

Whether Absentee Ballots in Minnesota Mailed by Election Day but Received Later Should be Counted

Carson v. Simon (Nancy E. Brasel, D. Minn. 0:20-cv-2030)

To accommodate increased voting by mail and poorer than normal mail service because of a global infectious pandemic, a consent decree in state court allowed for the counting of ballots received up to a week after election day if postmarked by election day. A federal complaint filed seven weeks later challenged the state-court consent decree. The district judge found that the plaintiffs did not have standing to bring the case. The court of appeals, five days before election day, disagreed and moreover decided that the plaintiffs were entitled to relief.

Subject: Absentee and early voting. *Topics:* Absentee ballots; Covid-19; interlocutory appeal; intervention; matters for state courts.

Two prospective presidential electors in the November 3, 2020, general election filed a federal complaint in the District of Minnesota on September 22, 2020, against Minnesota’s secretary of state, challenging a state-court consent decree accommodating increased voting by mail at a time of poor postal service and social distancing—made necessary by a global Covid-19 infectious pandemic—and allowing the counting of absentee ballots received up to a week after election day if postmarked by election day.¹ Two days later, the plaintiffs filed a motion for a preliminary injunction.²

Judge Nancy E. Brasel set the case for a videoconference hearing on October 2, posting contact information on the docket sheet.³ On September 28, Judge Brasel granted an unopposed motion by state-court plaintiffs to intervene.⁴

Judge Brasel denied immediate relief on Sunday, October 11.⁵ Noting that the federal case was filed seven weeks after entry of the consent decree, Judge Brasel concluded that because the plaintiffs’ claims of vote dilution from

1. Complaint, *Carson v. Simon*, No. 0:20-cv-2030 (D. Minn. Sept. 22, 2020), D.E. 1; *Carson v. Simon*, 494 F. Supp. 3d 589, 596–97, 600 (D. Minn. 2020); see Jessie Van Berkel, *GOP Sues Over Ballot-Acceptance Date*, Minneapolis Star Trib., Sept. 24, 2020, at 1B; see also Jessie Van Berkel, *Absentee Voting Deals Get GOP Critics*, Minneapolis Star Trib., June 18, 2020, at 1B.

2. Preliminary-Injunction Motion, *Carson*, No. 0:20-cv-2030 (D. Minn. Sept. 24, 2020), D.E. 12.

3. Docket Sheet, *id.* (Sept. 22, 2020) (D.E. 19); see Transcript, *id.* (Oct. 2, 2020, filed Oct. 6, 2020), D.E. 48; Minutes, *id.* (Oct. 2, 2020), D.E. 45; Notice, *id.* (Sept. 25, 2020), D.E. 18.

4. Order, *id.* (Sept. 28, 2020), D.E. 33; see Intervention Brief, *id.* (Sept. 25, 2020), D.E. 22; Intervention Motion, *id.* (Sept. 25, 2020), D.E. 20.

5. *Carson*, 494 F. Supp. 3d 589 (amending an opinion filed on October 11, one day earlier); see Opinion, *Carson*, No. 0:20-cv-2030 (D. Minn. Oct. 16, 2020), D.E. 71, 2020 WL 6117687 (denying an injunction pending appeal); see also Stephen Montemayor, *Ballot Counting Deadline Upheld*, Minneapolis Star Trib., Oct. 13, 2020, at 1B.

counting too many ballots were speculative and not specific to them, they lacked standing to bring the suit.⁶

On October 29, however, the court of appeals determined, by a vote of two to one, that as candidates the plaintiffs did have standing to ensure accurate vote tallies.⁷ Although Judge Brasel did not reach the merits of the claims, the court of appeals decided that the case presented a purely legal question, and it decided that the secretary had no power to override the legislature by consenting to the decree.⁸ The court of appeals acknowledged that a change in election rules only five days before the election, while absentee ballots were being mailed, was disfavored, but it was necessary in this case to protect the constitutional role of Minnesota's legislature.⁹

Judge Brasel therefore issued an order drafted by the court of appeals requiring election officials to segregate absentee ballots received after election day, so that a determination about whether they would be counted could be made later.¹⁰

On November 5, two days after the election, Judge Brasel denied an election-day motion by the intervening state-court plaintiffs to certify to Minnesota's supreme court a question of whether the federal-court plaintiffs were in privity with state-court parties bound by agreements supporting the consent decree.¹¹

Judge Brasel issued a stipulated dismissal of the case on December 9.¹²

6. *Carson*, 494 F. Supp. 3d 589.

7. *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020); see Stephen Montemayor, *Court Puts Late Ballots on Hold*, Minneapolis Star Trib., Oct. 30, 2020, at 1A.

8. *Carson*, 978 F.3d at 1059–60.

9. *Id.* at 1062.

10. Order, *Carson*, No. 0:20-cv-2030 (D. Minn. Oct. 30, 2020), D.E. 72; *Carson*, 978 F.3d at 1062–63.

11. Order, *Carson*, No. 0:20-cv-2030 (D. Minn. Nov. 5, 2020), D.E. 86; Certification Motion Brief, *id.* (Nov. 3, 2020), D.E. 80.

12. Order, *id.* (Dec. 9, 2020), D.E. 89; see Stipulation, *id.* (Dec. 9, 2020), D.E. 88.