 uncounted ballots; and (2) to disregard the sworn testimony from 12 of the affected voters regarding how they cast their ballots. The outcome of the election is not in doubt; Representative Tabke won and is the duly elected representative for House District 54A.

## 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.<sup>1</sup> A total of 21,980 ballots were counted in the election.

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.<sup>2</sup> This included one uncounted absentee ballot from Shakopee Precinct-12A and 20 uncounted absentee ballots from Shakopee Precinct-10.<sup>3</sup> 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.<sup>4</sup> The 20-ballot discrepancy for Precinct-10 was unusual and the County undertook a thorough investigation, led by its Elections Administrator Julie Hanson, to determine the cause.<sup>5</sup>

Using the data in the Statewide Voter Registration System (“SVRS”), Scott County was able to determine that the uncounted absentee ballots for Precinct-10 originated from the early

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<sup>1</sup> *Paul v. Tabke*, Case No. 70-CV-24-17210, Exhibit No. 5, at AP00142. Exhibits admitted into evidence before the district court are referred to as “Ex. \_\_\_.”).

<sup>2</sup> *Paul v. Tabke*, Case No. 70-CV-24-17210, Index No. 38 at 77:14-79:25 (J. Hanson). Documents in the district court record are referred to as “Index No. \_\_\_.”).

<sup>3</sup> Ex. 3 at AP00103; Index No. 38 at 80:1-15 (J. Hanson).

<sup>4</sup> Ex. 3 at AP00103; Index No. 38 at 21:16-22:10 (J. Hanson).

<sup>5</sup> Ex. 3; Index No. 38 at 73:11-74:10 (J. Hanson).

voting location administered by the City of Shakopee at City Hall.<sup>6</sup> Specifically, the County was able to determine that the City of Shakopee 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.<sup>7</sup> 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.<sup>8</sup> The City was unable to locate the uncounted ballots.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> The spreadsheet included a page titled “AB Count from 9/20 – 10/17” which included the ballots accepted from September 20 through October 17.<sup>12</sup> 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.<sup>13</sup> Each day, the election judges at the Shakopee

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<sup>6</sup> Ex. 3 at AP00103-04; Index No. 38 at 80:19-81:9 (J. Hanson).

<sup>7</sup> Ex. 3 at AP00103-04; Index No. 38 at 81:13-82:2 (J. Hanson).

<sup>8</sup> Index No. 38 at 26:20-28:5 (J. Hanson).

<sup>9</sup> Index No. 38 at 50:15-23 (J. Hanson).

<sup>10</sup> Ex. 3 at AP00103; Index No. 38 at 81:19-25 (J. Hanson).

<sup>11</sup> Ex. 3 at AP00104; Ex. 202; Index No. 38 at 82:25-84:4; (J. Hanson); 165:19-167:8, 170:8-20 (K. Gamble).

<sup>12</sup> Ex. 202 at 4; Index No. 38 at 170:8-171:12 (K. Gamble).

<sup>13</sup> Index No. 38 at 23:1-25 (J. Hanson); Index No. 38 at 164:4-18 (K. Gamble).

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.<sup>14</sup> The spreadsheet shows that a total of 1,124 ballots were cast at the Shakopee early voting location during the envelope voting period.<sup>15</sup>

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.<sup>16</sup> This is the so-called “direct balloting” period where voters deposit their ballots directly into the tabulator machine.<sup>17</sup> 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.<sup>18</sup> The election judges did not record the daily count on the tabulator machine until Monday, October 21.<sup>19</sup> 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).<sup>20</sup> The election judges recorded the end-of-day machine counts on each day from October 21 through November 4.<sup>21</sup>

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<sup>14</sup> Index No. 38 at 170:8-24 (K. Gamble).

<sup>15</sup> Ex. 202 at 4; Index No. 38 at 85:17-86:14 (J. Hanson); Index No. 38 at 171:8-12 (K. Gamble).

<sup>16</sup> Ex. 202 at 3; Index No. 38 at 165:19-167:8 (K. Gamble).

<sup>17</sup> Index No. 38 at 24:9-25 (J. Hanson); Index No. 38 at 164:4-18 (K. Gamble).

<sup>18</sup> Ex. 202 at 3; Index No. 38 at 165:19:-167:8 (K. Gamble).

<sup>19</sup> Index No. 38 at 168:4-169:6 (K. Gamble).

<sup>20</sup> Ex. 202 at 3; Index No. 38 at 86:15-87:3; 168:4-169:6 (K. Gamble).

<sup>21</sup> Index No. 38 at 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.<sup>22</sup> 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.<sup>23</sup> This means that the 21 uncounted ballots must have been cast on or before October 18, 2024.<sup>24</sup>

Scott County’s investigation determined that the City’s daily absentee ballot counts as reflected on the spreadsheet were accurate through October 17.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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

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<sup>22</sup> Ex. 3 at 3-4.

<sup>23</sup> Ex. 202 at 3; Index No. 38 at 85:17-86:11 (J. Hanson); Index No. 38 at 171:8-172:4 (K. Gamble); Index No. 38 at 193:20-194:25 (C. Petersen).

<sup>24</sup> Index No. 38 at 85:17-86:11 (J. Hanson).

<sup>25</sup> Index No. 38 at 95:2-5 (J. Hanson).

<sup>26</sup> Ex. 9; Index No. 38 at 27:20-30:18, 84:8-15, 95:2-16 (J. Hanson).

<sup>27</sup> Index No. 38 at 92:20-95:16 (J. Hanson).

judges, met on the morning of October 17 to review the absentee ballots received by the City which had not yet been accepted.<sup>28</sup> 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.<sup>29</sup> The absentee ballot board then began the process of opening envelopes to prepare the ballots for counting.<sup>30</sup>

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.<sup>31</sup> The members of the absentee ballot board counted the envelopes for each precinct to confirm the numbers matched the list provided by Ms. Gamble.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> The counts

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<sup>28</sup> Index No. 38 at 95:17-96:17 (J. Hanson); Index No. 39 at 239:1-240:14 (R. Swearingin).

<sup>29</sup> Index No. 38 at 95:17-96:17, 99:9-100:3 (J. Hanson); Index No. 39 at Tx. 239:1-240:4 (R. Swearingin).

<sup>30</sup> Index No. 38 at 96:17-97:4 (J. Hanson); Index No. 39 at 240:15-21 (R. Swearingin).

<sup>31</sup> Index No. 38 at 93:7-22 (J. Hanson); Index No. 39 at 241:4-246:6 (R. Swearingin); Index No. 38 at 172:23-173:14, 174:12-15 (K. Gamble).

<sup>32</sup> Index No. 38 at 93:7-22 (J. Hanson); Index No. 39 at 241:4-246:6 (R. Swearingin).

<sup>33</sup> Index No. 39 at 241:4-246:6 (R. Swearingin); Index No. 38 at 174:18-175:1 (K. Gamble).

<sup>34</sup> Index No. 39 at 241:4-246:6 (R. Swearingin); Index No. 38 at 172:23-174:7, 174:18-175:24 (K. Gamble).

for Shakopee Precinct-1, and all other precincts, matched the totals included in Ms. Gamble's revised list.<sup>35</sup>

Once the absentee ballot board had counted the envelopes, they opened the outer signature envelopes and separated them from the inner secrecy envelopes.<sup>36</sup> Every signature envelope contained a secrecy envelope.<sup>37</sup> The absentee ballot board then opened the secrecy envelopes and removed the ballots that had been completed by the voters.<sup>38</sup> Every secrecy envelope contained a ballot.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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.<sup>42</sup> A total of 99 ballots for the Shakopee early voting location—including 20 ballots from Precinct-10—were accepted on either October 17 or

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<sup>35</sup> Index No. 38 at 94:15-95:5 (J. Hanson); Index No. 39 at 241:4-246:6 (R. Swearingin); Index No. 38 at 174:18-175:9 (K. Gamble).

<sup>36</sup> Index No. 39 at 243:7-244:4 (R. Swearingin).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Index No. 39 at 243:7-19; 246:10-24 (R. Swearingin).

<sup>41</sup> Index No. 38 at 96:1-97:4 (J. Hanson); 175:17-24 (K. Gamble) (noting that the absentee ballot board accepted ballots after the report was run on the morning of October 17).

<sup>42</sup> Index No. 38 at 100:4-9 (J. Hanson).

18 and would have been opened and prepared for counting on October 18.<sup>43</sup> These ballots were opened by former Shakopee City Clerk Lori Hensen acting by herself.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

The County was able to identify the voters who cast the 20 uncounted ballots using data in the SVRS database.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> This leaves 47 voters who cast ballots for Shakopee Precinct-10 at the Shakopee early voting location during the

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<sup>43</sup> Ex. 9; Index No. 38 at 100:4-102:6 (J. Hanson).

<sup>44</sup> Index No. 38 at 101:19-103:2 (J. Hanson); 176:17-177:23 (K. Gamble) (testifying that she observed Ms. Hensen opening ballots on the morning of October 18).

<sup>45</sup> Ex. 2 at AP00104; Index No. 38 at 37:19-24 (J. Hanson).

<sup>46</sup> Ex. 2 at AP00104-05; Index No. 38 at 52:14-21 (J. Hanson).

<sup>47</sup> Index No. 38 at 103:4-10; 105:10-18 (J. Hanson).

<sup>48</sup> Index No. 38 at 105:19- 106:13 (J. Hanson).

<sup>49</sup> Ex. 9; Index No. 38 at 88:21-90:3,105:19-106:13 (J. Hanson).

<sup>50</sup> Ex. 9; Index No. 38 at 90:4-91:23 (J. Hanson).



“envelope voting” period which ended on October 17.<sup>51</sup> Of these, only twenty voters had their absentee ballots accepted on October 17 or October 18.<sup>52</sup> These individuals are identified as “Voter 1” through “Voter 20” in the copy of the SVRS report which was introduced at trial.<sup>53</sup>

A total of 1,362 ballots were cast by voters in Shakopee Precinct-10.<sup>54</sup> Of these, 731 were cast for Representative Tabke, 534 were cast for Aaron Paul, and 94 were cast for neither candidate.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> And six of the affected voters called by Contestant testified at trial that they cast ballots for Aaron Paul.<sup>58</sup> This leaves only eight

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<sup>51</sup> Ex. 9; Index No. 38 at 91:24-92:5 (J. Hanson).

<sup>52</sup> Ex. 9; Index No. 38 at 105:19-106:13 (J. Hanson).

<sup>53</sup> Ex. 9; Index No. 38 at 105:19-106:13 (J. Hanson).

<sup>54</sup> Ex. 206; Index No. 38 at 65:4-66:18 (J. Hanson).

<sup>55</sup> Ex. 10; Index No. 38 at 65:4-66:18 (J. Hanson).

<sup>56</sup> Ex. 207 at 3-4; Index No. 37 at 264:25-266:3 (A. Rendahl).

<sup>57</sup> Index No. 39 at 214:22-217:2 (Voter 5); 210:-6-213:9 (Voter 9); 218:23-221:13 (Voter 11); 231:15-233:24 (Voter 12); 224:20-226:11 (Voter 18); 227:19-230:10 (Voter 20).

<sup>58</sup> Index No. 39 at 201:9-203:2 (Voter 4); 156:6-157:19 (Voter 10); 132:8-133:12 (Voter 14); 138:13-140:14 (Voter 15); 153:11-154:21 (Voter 16); 143:20-145:4 (Voter 17).

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.<sup>59</sup>

### **III. ARGUMENT**

Petitioner raises two arguments in support of his request to vacate the results of the 2024 general election for House District 54A. First, Petitioner asserts that there is some doubt as to the identity of the individuals who cast the 20 uncounted ballots.<sup>60</sup> That is not correct. As explained below, the evidence introduced before the district court established the identity of the 20 affected voters beyond any reasonable doubt. Second, Petitioner asserts Minnesota law prohibits consideration of testimony from 12 of the individuals who cast the uncounted ballots. On this point, Petitioner is just plain wrong.<sup>61</sup> The voter testimony is credible, reliable, and admissible and definitively establishes that Representative Tabke won the election.

#### **A. The evidence introduced before the district court conclusively identifies the individuals who cast the 20 uncounted ballots.**

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

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<sup>59</sup> See Index No. 39 at 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); 290:16-291:5 (T. Brunnell) (same).

<sup>60</sup> Pet. Br. at 5.

<sup>61</sup> Pet. Br. at 6-9.

explanation for when or how the 20 uncounted ballots were lost.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

The district court reached this same conclusion based on the evidence. In rejecting Contestant Aaron Paul's assertion that the County had not linked the 20 uncounted ballots to the individuals identified as Voters 1-20, the Court recounted the testimony from Ms. Hanson that "she has no doubt based on reason or common sense that the 20 identified voters are in fact those for Shakopee Precinct-10 whose ballots were lost and not counted" and noted simply: "The Court agrees."<sup>65</sup> Petitioner's argument that there remains some doubt as to the identity of the affected voters is unsupported by the facts.

**B. The district court properly considered testimony from the individuals who cast 12 of the uncounted ballots.**

Petitioner asserts that Minnesota courts "have long held" that "testimony of certain voters about how they did or would have voted" "cannot be used to determine the election."<sup>66</sup> This is not

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<sup>62</sup> Index No. 38 at 105:10-18.

<sup>63</sup> See Index No. 38 at 106:17-107:9.

<sup>64</sup> See 10 MNPRAC. CRIMJIG 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.").

<sup>65</sup> Index No. 37 at ¶ 107.

<sup>66</sup> Pet. Br. at 6.

correct. In fact, the Minnesota Supreme Court has recognized that testimony from voters identifying the candidates for whom they cast their ballots may be used to determine the outcome of an election contest. In its decision in the 1941 case of *Hanson v. Emanuel*, the Minnesota Supreme Court 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.<sup>67</sup> The Minnesota Supreme Court concluded that this testimony was determinative of how the ballots were cast. Similarly, the Court acknowledged that parties could obtain testimony regarding how ineligible voters cast their ballots in a 1965 decision involving a contested schoolboard election.<sup>68</sup>

In support of his argument that voter testimony should not be considered, Petitioner relies primarily upon the 1895 decision in *Pennington v. Hare*.<sup>69</sup> That case involved a situation where election judges improperly refused to allow eligible voters to cast their ballots. The Minnesota Supreme Court concluded that the voters should not be allowed to testify as to how they *would have* cast their ballots in order to determine the outcome of the election.<sup>70</sup> The concerns raised in *Pennington* about the reliability of testimony regarding what individuals would have done—as opposed to what they did do—is not present in this case. Moreover, even if *Pennington* could be read to stand for the general proposition that voter testimony could not be used to determine the

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<sup>67</sup> *Hanson v. Emanuel*, 297 N.W. 749, 755 (Minn. 1941); see also *Nelson v. Bullard*, 194 N.W. 308, 309-10 (Minn. 1923) (affirming reliance on voter testimony to determine for whom a contested ballot was cast)).

<sup>68</sup> *Ganske v. Ind. Sch. Dist. No. 84*, 136 N.W.2d 495, 408, (Minn. 1965); see also *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.”).

<sup>69</sup> Pet. Br. at 7 (citing *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895)).

<sup>70</sup> *Pennington*, 62 N.W. at 117.

outcome of an election, that holding was implicitly overruled by the Supreme Court's decision in *Hanson v. Emanuel*, 46 years later, which permitted the reliance on voter testimony to decide the contest.

Petitioner also briefly mentions the Minnesota Court of Appeals case of *Kearin v. Roach* which Contestant Aaron Paul relied upon in his reply brief to the district court.<sup>71</sup> Despite its superficial gloss, this case does not support Petitioner's argument that voter testimony should not be considered in connection with the election contest before this committee. *Kearin* involved an election for Supervisor of Spring Lake Township which was separated by a one-vote margin.<sup>72</sup> Following a recount, Robert Kearin initiated an election contest alleging that the winning candidate's two daughters were not eligible to vote in Spring Lake Township because they were not residents of the township. Both daughters were "under indictment for voting violations in the [Township's] election [and] they refused to testify, citing the protections of the Fifth Amendment...." The district court deducted their two votes from the results and declared the contestant, Robert Kearin, the winner of the election.

The question before the Court of Appeals was whether the contestant had offered sufficient evidence to prove for whom the two votes were cast. The Court of Appeals concluded that the circumstantial evidence in the election contest was sufficient to conclude that the candidate's daughters did not reside in the Township and had cast their ballots for their father.<sup>73</sup> In addressing this question, the Court of Appeals stated: "[a]lthough for obvious reasons arising from the inviolable secrecy of the ballot, direct evidence as to how contested votes were cast is not allowed,

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<sup>71</sup> Pet. Br. at 2, n. 1 (citing *Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. Ct. App. 1986)).

<sup>72</sup> *Kearin*, 381 N.W.2d at 532.

<sup>73</sup> *Id.*

circumstantial evidence is sufficient to sustain a contestant’s burden of proof if it has the requisite degree of persuasion.”<sup>74</sup> This statement, which was not part of the Court’s holding, misstates Minnesota law.

The Court of Appeals cited the 1924 decision from the Minnesota Supreme Court, *In re Mathison v. Meyer*, as the source of its statement that direct evidence of how a contested ballot was cast “is not allowed.” That decision says “direct evidence as to how contested votes were cast *is not required*” and that circumstantial evidence, such as a voter’s affiliations and pre-election activities “ordinarily are a reliable indication of how his vote was cast.”<sup>75</sup> Far from saying that voter testimony is prohibited, the Supreme Court’s decision explained simply that it is not required and, where it is not available, other evidence can be used to prove how specific ballots were cast. In any event, the Supreme Court decision cited in the *Kearin* opinion predates, by 17 years, the Court’s *Hanson* decision which recognized that direct voter testimony could be used to prove how ballots were cast. Neither *Kearin*, *Mathison*, nor *Pennington* are controlling law.

Judge Perzel, the Scott County District Court judge who presided over the election contest, noted that the voters in this matter whose ballots were not counted—and whose votes would be added to the election results—do not share the motivation of ineligible voters in the cases cited by Petitioner—whose votes would be deducted from the election results.<sup>76</sup> Importantly, the district court noted that Contestant Aaron Paul made no effort to cross-examine the six Tabke voters “regarding their candidate affiliation, pre-election activities, whether they actually voted in the race, recollections related to this vote, and any animosity they have toward Tabke even if he was

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<sup>74</sup> *Id.* (citing *In re Mathison v. Meyer*, 199 N.W. 173, 173 (Minn. 1924)).

<sup>75</sup> *In re Mathison*, 199 N.W. at 173.

<sup>76</sup> Index No. 37 at ¶¶ 97-98.

a member of the political party with whom the voter affiliated.”<sup>77</sup> The Court, which heard the testimony directly from the voter witnesses, concluded that each of them “appeared frank and sincere” in their statements regarding “the circumstances surrounding their absentee voting in the election at issue, [] the election documents related to their voting in this election, and [] for whom they voted in the House District 54A race.”<sup>78</sup>

In sum, the voters’ testimony is reliable, appropriate, and determinative.

#### **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 Committee conclude that he is the duly elected representative for House District 54A.

Dated: April 8, 2024

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**ATTORNEYS FOR RESPONDENT**

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<sup>77</sup> Index No. 37 at ¶ 98.

<sup>78</sup> Index No. 37 at ¶ 73.