

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

In the Matter of the contest of General
Election held on November 4, 2008, for the
purpose of electing a United States Senator
from the State of Minnesota,

Court File No. 62-CV-09-56

CONTESTANTS' PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

This matter came before the Honorable Elizabeth A. Hayden, Judge of the Seventh Judicial District, the Honorable Kurt J. Marben, Judge of the Ninth Judicial District, and the Honorable Denise D. Reilly, Judge of the Fourth Judicial District (herein collectively, the "Panel") in a bench trial to hear an election contest under Minnesota Statutes Chapter 209. The trial commenced on January 26, 2009 in Courtroom 300 in the Minnesota Judicial Center. Contestants were represented by counsel Joseph S. Friedberg, Tony P. Trimble and James K. Langdon. Contestee was represented by Kevin J. Hamilton, David L. Lillehaug and Marc E. Elias.

The Panel sits with jurisdiction under Minn. Stat. § 209.021, for the purpose of establishing a record and determining de novo the issue of which candidate received the greatest number of votes legally cast in the November 4, 2008 general election for the

office of United States Senator from the State of Minnesota, including full review of claims related to absentee ballots not yet counted, double counting and missing ballots.

Now, therefore, based on the testimony and evidence submitted at trial, the exhibits admitted into evidence at trial, and the pleadings, briefs and memoranda submitted by the parties, the Panel hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Parties

1. Contestant Cullen Sheehan (“Sheehan”) is a Minnesota resident qualified as an eligible voter under Minnesota election law who voted by absentee ballot in the November 4, 2008 general election. Notice at ¶ 1.

2. Contestant Norm Coleman (“Coleman”) is a Minnesota resident qualified as an eligible voter under Minnesota election law and United States Senator from the State of Minnesota who voted in the November 4, 2008 general election and whose name appeared on the official ballot as a candidate for election as United States Senator from the State of Minnesota in all counties within the State of Minnesota in the November 4, 2008 general election. Notice at ¶ 2.

3. Contestee Al Franken (“Franken”) is a person whose name appeared on the official ballot and was a candidate for election as United States Senator from the State of Minnesota in all counties within the State of Minnesota in the November 4, 2008 general election. Notice at ¶ 3.

4. In a very real and meaningful way, the voters of Minnesota are parties to this contest proceeding. They have an enormous stake in seeing that the election process works as it should, that the will of the voters is reflected in this Court's judgment, and that all legally cast votes are counted under a uniform set of standards. Minn. Stat. § 209.01, subd. 1.

5. This action was brought by Contestants pursuant to a Notice of Election Contest filed on January 6, 2009 (the "Notice"). The Notice sought an order correcting the vote totals certified by the Minnesota State Canvassing Board ("MSCB") to reflect that Contestant Norm Coleman received a higher number of votes than Contestee Al Franken and further declaring that Contestant Norm Coleman is entitled to the Certificate of Election as United States Senator from the State of Minnesota. Notice at ¶¶ 8, 9, 14, 21.

The Election

6. On November 4, 2008, the general election was held in the State of Minnesota, which included the election for the office of United States Senator in all counties within the State of Minnesota. Notice at ¶ 7.

7. On the evening of the election, the votes for the office of United States Senator were tallied with the result of 1,211,590 votes cast for Contestant Coleman and 1,211,375 votes cast for Contestee Franken, a difference of 215 votes.

The Administrative Recount

8. On November 18, 2008, the Minnesota State Canvassing Board ("MSCB") met and directed the Office of the Minnesota Secretary of State to oversee an

administrative manual recount of votes cast for the office of United States Senator from the State of Minnesota pursuant to Minn. Stat. § 204C.35, Subd. 1. Notice at ¶ 7.

9. Contestee Franken requested that all wrongly rejected absentee ballots be counted during the recount. Contestant Coleman asked the MSCB to defer reviewing and, potentially, counting rejected absentee ballots until an election contest so that the process could be conducted in a consistent and fair fashion. (Gelbmann, 1/29 p. 111-112, 123-124, 167-168, 170, 171)

10. During the recount process, upon the recommendation of the MSCB, the Minnesota Secretary of State requested all election officials throughout the State of Minnesota to review the absentee ballot envelopes rejected within their jurisdictions to determine whether they were rejected improperly and sort these envelopes into five piles: piles for each of the four statutory reasons for rejecting absentee ballots under Minn. Stat. § 203B.12 and a fifth pile (“Pile 5”) representing envelopes rejected for reasons other than the four statutory reasons. (Gelbmann, 1/27 p. 65-66, Exhibits C-248, C-249)

11. The sorting process and the Pile 5 arrangement resulted because local election officials were concerned that there were a number of absentee ballots that were wrongfully rejected by absentee ballot boards or election judges on election day. (Gelbmann, 1/27 p. 65). It became evident during the counting process that not every county or city used the same standards in determining whether an absentee ballot should be accepted.

12. The MSCB indicated that the scope of its review during the recount was limited to those matters before it and that it lacked authority to bring additional evidence

before it. The MSCB noted that its role was purely ministerial and that issues of law and fact were reserved for the contest court.

13. To provide transparency and openness, the Minnesota Secretary of State requested that the counties permit the public (including representatives of each of the Coleman and Franken campaigns) to observe the sorting process. (Gelbmann, 1/27 p. 67-68)

14. The counties did not review all rejected absentee ballots in a consistent manner. Approximately 10 counties (out of 87 counties in the State of Minnesota) did not participate in the voluntary sorting process. Additionally, approximately ten to fifteen counties did not conduct the sorting process in public; rather, they conducted the sorting process without permitting the public (including representatives of each of the Coleman and Franken campaigns) to observe the sorting process. (Gelbmann, 1/27 p. 69)

15. As part of the sorting process, some counties reported that they rejected no envelopes improperly. Indeed, not all counties reviewed the rejected ballots to the same extent and in the same fashion. (Gelbmann, 1/27 p. 69, 71)

16. Pursuant to Orders by the Minnesota Supreme Court dated December 18, 2008 and December 24, 2008, local election officials identified 1,346 absentee ballot envelopes which such local election officials believed had been improperly rejected on election night and constituted obvious errors. Representatives of the Coleman campaign and Franken campaign reviewed these envelopes. On Saturday, January 3, 2009, the Minnesota Secretary of State opened and counted 933 previously-rejected absentee

ballots which local election officials, the Coleman campaign and the Franken campaign all agreed were improperly rejected. (Gelbmann, 1/27 p. 83, 104; 1/28 p. 87, 203, 207)

17. The Coleman and Franken campaigns exercised good faith in reviewing the 1,346 absentee ballot envelopes identified by local election officials as having been wrongly rejected and in challenging, between them, 413 of those ballot envelopes. (Gelbmann, 1/27 p. 87-88, 104; 1/29 p. 36)

18. Based on parties and counties' reasonable expectation of what the standard was for accepting such ballots, 933 such envelopes were opened and counted on January 3, 2009.

19. The Secretary of State's Office notified every voter who was rejected by either or both of the campaigns during the recount. Poser, 2/23 p. 228. This letter provided the voter with some remedies that could be taken. Id.

20. The Secretary of State did not send a letter to the other approximately 11,000 voters whose ballots had been rejected at the local level, most of which never received any notice that there was any problem with their ballots. Poser, 2/23 p. 228; Erickson, 2/20 p. 134; Huvala, 2/17 p. 27; Kes, 2/17 p. 179.

21. On January 20, 2009 and January 21, 2009, the Minnesota Secretary of State prepared a spreadsheet identifying the names and reasons for rejection of these 933 ballots. (Gelbmann 1/27 p. 74, 79-80 Exhibit C-245). Included among these ballots counted were envelopes originally identified by local election as having the following reasons for rejection (as stated in the "For Office Use Only" section of the absentee ballot envelope):

Initially marked “accepted”;

Initially marked “accepted” and “rejected”;

No reason given for initial rejection;

No proof of residence (space for driver’s license not filled in);

Voter not registered/voter not on roster/no voter registration card;

Delivered to wrong precinct/delivered to wrong city;

No absentee ballot application found;

No date on signature line or witness signature;

Dates on voter and witness signature lines do not match;

Notary stamp missing on witness signature line;

Witness not a Minnesota resident/incomplete witness address;

Signature on envelope did not match signature on application;

Voter did not sign absentee ballot application;

Voter voted in person on election day;

Incomplete voter registration/no date of birth on registration card; and

Non-registered voter received registered voter envelope.

(Gelbmann 1/27 p. 90-126; 1/28 p. 9-27, 78; Exhibit C-245)

Among those previously rejected absentee ballots the counties put in Pile 5 as meeting the standards for a legally cast vote were ballots having the following characteristics:

- voter did not sign the certification ;
- witness notary failed to affix stamp or seal;
- witness gave out-of-state address;

- no witness at all;
- no voter address;
- no witness address.

In total, it appears that more than 50 ballots like these were among those opened and counted on January 3, 2009 and certified by the MSCB on January 5, 2009. Each of these ballots constitutes an illegal vote under the Court's February 13, 2009 Order and related rulings.

22. Upon conclusion of the recount, on January 5, 2009, the MSCB declared that Contestee Franken had received 1,212,431 votes for the office of United States Senator from the State of Minnesota and that Contestant Coleman had received 1,212,206 votes for the office of United States Senator from the State of Minnesota, a difference of 225 votes. (Gelbmann 1/29 p. 58-59).

Absentee Ballots

23. During the 2008 general election, significantly more persons cast absentee ballots than in previous elections, even though overall voter turnout was essentially the same as in the 2004 presidential election. (Gelbmann 1/29 p. 63-64). Ramsey County, for example, had a 31% increase in absentee voting in the 2008 general election compared to the 2004 general election, with approximately 31,000 absentee ballots cast. Mansky, 1/30 p. 29. In the 2004 election, Pine County had about 850 absentee ballots. In 2008, the county had about 1300 absentee ballots. Clemmer, 2/5 p. 93. Some 26,000 absentee ballots were cast on November 4, 2008 in Anoka County. This represented an

approximate increase of 30 to 35% over the previous presidential election. Smith, 2/5 p. 163. In total, approximately 292,000 absentee ballots were cast.

24. Higher absentee voter volume increases the mistake rate in deciding whether or not to accept an absentee ballot. Mansky, 1/30 p. 30-31.

25. When absentee ballot volume is high, election officials have less time to review the return envelopes. Absentee ballot boards and election judges take only approximately 15 to 20 seconds to review absentee ballot envelopes to determine whether each should be accepted or rejected. Mansky, 1/30 p. 25-26, 30-31.

26. Absentee ballot boards and election judges sometimes made mistakes in deciding whether or not to accept an absentee ballot. Mansky, 1/30 p. 28-29.

27. In Ramsey County, approximately 5% of absentee ballots were rejected, which is higher than in previous years. Mansky, 1/30 p. 29.

Absentee Ballot Envelopes are Reviewed by Boards and/or Election Judges

28. When an absentee ballot is returned to a local election official, the absentee ballot envelope is reviewed by either an absentee ballot board or election judges within the precinct from which the envelope was mailed to determine whether the envelope complies with Minnesota law. Gelbmann, 1/27 p. 119-120.

29. Minnesota cities or counties that convene an absentee ballot board more than five days before the election will send replacement ballots to any absentee voter who previously submitted a technically deficient absentee ballot to give the voter an opportunity to correct the mistake. Voters in cities or counties that do not convene an absentee ballot board more than five days before the election do not get this opportunity

to fix any absentee ballot mistakes before the envelopes are reviewed to determine whether to accept the ballots. Mansky, 1/29 p. 196; 1/30 p. 13-15

30. Some jurisdictions have absentee ballot boards; others do not. The processes used to handle and review absentee ballots varies widely among the state's counties and cities. Examples from the testimony include:

Washington County does all of the accepting and rejecting of absentee ballots for all of the cities in the county except Stillwater, which has its own absentee ballot board. Corbid, 2/3 p. 28.

In Pine County, an absentee ballot board exists only for UOCAVA voters. Clemmer, 2/5 p. 90. All other rejection decisions are left to the local election judges and are not reviewed by the County Auditor. Clemmer, 2/5 p. 91.

The absentee ballot board in Dakota County was for UOCAVA ballots only. Boyle, 2/9 p. 32. The decision to reject absentee ballots was made in each city and township. For the eleven large cities in Dakota County, the municipal clerk's ballot board made the decision to accept or reject ballots. *Id.* at p. 33. In the smaller cities and townships in Dakota County, the absentee ballots were accepted or rejected at the polling location on election day by election judges. *Id.*

Anoka County utilizes an absentee ballot board for all absentee ballots cast in the County. Smith, 2/5 p. 166. This board checked for "signature mismatch" and "proof of residence" issues. Ms. Smith provided the final say on whether the absentee ballot board rejected an absentee ballot for "signature mismatch." Smith, 2/5 p. 169.

The Plymouth absentee ballot board is responsible for the decision to accept or reject absentee ballots. Two members of the board from each party review absentee ballot envelopes together, deciding whether to accept or reject. Engdahl, 2/12 at p. 8.

The Plymouth absentee ballot board has a policy of contacting voters to inform them that there is a problem with the absentee ballot which will need to be corrected for the vote to be counted. Engdahl, 2/12 at p. 9. The board will send replacement ballots and allow the voter to correct the error. *Id.*

Olmsted County has an absentee ballot board which reviews all the absentee ballots for Olmsted County before they are sent to the precincts. Fuller, 2/18 p. 159.

The City of Eden Prairie has a four-member absentee ballot board. When absentee ballots arrive two election judges work together to review each absentee ballot envelope for completion and compliance. Porta, 2/19 p. 61.

The City of Minnetonka has an absentee ballot board which consists of two county workers.

Cass County has an absentee ballot board comprised of eight election judges. Cass County staff is also used if necessary. Anderson, 2/19 p. 132.

The City of Edina has an absentee ballot board with 46 persons who are trained election judges. Mangen, 2/19 p. 176.

Meeker County does not have an absentee ballot board. Lock, 2/19 p. 216. Decisions as to whether to accept or reject absentee ballots are made at the precinct level in each of the 30 precincts. Id.

The City of Champlin has a 17-member absentee ballot board which reviews absentee ballot envelopes. Colotti, 2/19 p. 226.

The 2008 election was the first year Crow Wing County had an absentee ballot board to handle the acceptance and rejection of absentee ballot envelopes. Erickson, 2/20 p. 130-31.

Goodhue County established an absentee ballot board for the 2008 election comprised of staff from the auditor/treasurer office. Holmsten, 2/20 p. 162, 164.

Scott County has a three-person absentee ballot board. Kes, 2/17 p. 170. The board determines compliance when the absentee ballots are received.

There is an absentee ballot board for the City of Maple Grove. Koll, 2/23 p. 39. The absentee ballot board determined whether an absentee ballot would be rejected for "signature mismatch."

Stearns County absentee ballot procedure is to process the envelopes and then send them off to be counted by their particular precinct. Only UOCAVA ballots are fully processed by the absentee ballot board in the auditor's office. Schreifels, 2/18 p. 64-65. The precincts, on election day, review the absentee ballots. If the ballot was accepted, election judges take out the secrecy envelope and set it aside. When all of the absentee ballots have been processed, election judges open the secrecy envelopes. Schreifels, 2/18 p. 66.

For its absentee ballot board, the City of Duluth uses election judges from both parties to review the absentee ballots. Absentee ballots accepted by the board are

sent to their individual precincts for opening and counting. Rejected absentee ballots are kept by the absentee ballot board.

The City of Rogers does not have an absentee ballot board. Instead, Ms. Doboszinski and an election judge examined each absentee ballot on election night. Doboszinski, 2/23 p. 101.

The Hennepin County absentee ballot board receives and processes the UOCAVA ballots and sends all Minneapolis absentees ballots to the Minneapolis absentee ballot board. Reichert, 2/25 (Rough) p. 104.

The Minneapolis absentee ballot board is comprised of Minneapolis administrative staff and election judges, approximately 20 to 30 individuals. Reichert, 2/25 (Rough) p. 105; 2/26 p. 31. The Minneapolis absentee ballot board reviews each absentee ballot to verify that it complies with the four statutory requirements for absentee ballots. Reichert, 2/25 (Rough) p. 106. Absentee ballots that are rejected by the Minneapolis absentee ballot board are set aside. Id. at p. 107. Accepted absentee ballots are transported to the precincts on election night where they are reviewed by election judges to verify that the voter did not vote in person on election day. Id.

31. The major political parties can designate a challenger in the polling place for a partisan election, and that challenger can challenge the eligibility of a voter attempting to vote at the polling place. Poser, 3/2 p. 44.

32. There is no opportunity for a challenge by any person to any absentee ballot envelope. Mansky, 3/9 p. 223-24; Reichert, 3/12 p. 96; Exs F2044, 2104. Only an absentee ballot board or election judges at the precinct level have any part in the decision whether to accept or reject an absentee ballot. Poser, 3/2 p. 45.

On Election Day, Officials Reviewed Absentee Ballots Under a Substantial Compliance Standard Different Than the Rules this Court has Articulated.

33. The Secretary of State's office has consistently encouraged local election officials to apply standards to the review of absentee ballots with the goal of

enfranchising the voters. Mansky, 1/30 p. 27-28; Poser, 3/9 p. 220; Gelbmann, 1/28 p. 79-82.

34. Ramsey County is a prominent example. It accepts absentee ballots as long as the required information is somewhere on the return envelope, even if it is not on the proper line. That applies to the signature of the voter and the witness information, which must be somewhere on the envelope even if not in the specified spaces. Mansky, 1/30 p. 23-24, 56; 2/2 p. 156.

35. Ramsey County presumes that a voter who returns a registered voter absentee ballot return envelope is registered. Election officials do not conduct any further investigation (or check the SVRS) to determine whether or not the voter is indeed registered. Mansky, 1/30 p. 70-17.

36. Since voters cannot receive an absentee ballot without submitting an application, Ramsey County's policies and proceeding are that absentee ballots should not be rejected for the reason that the absentee ballot application cannot be found or if the absentee ballot application is not signed. Mansky, 2/2 p. 161.

37. The testimony from other election officials was similar. Bunting, 2/23 p. 89-91; Boyle, 2/23 p. 66.

38. In its February 13, 2009 Order and related rulings, the Court adopted a strict compliance standard for determining whether or not an absentee ballot was "legally cast" that is at variance with the rules used by the vast majority of Minnesota's counties and cities on election day. Order at 1-2, 14. The Court therefore did not allow Contestants to introduce additional evidence of such from county and city officials.

Different Counties and Municipalities Applied the Standard Differently

39. The Court heard testimony from 38 election officials from jurisdictions around the State who testified as to how their jurisdictions applied the substantial compliance standard for determining whether to accept or reject an absentee ballot. The differences were many and were substantial. Examples follow.¹

Signature mismatch

40. Election officials testified regarding their discretion in determining whether a signature is genuine. This discretion created inconsistencies with respect to determinations of whether absentee voters' signatures were genuine. Some election judges used a strict eye while others erred on the side of accepting the vote. Gelbmann 1/27 p. 105, 120-121; 1/28 p. 36-38; c.f. Order at 11-12.

41. It is very difficult for election judges to determine if a signature is the voter's genuine signature. Election judges are not and cannot be handwriting experts. Ramsey County election officials give absentee voters wide latitude when attempting to match signatures. Mansky, 1/30 p. 39-40, 48-53; 3/9 p. 204, 220.

42. While Rachel Smith of Anoka County wanted to see a uniform application of standards apply to signature mismatch issues within the county, she has seen considerable disagreement and differences between election judges as to what standards,

¹ "The Court ruled that evidence from county officials concerning Contestants claims of equal protection violations, due process violations after its February 13th Order and Memorandum changed the rules of the game from what Minnesota's jurisdictions used on election day and the MSCB used in the recount, and illegal ballots under the February 13th Order were contained in the Election Day and MSCB counts was inadmissible, could not be asked directly of witnesses and could be put in the record only as offers of proof."

restrictive or broad, are to be applied to whether the same individual signed both the application form and the absentee ballot envelope.

43. Washington County provided training to election judges on the issue of matching signatures of the voter on an application form with the signature on the envelope. Corbid, 2/3 p. 60. The judges were told that some variation in the two signatures were allowed, but that the signatures should be determined not to match if, in the opinion of the judges, the same person had not signed both. Corbid, 2/3 p. 60. Judges were encouraged to ask other judges about whether signatures matched and absentee ballots were rejected if two judges agreed the signatures did not match. Corbid, 2/4. A determination as to whether the signature on the application matches that on the ballot envelope is a subjective judgment. Corbid, 2/3 p. 63. During the recount process, Washington County election officials took into account whether an absentee ballot was witnessed by a notary when determining whether signatures on the application and on the return envelope matched. Corbid, 2/5 p. 69.

44. Only 6 out of 17,127 absentee ballots were rejected for signature mismatch by the Minneapolis absentee ballot board. Reichert, 2/25 (Rough) p. 113; Exhibit C620.

45. More than sixty (60) City of Plymouth absentee ballots were rejected and not counted on election night because the signature on the absentee ballot application did not match the signature on the absentee ballot envelope. Engdahl, 2/12 p. 68-70. Plymouth had 2,024 absentee ballots.

46. When the absentee ballot board identified a signature mismatch between a voter's absentee ballot envelope and absentee ballot application, Lyon County contacted

the voter to determine why the signatures did not match and had voters come in and re-sign their applications. Van Overbeke, 2/19 p. 142. Lyon County did not reject any absentee ballots for signature mismatch. Id.

47. Dakota County election workers are not instructed to take into account circumstances such as disability, illness or accident in assessing whether a voter's signature on the absentee ballot envelope is similar to the voter's signature on the absentee ballot application. Boyle, 2-10, p. 64; p. 65. Dakota rejected more than 100 absentee ballots for a purported signature mismatch.

48. Meeker County rejected only one absentee envelope for signature mismatch. It identified that absentee ballot as improperly rejected when reviewing absentee ballots pursuant to the Supreme Court's December Orders. Exhibit C573; Lock, 2/19 p. 217.

49. Scott County trains its county workers regarding signature matches on the absentee ballot paperwork to "give the voter the benefit of the doubt." Kes, 2/17 p. 177. The absentee ballot board determines if the signatures match. Kes, 2/17 p. 177.

50. Stearns County will accept an absentee ballot if the signatures on the application and ballot envelope are a "relatively close match." Schreifels, 2/18 p. 69.

51. Nothing in the directions for submitting an absentee ballot application or the ballot itself tells a voter that his or her signatures match.

Proof of residence

52. Election officials testified regarding their view that if a driver's license was used by a witness to confirm proof of residence, the witness need only check the box

indicating proof of residence, and the law does not require that the driver's license number be filled in. Gelbmann, 1/27 p. 94-95.

53. Washington County considered that the law requires that a number, such as driver's license or passport number, is required by law. Corbid, 2/3 p. 167.

54. Dakota County's practice is to reject absentee ballots where the proof of residence has not been written in, even where the witness checked that they had seen the proof of residence. Boyle, 2/9 p. 62-63.

55. The Edina absentee ballot board rejected absentee ballot envelopes if the identification number under the proof of residence did not match the identification number on the voter registration application. Mangen, 2/19 p. 184.

56. In the instances where a voter's driver's license number as listed on his or her voter registration card will be one or two numbers off what is written on the absentee ballot envelope, per instructions from the Minnesota Secretary of State, Eden Prairie accepts those absentee ballot envelopes. Porta, 2/19 p. 70.

57. Steele County rejected absentee ballot envelopes if the voter had checked a box for proof of residence, but did not fill in an identification number. Ihrke, 2/19 p. 210.

58. Anoka officials require a driver's license number. Smith, 2/6 p. 32.

59. Olmsted County has never set a policy on whether to accept or reject absentee ballots where a proof of residence box has been checked, but no ID number has been provided. Fuller, 2/18 p. 182. The County makes a determination on a case-by-case basis. Fuller, 2/18 p. 191.

60. In Mr. Manksy's view, Minnesota does not require that a driver's license number be written on the absentee ballot envelope. Manksy, 2/2 p. 93.

61. Sherburne County rejected absentee ballot envelopes where a box was checked under the proof of residence section, but no identification number was written on the envelope. Arnold, 2/20 p. 38-39.

62. Crow Wing's policy was not to reject absentee ballot envelopes where the witness had checked a proof of residence box, but had not filled out an identification number. Erickson, 2/20 p. 129.

63. Carver County believes the law requires that, as proof of identification, a driver's license number must be written down. Olson, 2/17 p. 85. Thirty-six (36) Carver County absentee ballots were originally rejected and not counted on election night because the non-registered voter had checked the proof of residence box but given no identification number.

64. The City of Brooklyn Center would require the driver's license number be filled in. Knutson, 3/10 p. 49.

65. Ms. Reichert would consider an absentee ballot envelope without a driver's license number as being an incomplete certificate and would reject the absentee ballot. Reichert, 2/26 p. 37, 125-26.

Absence of an application for the ballot

66. Olmsted County would reject an absentee ballot if the application could not be found. Fuller, 2/18 p. 165. Olmsted County also rejected absentee ballots if the application was not signed. Fuller, 2/18 p. 166.

67. Cass County rejected absentee ballots where the voter filled out the absentee ballot in front of an election official, but the election official failed to have the voter complete an absentee ballot application. Anderson, 2/19 p. 125-28.

68. Several election officials noted that individuals do not receive an absentee ballot unless they have already filled out an absentee ballot application, so they agreed that the absentee ballot of a voter whose application cannot be found should be accepted. Bunting, 2/23 p. 89-91; Boyle, p. 66, Exhibit C400.

69. This Court's February 13 Memorandum notes the importance of election officials comparing a voter's application to his or her ballot to prevent fraud and states: "Even if a voter's failure to register to vote is the result of official errors or omissions, his or vote cannot be counted." *Id. at 7, 8.* This places the Court's Order for the contest at variance with the election day practices of the jurisdictions cited in paragraph 67 above and with the MSCB during the recount. The Court did not allow Contestants to put into evidence additional testimony from county officials on this subject.

Witness address

70. The Court's February 13 Memorandum states: "Absentee voters are instructed that in order to vote by absentee ballot they must have a witness. ... The witness may be anyone who is registered to vote in Minnesota. ... The witness is required to provide their name, address, and signature....Requiring a witness' name and address provides a means by which to verify the witness' identity." *Id. at 14-15.* This places the Court's Order for the contest at variance with the practices of the jurisdictions cited

below. The Court did not allow Contestants to put into evidence testimony from additional county officials on their practices concerning this subject.

71. If a witness does not provide his or her address, Ramsey County election officials will look the witness's name up on SVRS to see if he or she is registered. If the witness is registered, Ramsey County will accept the ballot even though the witness did not provide an address. Mansky, 1/30 p. 71-72. As long as the witness provides a Minnesota address, Ramsey County presumes that the witness is registered and will not reject the absentee ballot due to non-registration of a witness. Ramsey County simply does not check the SVRS to see if the witness is a registered voter. Mansky, 1/30 p. 71.

72. For those absentee ballot envelopes on which the witness did not write a complete address, some municipal ballot boards in Dakota County attempted to contact the voter and/or witness to obtain the information. Absentee ballot boards in other counties and cities did not attempt to obtain that information. Boyle, 2/10 p. 36.

73. Election officials testified regarding their view that if a county official was the witness for an absentee voter, but failed to fill in witness information, the vote should still be accepted. Gelbmann, 1/28 p. 48-50.

74. Benton County does not have an established process of handling absentee ballots without witness addresses. Bunting, 2/23 p. 94.

75. Carver County does check every witness on the SVRS to confirm the individual is at the address provided. Olson, 2/17 p. 78. Fifteen (15) Carver County absentee ballots were rejected and not counted on election night because the witnesses' addresses were incomplete. Exhibit C410. If a witness provided a P.O. box for an

address, Carver County officials checked to see if the witness was a registered voter. Carver County checked the SVRS to see if anyone with that name and P.O. box was registered. Carver County did not focus on the technicality of what type of address was provided. Olson, 2/17 p. 65-66. In situations where absentee ballots were signed by witnesses who provided a street address but no city, Carver County rejected such envelopes because it could not be proven the witness was a registered voter. Olson, 2/17 p. 69.

76. If all other information was filled out correctly, Stearns County did not reject an absentee ballot that was missing the witness's address. Schreifels, 2/18 p. 129 and 149. Completing an absentee ballot is a "very confusing process," so if the voter's signature and address matched, the county would not reject for lack of a witness address. Schreifels, 2/18 p. 149.

77. If the witness did not write a complete address, but the witness was the voter's spouse, the Minneapolis absentee ballot board accepted the absentee ballot as complete. Reichert, 2/25 (Rough) p. 108. This was the Minneapolis absentee ballot board's policy with respect to both registered and non-registered absentee ballot envelopes. *Id.* at p. 108-09.

Witness registration

78. The Court's Memorandum of February 13 states that absentee voters "must have a witness....The witness may be anyone who is registered to vote in Minnesota." *Id.* at 14 (citations omitted). This places the Court's Order for the contest at variance with the election day practices of the jurisdictions cited below and with the MSCB during

the recount. The Court did not allow Contestants to put into evidence testimony from additional county officials concerning their practices on this subject.

79. If a witness gives a Minnesota address, Washington County does not check whether the witness is in fact a registered voter. Corbid, 2/5 p. 45. Washington County presumes anyone with a Minnesota address is a legitimate witness.

80. Neither the Olmsted election board nor election judges checked to see if witnesses were registered. Fuller, 2/18 p. 161 and 164.

81. The Minnetonka absentee ballot board does not check the registration status of witnesses on absentee ballot envelopes. Maeda, 2/19 p. 93.

82. Lyon County does check the registration status of witnesses on absentee ballot envelopes. Van Overbeke, 2/19 p. 140.

83. Beltrami County checks the SVRS to make sure the witness who signed an absentee ballot is a registered voter. Mack, 2/24 p. 94. Ms. Mack believes state law requires that the county verifies that witnesses are registered voters. Mack, 2/24 p. 95. In order to be verified, a witness has to be labeled as registered in the SVRS on whatever day Beltrami County officials decide to accept or reject an absentee ballot. Mack, 2/24 p. 96. This is often the day the county receives the ballot. Mack, 2/24 p. 111.

84. In reviewing absentee ballot envelopes, the Eden Prairie absentee ballot board does not check to see if the witnesses are registered Minnesota voters. Porta, 2/19 p. 64. Eden Prairie has never been instructed to check witness registration status by the state or the county. Id.

85. Benton County does not verify that the witnesses who sign the absentee ballots are registered voters. Bunting, 2/23 p. 64.
86. The Edina absentee ballot board does not check whether the witnesses on absentee ballot envelopes are registered Minnesota voters. Mangen, 2/19 p. 177.
87. The Bloomington absentee ballot board did not check whether witnesses on absentee ballot envelopes were registered Minnesota voters. Ferber, 2/19 p. 153.
88. Steele County does not have a consistent policy on whether to check the registration status of the witness on an absentee ballot envelope. Ihrke, 2/19 p. 204.
89. The Goodhue County absentee ballot board did check whether witnesses on absentee ballot envelopes were registered Minnesota voters. Holmsten, 2/20 p. 165.
90. Meeker County does not check the registration status of witnesses on absentee ballot envelopes. Lock, 2/19 p. 216.
91. Champlin does not check the registration status of witnesses on absentee ballot envelopes. Colotti, 2/19 p. 222.
92. The absentee ballot board for the City of Maple Grove did not verify whether the witnesses who signed the absentee ballots were registered voters. Koll, 2/23 p. 49.
93. Sherburne County does not check whether the witness on an absentee ballot envelope is a registered Minnesota voter. Arnold, 2/20 p. 35.
94. When determining whether to accept an absentee ballot, Wright County election judges were not instructed to check whether witnesses were actually registered voters. Hiivala, 2/17 p. 26.

95. Scott County does not check to see if the witnesses are registered voters. Kes, 2/17 p. 171.

96. The Minneapolis absentee ballot board reviews each ballot to make sure witness information is complete, but it does not verify whether the witness is a registered Minnesota voter. Reichert, 2/25 (Rough) p. 108. Indeed, Minneapolis rejected no absentee ballots for lack of witness registration, (out of 17, 127 accepted).

97. Ramsey County does not check a witness's registration unless there is no address. Mansky, 3/9 p. 203. Indeed, Ramsey County rejected only 7 absentee ballots for lack of witness registration (out of more than 31,000 submitted).

98. St. Louis County rejected no absentee ballots for lack of witness registration (out of more than 7,800 submitted).

99. Carver County checks to see the witness is registered for all out-of-state absentee ballots they receive. Olson, 2/17 p. 121. Carver County had 4,709 accepted absentee ballots and 542 rejected absentee ballots. Olson, 2/17 p. 131-32. At least 179 of them were rejected because the witness was not a registered voter. Olson, 2/17 p. 77.

Wrong precinct

100. The Court's February 13 Order states that it "shall not order the opening and counting of ballots that fall into the following categories because such ballots are not legally cast under relevant law: ... 10. A ballot submitted by a voter who was not registered to vote within the precinct in which he or she resides." *Id.* at 1-2. This places the Court's Order for the contest at variance with the election day practices of the jurisdictions cited below and with the MSCB during the recount. The Court did not allow

Contestants to put into evidence testimony from additional county officials concerning their practices on this subject.

101. If an absentee voter receives and then submits a ballot for the wrong precinct, Ramsey County will count the voter's votes for each office or question that is common to that voter's proper precinct, which includes all statewide races. Mansky, 1/30 p. 84.

102. In Washington County, if a voter was sent a ballot for the wrong precinct, the County requested that election judges remake the ballot onto a ballot in the right precinct and include those votes cast for the races that were on both ballots, including statewide races. Corbid, 2/3 p. 59.

103. Cass County rejected absentee ballots that were delivered to the wrong precinct through no fault of the voter. Exhibit C569; Anderson, 2/19 p. 129-31.

104. Douglas County rejected an absentee ballot where the voter was provided materials for the wrong precinct through administrative error on the part of election officials. Doehling, 2/20 p. 150.

105. If an absentee ballot was delivered to the wrong precinct, Minneapolis arranged for the ballot to be delivered by election staff to the correct precinct during election day. Reichert, 2/26 p. 49. If it was too late in the day to transfer the ballot to the correct precinct, the election judges were instructed to duplicate the ballot to the extent possible and run it through the tabulating machine at the precinct to which it was originally delivered. Id. at p. 66.

No voter signature in certification box

106. Ramsey County takes the position that absentee ballots should not be rejected for lack of signature where there is a sticker obstruction. Mansky, 2/2 p. 184, 156; *cf* Court's Memorandum at 13 ("Absentee ballots submitted in absentee ballot return envelopes where the voter has failed to sign the return envelope, irrespective of whether or not a sticker placed by election officials obstructs the certification or signature block, are not legally cast."). Ramsey County originally rejected absentee ballots for lack of signature where there was no voter signature. However, in those cases where the pre-printed address sticker covers the "To be completed by voter" instruction or the certification, Mr. Mansky believes that those ballots should be accepted and opened. Mansky, 1/30 p. 35-39; Exhibits C-210, C-251. It is an error by election officials when address stickers are placed on the return envelope in such a way that the voter cannot read the "To Be Completed by Voter" instruction or the certification or the signature line. Mansky, 1/30 p. 36-37.

107. The Minnetonka absentee ballot board accepted absentee ballots on which the voter did not sign on the correct line, but did sign elsewhere on the ballot envelope. Maeda, 2/19 p. 97.

108. If the voter signs the absentee ballot envelope, but does not do so on the correct line, Eden Prairie's policy is to reject the envelope for lack of voter signature. Porta, 2/19 p. 71.

109. The Bloomington absentee ballot board did not accept absentee ballots where the voter signed the ballot envelope, but not on the designated line. Ferber, 2/19 p. 158-59.

110. Sherburne County accepted absentee ballot envelopes on which the voter signed, but not in the proper place, as long as the voter's signature matched that on the absentee ballot application. Arnold, 2/20 p. 109-10.

111. Crow Wing rejected absentee ballot envelopes where the voter signed the envelope but not in the correct spot. Erickson, 2/20 p. 128-9; Exhibit C589.

112. Wright County accepted ballots where the voter did not sign the ballot envelope in the correct place. Hiivala, 2/17 p. 27.

113. Carver County will accept absentee ballots where the voter signed in the wrong place, such as the line for a voucher signature. Olson, 2/17 p. 68. Carver County did accept ballots where the voter did not sign his or her application. Olson, 2/17 p. 124.

Non-registered voter mistakenly sent registered packet

114. Washington County considers that even if it was an election official's fault that a voter received a registered ballot envelope rather than an unregistered ballot envelope, the voter's ballot should be rejected and not counted. Corbid, 2/4 p. 122.

115. If Olmsted County mistakenly sent a non-registered voter materials for a registered voter, the County would reject the absentee ballot. Fuller, 2/18 p. 180.

116. In situations where there is not enough time to send a replacement ballot, Carver County will accept absentee ballots if county officials mistakenly sent a non-registered voter materials for a registered voter. Olson, 2/17 p. 117.

117. Scott County would count a non-registered voter's vote if the County mistakenly sent out and the absentee voter received a registered voter absentee ballot and materials. Kes, 2/17 p. 181. The ballot would be counted because it was the County's mistake to send the wrong envelope, not the voter's. Kes, 2/17 p. 182.

118. Stearns County would reject an absentee ballot where the County mistakenly sent a non-registered voter materials use for registered voters. Schreifels, 2/18 p. 103.

119. The City of Duluth would count such a ballot. Cox, 3/5 p. 260.

Checking registration of voters sent registered voter package

120. In sending the absentee ballot package to a voter, most counties use pre-printed labels with the voter's name and address. Many counties use the SVRS to print those labels; if the voter is registered, the label should include an "R" to designate that status.

121. If the pre-printed label contains the "R" designation, the county should send a registered voter package. Upon receiving an absentee ballot return envelope in the format designated for registered voters, therefore, most counties do not check the voter's registration status further. For example, the Eden Prairie board did not take any steps to inquire as to the voter's registration status. Porta, 2/19 p. 61-62. Washington County does not check absentee ballots it receives against the Secretary of State list to verify whether a voter is registered or unregistered; the County assumes the registration status based upon the type of envelope the voter submits. Corbid, 2/3 p. 38.

Mistakes Occur

122. Most absentee voters do not have the same opportunity to correct errors as do same day voters. Mansky, 1/30 p. 28.

123. Mistakes sometimes occur in which election officials mark the absentee ballot "Accepted" but do not open and count the ballot. Mansky, 1/30 p.75-78; Exhibits C-258, C-245.

124. Some rejected absentee ballots reflected no stated reason for rejection, despite the fact that the ballots had been reviewed by election officials at least twice before. Gelbmann, 1/27 p. 92-93.

125. Legally cast absentee ballots are still rejected and have not yet been counted. The voters who cast those ballots remain disenfranchised. Gelbmann, 1/28 p. 56. Ramsey County, for example, still has absentee ballots that were improperly rejected that have not been opened and counted. Mansky, 1/30 p. 32-33. Indeed, after election day it found between 100 and 150 such ballots. Mansky 3/12.

Voters Presented by Contestee

126. The following voters were not on Contestee's X or Y list for his First Counterclaim:

David Lysne
Kenneth Jorgenson
Anatol Lysyij
Robert Zelesnikar
Lora West
Brenda Peavie

In addition, Leah A. Barna-Hedlund already had her vote counted (on January 3, 2009).

127. Contestee failed to present direct admissible documentary evidence—such as challenged ballots, recount incident logs, pre-registered voter rosters, same-day voting rosters, UOCAVA rosters and/or accepted absentee ballot envelopes—to demonstrate that Contestee was disadvantaged, or that Norm Coleman benefited, by the application of Rule 9 during the recount.

128. Contestee did not present any evidence regarding his Fifth Counterclaim (Votes by Felons).

Election Officials Continue to Find New Ballots that Have not Been Counted

129. Following a data practices request and subpoena from Contestee, Anoka County Elections Manager Rachel Smith conducted a diligent search for ballots and/or absentee ballots that were thought to be missing following the recount. Smith, 2/6 p. 127. Following such a search, Ms. Smith informed counsel for Contestants and Contestee by correspondence dated February 5, 2009 (Exhibit C351) that she had located the following ballots, absentee ballot envelopes or other election materials relating to voters in Anoka County after the recount was completed:

- Four (4) ballots from Spring Lake Park 1A that were not counted during the recount, but which were counted on election night, in an envelope containing the UOCAVA precinct record, which ballots were marked “Ballot #1”, “Ballot #2”, “Ballot #3” and “Rejected AB Ballot – Wrong Precinct”. Ms. Smith testified that these ballots were counted on election night but went missing during the recount and should be added to the recount totals for Spring Lake Park 1A, because the ballots were identified as missing and searched for during the recount based on the incident log from the administrative recount of Spring Lake Park 1A dated

November 25, 2008. Ms. Smith testified that the chain of custody relative to these ballots is secure.

- Six (6) voted ballots still enclosed in secrecy envelopes from Coon Rapids W2-P1, Fridley W1-P3, Columbia Heights P5, Columbia Heights P8, Spring Lake Park 1A and Lino Lakes P6. Ms. Smith testified that all of these ballots, which were not counted during the recount, should now be counted.
- A voter registration application for absentee voter Amie Lasserre, Ramsey W2 P1, initially rejected due to lack of a voter registration application. Ms. Smith testified that this envelope, which was not opened and counted during the recount, should now be opened and counted.
- Absentee ballot envelope for Alex Fischer in Coon Rapids W1, P4, initially rejected due to lack of voter registration. However, Ms. Smith testified that she has since double-checked the SVRS, determined that Mr. Fischer is a registered voter and believes that this individual's absentee ballot should now be opened and counted.
- Absentee ballot envelope for Marvin Tomala in Fridley W3, P4, initially rejected due to lack of voter registration.
- Absentee ballot envelopes for Marvin Easter and Jacqueline Easter in Andover P5, initially rejected due to lack of voter registration.

130. In Washington County, since the recount, two (2) absentee ballot envelopes not previously counted have been found in various precincts. Following a data practices request and subpoena from Contestee, Washington County Elections Director Kevin Corbid conducted a diligent search for ballots and/or absentee ballots that were thought to be missing following the recount and subsequently informed the Court counsel for Contestants and Contestee by correspondence dated February 6, 2009 that he had located absentee ballot envelopes from Emily Ann Johnston and Mary C. O' Brien in Stillwater W3 P6, which were located in storage bins utilized to store and sort absentee ballots prior

to them being provided to Washington County's absentee ballot board. Mr. Corbid's correspondence indicates that the chain of custody relative to these ballots is secure and that these absentee ballot envelopes should be opened and counted.

131. In the City of Maple Grove, since the recount, one (1) absentee ballot envelope not previously counted has been found. Following a data practices request and subpoena from Contestee, City of Maple Grove Deputy Clerk Stevie Koll Anderson conducted a diligent search for ballots and/or absentee ballots that were thought to be missing following the recount. Upon such a search, Ms. Anderson informed counsel for Contestants and Contestee by correspondence dated February 3, 2009 (Exhibit C594) that she had located an absentee ballot envelope from David Michael Kelly whose absentee ballot envelope was "inadvertently misplaced during the election process and has not, to date, been counted". Ms. Anderson's correspondence indicates that the chain of custody relative to this ballot is secure and that this absentee ballot envelope should be opened and counted.

The SVRS has not Been Fully Updated and is not Accurate

132. The Secretary of State's Office maintains the Statewide Voter Registration System ("SVRS"), which is a database designed to identify registered voters. It was not until March 2, 2009 that the Secretary of State's Office informed the parties that the SVRS was incomplete and not fully accurate. Poser, 3/2. The responsibility for entering the voter registration information into the SVRS belongs to each county and city since individual voters register at the county level rather than directly with the Secretary of State. Poser, 2/23 p. 12.

133. Since each county is responsible for inputting its own data, there can be inconsistencies and inaccuracies in the data. Poser, 3/3 p. 272; 3/4 p. 13, 17-18, 25-26; Gelbmann, 3/12 p. 70-72; Mansky, 3/12 p. 153-55. This can come from the different counties having different practices and standards regarding inputting the data.

134. Since each Minnesota jurisdiction enters its data on its own schedule, the only way to be absolutely accurate when checking to see if someone is already registered is to check the hard copy registration record. Poser, 3/4 p. 17-18. The U.S. Senate recount and contest has delayed the process this year. Mansky, 2/2 p. 134.

135. Because the Secretary of State's schedule for entering data is not enforced and because the SVRS is continuously being updated, less data was entered in the SVRS on January 26, 2009 than on March 13, 2009. Poser, 3/4 p. 10; Mansky, 3/9 p. 200; Lautzenheiser, 3/12 p. 79-80. On February 2, 2009, some counties were still entering voter registration documents, including individual voter's registration applications from election day, into the SVRS, so the SVRS could not be relied upon for complete accuracy. Mansky, 2/2 p. 134. As of March 4, 2009, about 600 of Minnesota's 4,000 precincts still had not yet completed the data entry from registration applications received on or prior to November 4, 2008. Poser, 3/3 p. 268; 3/4 p. 9-10. By March 11, 2009, 36 precincts still had not completed this work. Gelbmann, 3/12 p. 58. Some registered voters, therefore, are not yet listed in SVRS and certainly were not there on January 26, 2009. Mansky 1/29 p. 235-242. At no point during the contest trial was the SVRS complete, or therefore, completely accurate, meaning that some voters did not have their

votes counted because either they or their witnesses showed up as “unregistered” on the SVRS but they were, in reality, registered. Gelbmann, 3/12 p. 58-62.

136. As a result, a voter may still have been properly registered despite not being listed as such in SVRS on a given date during the contest trial. Mansky, 2/2 p. 167-68. A number of absentee ballots of voters in Ramsey County were originally rejected and not counted on election night due to lack of voter registration. Many of these voters are, in fact, registered or may be registered. Mr. Mansky believes that these ballots should be counted in the contest. None of these ballots have been counted. Mansky, 2/2 p. 85, 98.

137. As of February 5, 2009, not all the registrations Pine County received from the 2008 election had been entered into the SVRS. As a result, there are some people who are Pine County registered voters whose names do not appear in the SVRS as a registered voter. Clemmer, 2/5 p. 87.

138. The SVRS can be inconsistent. If a person moves, that person may still appear registered on the SVRS. If a person changes his or her name, that person may still be listed as registered and active under the old name. The SVRS would not reflect these disqualifying changes unless the County learns of them and inputs the information. Poser, 2/24 p. 189-90; Reichert, 3/10 p.181.

139. The Secretary of State’s Office and other elections officials acknowledge that the SVRS is continuously being updated and is therefore accurate only as of the date the information is accessed. Lautzenheiser, 3/12 p. 79-80; Poser, 3/4 p.13; Gelbmann, 3/12 p. 70-72; Mansky, 2/2 p. 158-59.

140. Some voters were mistakenly labeled “EDR,” for election day registrants, in the source code of the SVRS even though the voters should have been labeled “EDR-Absentee.” Poser, 3/2 p. 9, 17, 20; 2/24 p. 21; Mansky, 3/12 p. 153-55. A label of “EDR” means a person both registered and voted at the polls on election day, rather than by absentee ballot. Poser, 2/24 p. 209. A person should not get an “EDR” designation unless he or she is listed on the election day roster. Id. “EDR-Absentee” means the voter registered as an election day registrant through the absentee ballot process. Poser, 3/2 p. 48.

141. Because of the incorrect coding, voters may be coded as having voted in person when the voters did not in fact vote in person. Poser, 3/2 p. 10-11, 17. This caused confusion in the contest phase as to whether a person had already voted at the polls on election day so his or her absentee ballot should not be counted. Mansky, 3/12 p. 145-60, 169. Because of this confusion, election officials testified that certain voters’ absentee ballots should not have been counted (having already voted on election day) when that was not the case and their vote should be counted. Poser, 3/11.

142. Incorrect coding was discovered as to ballots in Clay County, McLeod County, St. Louis County, Steele County, Wilkin County and Ramsey County, as well as with respect to at least 9 ballots opened and counted by the MSCB. Poser, 3/2 p. 20, 22-24, 46; see also Ex. F-2300 (witness application date).

143. Among the problems resulting from incorrect coding is that a registered voter could receive a non-registered voter ballot. Poser, 3/4 p. 15.

144. The information in SVRS may also be incorrect as to the information regarding the registration of new voters who registered and voted on November 4, 2008 but would not be entered into SVRS until November 5, 2008 or later.

145. If a voter's registration card is found inside a secrecy envelope, that voter's registration status will be updated with a registration date of November 4, 2008. Poser, 2/23 p. 27. A non-registered voter envelope would consist of the outside envelope, a voter registration application form, a secrecy envelope, and a ballot within the secrecy envelope. Corbid, 2/3 p. 40. The same material would exist for a registered voter, except the outside of the envelope looks different and there is no voter registration application. Corbid, 2/3 p. 40.

146. The information in the SVRS may also be incorrect as to a voter whose address has changed and who signs a voter registration application but the SVRS fails to register the changed address. If a voter changes his or her address, the voter is required to complete a new registration application and turn it into his or her county auditor. Poser, 2/23 p. 16.

147. A voter who moved apartments within the same building could be required to re-register in some counties and be permitted to vote using the same address in other counties. There is not a consistent policy on whether moving to a new apartment in the same complex requires new registration. Different auditors treat this situation differently. Poser, 2/23 p. 16; 3/4 p. 21-22; Reichert, 3/10 p. 110-11; Gibbs, 3/10 p. 24-25; O'Donnell, 3/10 p. 66.

148. The SVRS is supposed to work so that voter registration is effective when the registration is processed in the state's system. Unregistered voters must register prior to twenty days before election day or must register on election day. Poser, 2/23 p. 27. If a voter tries to register after the cut-off date, the county will send a notice in the mail instructing the voter that he or she can either register and vote on election day, or if they do nothing, their registration will not become effective until the day after the election. Poser, 2/23 p. 28.

149. Voters are assigned a voter ID when they are entered into the SVRS. Poser, 2/23 p. 14. Sometimes a voter inadvertently receives more than one voter ID. See, e.g., Ex. F-2200. This can create considerable confusion in determining the voter's registration status and whether he or she may already have voted in the election. Reichert, 3/10 p. 119, 165.

150. A voter becomes "challenged" in the system if a postcard was mailed to him or her and the postcard was returned as non-deliverable. Election judges would require a challenged voter at the polls to verify his or her address. Poser, 2/23 p. 17.

151. Verification status is part of the statewide registration system. Whenever a voter registers, his or her information is checked against the driver's license information from the Department of Public Safety. If the information matches, the voter's status will be "verified." Poser, 2/23 p. 18.

152. Voters become "inactive" if they do not vote in a four-year period. Poser, 2/24 p. 16.

153. In order for a voter to determine whether another person, such as their neighbor, is a registered voter in the SVRS, the voter would need to complete a form saying the information was going to be used for election-related or political purposes. The form would have to be presented to either the county auditor or to the Secretary of State's Office. Poser, 2/23 p. 235. A voter could get a CD with this information for the entire state of Minnesota. Poser, 2/23 p. 236.

154. On the "Voter Lookup" page from the Secretary of State's Office, the "original registration date" should signify the date the person first registered. Poser, 3/4 p. 18-19. The "application date" should correspond to the date the voter put on the registration application, but the date should also be the date the information was put into the SVRS database if the voter did not date the application. Poser, 3/4 p. 19. The "updated registration date" should be the latest date that a voter was registered, so for pre-registered voters, it would be the date the data was put into the system, and for election day registrants it would be the day of the election itself. Poser, 3/4 at 19.

155. There are different designations that could be put into the source field in the SVRS. If the source field in the SVRS says "regular," this means the voter registration application did not come through the mail, but was received by the county auditor. Poser, 2/24 p. 19. If the source field says "DVS," this means the voter registered to vote when he or she renewed or got a driver's license. Poser, 2/24 p. 21. Data from the Department of Public Safety is not always transferred to the SVRS and, when it is, it is not always accurate. Poser, 3/3 p. 272-73; 3/4 p. 17-18. If the source code says "FPCA," this means a federal postcard application was sent in for a UOCAVA ballot. Poser, 2/24 p. 22.

156. In the SVRS system, the code “ALM” means “annual list maintenance,” which means at the time the voter was inactivated because he or she had not voted in the prior four-year cycle or updated his or her registration in that prior cycle. Poser, 2/24 p. 224.

157. The Secretary of State’s system generates the mailing labels for individual voters. Corbid, 2/4 p. 126. Most counties and cities use these labels. Smith, 2/6 p. 38; Fuller, 2/18 p. 163; Olson, 2/17 p. 150. Some labels have an “R” for registered voters and some have an “NR” for not registered. Corbid, 2/4 p. 124 and 131. At least one voter, Daniel Zemke from Washington County, was listed as “registered” in the Secretary of State’s registration system, but received a mailing ballot with “NR” written on it. Corbid, 2/4 p. 131; Exhibit C325 Sub 228, 229, and 230.

Absentee Ballots were Wrongly Rejected

158. When re-analyzing rejected absentee ballot envelopes to determine if any were improperly rejected, only the face of the envelope is needed when the given reason for rejection is (1) no signature, (2) misplaced signature, (3) no date, (4) mismatching date, (5) no identification number, (6) invalid identification number, (7) non-registered voter with a registered absentee ballot, (8) non-matching signature when witnessed by an election official, (9) non-registered witness when witness provided a Minnesota address, (10) wrong ballot, or (11) when the envelope is actually marked "accepted." When re-analyzing rejected absentee ballot envelopes to determine if any were improperly rejected for reasons other than those listed above, officials will need the face of the return

envelope, the application, and may need a voter registration application or confirmation of voter registration from the SVRS. Mansky, 1/30 p. 94-96.

The documentary evidence

159. The record reflects evidence, in the form of absentee ballot envelopes, absentee ballot applications, voter registration applications, certifications from counties and municipalities that voters did not otherwise already vote on election day and certified lists from officials that ballots remain rejected and uncounted, as well as testimony from election officials, for those voters on the attached spreadsheet entitled Contestants' Spreadsheet Detailing Evidentiary Support for Continuing Ballots that their ballots were wrongly rejected.

The testimony of individual voters

160. Approximately 90 individual voters whose ballots had been rejected by local election officials testified regarding the circumstances in which each cast his or her absentee ballot. A representative sample includes:

Gerald Anderson—who is blind and signed the envelope in the wrong place

Eugene Markman—an election judge from Stearns County whose ballot was rejected for a purported signature mismatch

Kevin Hendrickson—whose ballot was rejected for no signature but who did in fact sign the voter certification and application

Mijanou Rodriguez Sampers—whose ballot was rejected for a purported signature mismatch

Wesley Briest—whose ballot was rejected because his wife, who witnessed his vote, did not write her address

Doug Thompson—who authorized his girlfriend to sign his absentee ballot application for him because he was out of town caring for his cancer-ridden mother

Peter DeMuth—who signed his application via computer

James Wadzinski—whose ballot was rejected because officials did not think he lived at the address where he in fact resided

Margel and Rodger Kirchoff—from Carver County, whose witness used a P.O. Box for her address

Kelton and Marcella Adams—from Carver County, whose ballots were rejected because the witness (their daughter) purportedly was not registered when in fact she was

Laurie Sadie Woods—a college student whose ballot was rejected for no apparent reason

William Weidenbach—whose ballot was rejected for a purported signature mismatch

Jonathon Schultz—whose ballot was rejected for a purported signature mismatch

Sara Marie Banks—whose ballot was rejected for lack of a registration application even though she was already registered

Each of them remains disenfranchised.

The VRAs within secrecy envelopes

161. As a result of the Court's directive, various counties and cities opened the secrecy envelopes of certain rejected absentee ballots. Approximately 100 voter registration applications were found within them, including 15 additional VRAs from Sherburne County and 1 additional VRA from Lyon County.

Double-Counting Of Ballots

The Need to Create Duplicate Ballots When Originals are Damaged or Defective

162. In accordance with Minnesota Statutes § 206.85, subd. 5 and Minnesota Rules Section 8320.3850(E), duplicate ballots are made if a ballot submitted by the voter is damaged or otherwise defective such that it cannot be processed by a voting machine. Poser, 2/23 p. 113; Corbid, 2/4 p. 189; Reichert, 2/26 p. 47-48.

163. Absentee ballots are the ballots that most often require duplication because absentee ballots get folded in the mail or are completed in a colored ink that cannot be read by the machine. Corbid, 2/4 p. 189; Reichert, 2/26 p. 47.

164. UOCAVA ballots often require duplication because UOCAVA ballots are in a different format than regular ballots and are not typically able to be read by voting machines and with respect to overseas and military voters submitting ballots electronically for the 2008 election, these electronic ballots cannot be read by voting machines. Reichert, 2/26 p. 47.

165. Minnesota election officials and election judges have received specific training on the process for duplicating those ballots which are defective, damaged or otherwise unable to be read by a voting machine. Howell, 2/25 p. 59.

166. Duplicate ballots are to be made by two (2) precinct election judges from different major political parties, who, in accordance with Minnesota law, are to create a second ballot which is an exact duplicate (in terms of votes cast for particular candidates) of the damaged or defective ballot.

167. Minnesota law requires that the original defective or damaged ballots (“Original Ballots”) are to be marked and numbered sequentially (“ORIGINAL 1”, “ORIGINAL 2”, etc.), segregated from all other ballots and placed in a sealed envelope entitled “ORIGINAL BALLOTS FOR WHICH DUPLICATES HAVE BEEN MADE”. Poser, 2/23 p. 113; Corbid, 2/4 p. 191; Ex. C356, Howell, 2/25 p. 61.

168. Minnesota law further requires that the duplicated ballots are to be marked and numbered sequentially (“DUPLICATE 1”, “DUPLICATE 2”, etc.) with the same number as the corresponding Original Ballot and placed in the voting tabulation machine with all other legally cast ballots. Howell, 2/25 pp. 60, 62.

169. Because the polling places were so busy in the 2008 election, creating duplicate ballots relative to the November 4, 2008 general election was done by the election judges most often after the polls closed. Reichert, 2/26 p. 48.

170. Original Ballots are *not* to be run through the voting machine. Howell, 2/25 p. 62.

Duplicates were Made and not Marked

171. Notwithstanding the requirements of Minnesota law, and due to the high number of absentee ballots cast in the election, precinct election judges made mistakes in the marking of duplicate ballots and/or original ballots during the November 4, 2008 general election.

172. Due to the large number of absentee ballots cast in the November 4, 2008 general election as well as the high turnout in the election, certain precinct election judges either failed to mark original ballots or they failed to mark the duplicates with a

serialized duplicate number and the word “DUPLICATE” (“Unmarked Duplicates”).
Gelbmann 1/28 p. 137.

173. Minneapolis Elections Director Cynthia Reichert testified that the most common error made by precinct election judges with respect to duplicate ballots was the failure to properly mark the duplicate ballots with a serialized duplicate number and the word “DUPLICATE”. Reichert, 2/25 (Rough) p. 32.

174. If ballots are in the envelope entitled "BALLOTS FOR WHICH DUPLICATES HAVE BEEN MADE," the presumption, absent evidence to the contrary, is that duplicates were made, serialized and placed in the voting machines on election night. Mansky 1/30 p. 105-106.

175. On election night (November 4, 2008), in Minneapolis Ward 12, Precinct 8, a team of precinct election judges working on duplicating absentee ballots, following the creation of duplicate ballots, forgot to label the duplicated ballots as “DUPLICATE” before feeding the duplicated ballots through the voting machine. Howell, 2/25 p. 63.

176. The precinct election judges in Minneapolis Ward 12, Precinct 8 did not attempt to retrieve the Unmarked Duplicates to label them as duplicates, because once placed in the voting machine, the Unmarked Duplicates could not be identified or distinguished from the other ballots within the voting machine. Howell, 2/25 p. 64.

The Impact of Rule 9 During the Recount

177. During the recount, under administrative recount procedure Rule 9², if marked duplicate ballots (“Marked Duplicates”) were found during the recount, and if Original Ballots were found in the envelope entitled “ORIGINAL BALLOTS FOR WHICH DUPLICATES HAVE BEEN MADE”, recount officials were instructed to set all Marked Duplicates aside and count only the Original Ballots, even if the number of Original Ballots found did not match the number of Marked Duplicates found³. Poser, 2/23 pp. 112, 133.

178. The assumption behind Rule 9 was that all of the election judges who made duplicate ballots had properly marked both the Original Ballots *and* all corresponding duplicate ballots. Poser, 2/23 p. 121.

179. State of Minnesota Elections Director Gary Poser was concerned about Rule 9 and thought it would complicate the recount in precincts where the number of Marked Duplicates found did not match the number of Original Ballots found. Poser, 2/23 p. 123.

Order²Rule 9 was contained within the “Minnesota Secretary of State’s Administrative Recount Procedures General Election, November 4, 2008” as adopted by the Minnesota State Canvassing Board on November 18, 2008.

³In an email to all Minnesota election officials dated November 19, 2008 the Minnesota Secretary of States’ Office stated: “It is the opinion of our Office that Rule 9 is clear about the process to be used when duplicate ballots are found during the sorting process. Those ballots are to be removed from the sorting process and placed in a separate [sic] pile. If there is an envelope of Original Ballots, the Original Ballots should then be sorted. If there are no duplicate ballots found during the sorting process, the canvass board has not authorized the envelope of Original Ballots to be opened and the Original Ballots envelope should remain sealed. If no envelope of Original Ballots exist, the duplicate ballots should then be sorted. While there is no requirement to compare the number of duplicate ballots to the number of Original Ballots, if there is an apparent significant discrepancy in the numbers, the candidates’ representatives should attempt to agree on whether to sort the original or duplicate ballots. The Deputy recount official shall note on the incident log if the duplicates rather than Original Ballots were counted. If the two candidate representatives can not agree, the Deputy Recount Official shall sort and count the original [sic] ballots. I hope this provides additional clarity.” Poser, 2/23 p. 214-15, Exhibit C602.

180. Many Minnesota local election officials also believed that Rule 9's direction to count only the Original Ballots and set aside the Marked Duplicates was flawed due to the possibility that the number of Marked Duplicates found would not match the number of Original Ballots found⁴.

181. In most Ramsey County precincts during the recount, Marked Duplicates were counted instead of the Original Ballots, notwithstanding the requirements of Rule 9. Mansky, 1/30 p. 104.

182. The Minnesota 2008 United States Senate recount was the first and only recount in Minnesota history in which Original Ballots were counted and Marked Duplicates were set aside. Mansky, 1/30 p. 105.

Double-Counting Occurred in Ten Minneapolis Precincts

183. During the recount, in some counties, there were discrepancies between the number of Original Ballots and the number of Marked Duplicates. Gelbmann, 1/29 p. 83-84.

184. During the recount, the City of Minneapolis followed Rule 9 by counting Original Ballots and setting aside Marked Duplicates, even in precincts in which the

⁴"I'm assuming (or maybe I shouldn't be) that we would only recount the ballots in the pile we removed from the transfer case and not use the "original" ballots as a part of the recount. Exhibit C602, Page 00115, City of Maple Grove election official... "If the number of duplicate ballots does not match the number of Original Ballots we will count the duplicated ballots, not the Original Ballots. Some precincts may have kept the UOCAVA Original Ballots separate with the UOCAVA envelopes." Exhibit C602, Page 00121, City of Eden Prairie election official... "...bad decision. REALLY BAD! URGGGHHHHHHH. Pass it on. This is going to be ugly..." (emphasis in original). Exhibit C602, Page 00122, Hennepin County election official... "In my humble opinion, this is a bad rule and an even worse application. There's no good reason to involve the originals in the recount. We should be counting only what is in the sealed voted ballot boxes." Gary Poser's reply is: "I don't disagree – I lost that battle". Exhibit C602, Page 00155, Stearns County Election Official and Minnesota Secretary of State Elections Director. See also Poser, 2/23 p. 137-141

number of Marked Duplicates did not match the number of Original Ballots. Reichert, 2/25 (Rough) p. 30.

185. The record demonstrates that, in ten (10) precincts in the City of Minneapolis, the number of Marked Duplicates found and the number of Original Ballots found did not match, and the Original Ballots were challenged by representatives of Coleman for Senate campaign. Exhibits C55, C78, C85, C93, C101, C109, C116, C145, C152 and C159.

186. If there is concern about whether double counting occurred, an audit can be conducted to determine the number of persons who voted on election day by adding: (1) total signatures from pre-registered roster; (2) total signatures from election day registration roster; (3) the accepted regular absentee ballot envelopes; and (4) the accepted UOCAVA ballots (generally determined by the UOCAVA roster). Counting the rosters is the definitive way to determine the number of persons who voted in election day. Mansky, 1/29 p. 200-202, 205-206, 222-226.

187. The number of ballots counted during the recount is determined by adding the numbers from the following columns in the Secretary of State's statewide recount summary statement: (1) Votes for Coleman; (2) Votes for Franken; (3) Votes for Other; (4) Challenges by Coleman; and (5) Challenges by Franken. Mansky, 1/29 p. 232-234. These numbers are in the record in this matter as Exhibit C603.

188. The record in this matter contains the election day pre-registered voter sign-in rosters, same-day registration rosters and UOCAVA rosters from ten (10) Minneapolis precincts in which ballots were challenged during the recount because the number of

Original Ballots found and counted during the recount exceeded the number of Marked Duplicates set aside and not counted during the recount. Exhibits C56-60, C86-90, C94-98, C102-105, C110-113, C117-120, C138-141, C146-149, C153-156 and C160-163.

189. A comparison of the number of persons voting on election day with the number of ballots counted during the recount demonstrates that, in ten (10) Minneapolis precincts, the number of votes counted during the recount *exceeded* the number of persons voting at those precincts on election night, as follows:

<u>PRECINCT</u>	<u>PERSONS VOTING ON ELECTION DAY (BASED ON ROSTERS AND ACCEPTED ABSENTEE BALLOTS)</u>	<u>BALLOTS COUNTED DURING RECOUNT</u>
Minneapolis W11-P8	2857	2873
Minneapolis W12-P8	2923	2936
Minneapolis W10-P2	2079	2087
Minneapolis W11-P7	1996	2004
Minneapolis W7-P7	1849	1865
Minneapolis W9-P2	1712	1718
Minneapolis W10-P4	1193	1197
Minneapolis W2-P5	2102	2104
Minneapolis W8-P10	2214	2217
Minneapolis W13-P1	1916	1921

190. In precincts where the number of Original Ballots exceeded the number of Marked Duplicates, the conclusion that a vote was double counted is the most likely explanation where the number of ballots counted during the recount exceeds the number of persons voting on election day, because both the Original Ballot and its Unmarked Duplicate were counted during the recount. Mansky 1/30 p. 107-111; Poser, 2/23 p. 132.

191. The Minnesota Supreme Court agreed that the issue of double counting was within the jurisdiction of an election contest.

Missing Ballots

192. An envelope that local election officials testified contained ballots went missing from Minneapolis precinct 3-1 between election night and the recount.

Gelbmann 1/29 p. 97-107.

193. The search for the missing ballots began during the recount when the Minneapolis recount team noticed their count was short of the election night count by one hundred and thirty-two (132) ballots. Reichert, 2/25 (Rough) p. 34-35. Ms. Reichert, Jim Gelbmann, staff from the Minneapolis elections office, and campaign representatives conducted a search of the warehouse that the ballots were kept in, but were unable to find the missing ballots. Reichert, 2/26 p. 27. The pastor of the church and its custodian searched the polling location and were also unable to locate the missing ballots. Id.

194. There is no evidence the missing ballots ever reached the Minneapolis warehouse for storage following the election. Reichert, 2/25 (Rough Transcript 2) p. 53-54.

195. The missing ballots were not available to be examined or recounted during the recount, so the voters' intent cannot be determined from the face of these ballots, as the ballots cannot be examined. Gelbmann, 1/29 p. 97-107.

196. Since the ballots are still missing, there is no chain of custody for these ballots. Gelbmann, 1/29 p. 97-107. Nor is there any way to count them to see how many there are, to challenge them for voter intent or to verify them in any way.

197. Contestees failed to present direct admissible evidence – such as pre-registered voter rosters, same-day voting rosters and the number of accepted absentee and UOCAVA ballots – which could have been used to evidence that the number of ballots counted during the recount in the following precincts was less than the number of persons casting votes on election day in such precincts:

- Clay County, Oakport Township, 5 ballots
- Dakota County, Inver Grove Heights P4, 4 ballots
- Dakota County, Rosemount 4, 6 ballots
- Hennepin County, Minneapolis W3 P3, 5 ballots
- Hennepin County, Plymouth W3 P18, 1 ballot
- Hennepin County, Richfield W1 P4, 2 ballots
- Olmsted County, Rochester W3 P6, 2 ballots
- Ramsey County, St. Paul W5 P2, 5 ballots
- Ramsey County, St. Paul W5 P8, 6 ballots
- Stearns County, St. Cloud W3 P1, 2 ballots
- Washington County, Cottage Grove P9, 5 ballots
- Washington County, Oak Park Heights P2, 7 ballots
- Washington County, Woodbury P10, 2 ballots

198. Such evidence was available to Contestees but was not present to the Court. Instead, the only evidence introduced by Contestees as to missing ballots was the machine tape tallying the votes received by candidates Coleman and Franken on election night.

199. If missing, these ballots are not available to be examined or recounted during the recount, so the voters' intent cannot be determined from the face of these ballots.

200. If missing, there is no chain of custody for these ballots.

CONCLUSIONS OF LAW

Jurisdiction

201. The jurisdiction of this Court is defined by Minn. Stat. Ch. 209, which provides the second step of review after the canvassing board has completed its duties. *Coleman v. Ritchie*, -- N.W.2d --, 2009 WL 20954, at *2 (Minn. Jan. 5, 2009). While the canvassing board's jurisdiction is limited to ministerial duties associated with counting and certifying the results of the election, *O'Ferrall v. Colby*, 2 Minn. 180, 1858 WL 2544, at *5 (Minn. 1858), a contest court is not so limited. *See Hancock v. Lewis*, 122 N.W.2d 592, 594 (Minn. 1963). A canvassing board's powers are "purely ministerial," and are not extended to the question "whether any returns . . . from established precincts contained illegal votes." *Id.* at *3; accord Minn. Stat. § 204.31, subd. 3. Indeed, the Legislature established the contest court as the exclusive venue to resolve any issues necessary to determine the "highest number of votes legally cast" in an election for the United States Senate. Minn. Stat. § 209.12; *see also* Minn. Stat. § 209.02, subd. 1.

202. In a recount, the canvassing board is confined to considering "[o]nly the ballots cast in the election" and the summary statements certified by the election judges. Minn. Stat. § 204C.35, subd. 3; *see also* Minn. R. 8235.0200. The Secretary of State's own Recount Guide confirms the limited meaning of "ballots cast":

This is an administrative recount held pursuant to M.S. 204C.35 and M.R. 8235. It is not to determine who was eligible to vote. It is not to determine if campaign laws were violated. It is not to determine if absentee ballots were properly accepted. It is not—except for recounting the ballots—to determine if judges did things right. It is simply to physically recount the ballots for this race.

2008 Recount Guide at 6. In a contested election for U.S. Senator, however, this Court is empowered to determine the “highest number of votes legally cast” in an election. Minn. Stat. § 209.12.

203. The predecessor statute and the case law interpreting it confirm this analysis. The jurisdiction conferred by § 209.12 on U.S. Senate races is identical to the jurisdiction conferred by former § 209.10 over election contests related to the Minnesota state legislature. Compare Minn. Stat. § 209.12, with *Fitzgerald v. Morlock* (“*Fitzgerald I*”), 120 N.W.2d 336, 338 (Minn. 1963) (quoting former Minn. Stat. § 209.10, subd. 1). In *Fitzgerald II*, the Minnesota Supreme Court reviewed the actual ballots at issue for voters’ intents, *id.* at 347-53, made findings about “irregularities” in the ballot markings and resolved all issues necessary to determine the final vote tally and to award the certificate of election. *Id.* at 354. *Fitzgerald II* demonstrates that a contest court, with the same jurisdiction conferred by § 209.12, is empowered to resolve all “irregularities” necessary to determine the number of votes legally cast. Accord *Holmen*, 206 N.W.2d at 921-22 (election for state representative); *O’Ferrall*, 1858 WL 2544, at *3 (election for state senator).

204. The contest court must be empowered to do so in order to implement Minnesota’s “well-established policy of giving effect to the votes of legal voters regardless of irregularities in the election.” *Johnson*, 154 N.W.2d at 187; accord *Fitzgerald II*, 120 N.W.2d at 524 (“if [a voter] complies with the law his right to vote cannot be defeated by reason of irregularities, ignorance, inadvertence, or mistake, or even intentional wrong on the part of the election officers.”).

205. While U.S. Const. art. I, § 5, vests final power in each house to determine who shall be seated as a member of Congress, U.S. Const. art I, § 4, by express language not only grants power but imposes a duty on the legislatures of the several states to enact laws governing the election process, including the conduct of senatorial elections. The Supreme Court has recognized the breadth of these powers. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). Minnesota has found, along with other states, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount and an election contest. This is within the ambit of the broad powers delegated to the States by art. I, § 4. *See Roudebush v. Hartke*, 405 U.S. 15, 25-26 (1972) (“A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count and, if it chooses, to conduct its own recount.”).

206. *Odegard v. Olson*, 119 N.W.2d 717 (Minn. 1963), which was decided before Minn. Stat. § 209.12 was enacted, is not to the contrary. The court’s holding was based on the fact that Minnesota law, at the time, did not provide for an election contest for the office of a member of the United States Congress, *id.* at 720, and as such Minnesota had not yet exercised its authority under U.S. Const. art. I, § 4. As Chief Justice Knuston noted in his concurring opinion:

This does not mean that the legislature, if it saw fit, could not confer upon the court the right to supervise an election contest or recount of the ballots in order to determine who was legally elected. As long as the recount is part of the election process, it would be just as much within the constitutional power granted to the state as any other step in the elective process. The difficulty here is that our legislature has not included a recount of the votes,

with or without supervision of the courts, as part of the election process with respect to a Representative in Congress.

Id. at 446. Following *Odegard*, the Minnesota legislature passed § 209.12 to provide a constitutional process for a recount and an election contest supervised by the courts as part of the election process for Representatives in Congress.

207. The plain language of the statute, then, as well as Minnesota case law from previous election contests, confirm this Court's power to make meaningful, judicial decisions on which votes are legally cast and accordingly should be counted – and counted only once.

The Minnesota Supreme Court has repeatedly held this Court is the appropriate forum for resolving the issues pleaded in the Notice of Contest for this election. *See Coleman v. Ritchie*, -- N.W.2d --, 2009 WL 20954, at *2 (Minn. Jan. 5, 2009); *Coleman v. Minn. State Canvassing Board*, -- N.W.2d --, 2008 WL 5352937, at *2 (Minn. Dec. 24, 2008); *Coleman v. Ritchie*, 758 N.W.2d 306, 307-08 (Minn. 2008).

The Minnesota State Canvassing Board likewise deferred consideration of these issues to an election contest, as the following remarks by Board members reflect:

I might just observe that as much as we have made it clear that we want to count all legally cast ballots, I don't want to count ballots twice. And I am sensitive to the fact that there appears to be an issue that there is double counting. ***I'm just not sure that it's an issue that we have the ability to resolve. But it's an issue that's gotta be resolved. There should not be double counting. And I think that we're simply arguing about in what forum that issue is dealt with.*** And I still . . . don't understand how I can, without considering evidence extrinsic to the ballots, make a decision as to whether a particular ballot was counted more than once. I don't know how I can do that.

Magnuson, C.J., transcribed from Dec. 17, 2008 video at 4:26:50 p.m. (emphasis added)

(available at http://www.house.leg.state.mn.us/htv/archivessem.asp?ls_year=85).

I think I agree with where the Chief Justice was going, and I'm still not convinced that this will not take factual determinations that are beyond the scope of what it is we are doing here, so . . . I don't think anybody loses anything – *it's just a question of forums and I think that's what he said. I think the forum is an election contest, if that comes to be.*

Cleary, J., transcribed from Dec. 17, 2008 video at 4:34:18 p.m. (emphasis added).

I think those – like other factual issues – are matters for an election contest.

Anderson, J., transcribed from Dec. 17, 2008 video at 4:36:49 p.m. (emphasis added).

The Supreme Court's holdings, and the comments by the Chief Justice, Judge Cleary, and Justice Anderson during their service on the canvassing board, confirm the extent of the jurisdiction granted this Court under § 209.12.

208. The Notice also sufficiently states the grounds on which the contest will be made. *See* Minn. Stat. § 209.021, subd. 1 (“[t]he notice of contest must specify the grounds on which the contest will be made”). “A notice of election contest is sufficient if it states facts sufficient to apprise the contestee of the grounds of the contest so that he is given a fair opportunity to meet the asserted claims.” *Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W.2d 86, 90 (Minn. Ct. App. 1986). Indeed, the Minnesota Supreme Court has found notices far less specific than the one here to be sufficient. *See, e.g., Holmen*, 206 N.W.2d at 921-22 (notice of election contest which contested the result certified as erroneous because of irregularity and mistake in the counting, recording, and tabulation of the vote within the precincts was sufficient to confer jurisdiction). In *Holmen*, the notice of contest stated as follows:

Contestant contests the results so certified by the State Canvassing Board as erroneous because of irregularity and mistake in the counting, recording,

and tabulation of the vote within the precincts and by the county auditors involved, and in the canvas of votes, and contends that in fact he and not contestee received the highest number of votes legally cast at said election for said office so that he and not contestee has been elected.

Id. at 921. The Supreme Court rejected contestee's claim that this language was statutorily inadequate. *Id.* at 922; *see also Moon v. Harris*, 142 N.W. 12, 13 (Minn. 1913) (notice which stated that the contestant received a plurality of the votes and that the ballots were erroneously counted and returned was sufficient and justified the court in ordering an inspection of the ballots).

Scope Of Review

209. The Court determines which ballots are legally cast votes by a review de novo of the evidence. *Fitzgerald v. Morlock*, 120 N.W.2d 339, 352 (Minn. 1963); *Application of Andersen*, 119 N.W.2d 1, 8 (Minn. 1962). Although the Court recognizes and appreciates the good faith efforts of election officials, it is not bound by their decisions and, indeed, owes them no deference. *See Johnson v. Tanka*, 154 N.W.2d 185, 187-88 (Minn. 1967) (reviewing election judges' decisions on how to count ballots); *In re Contest of Election of Vetsch*, 71 N.W.2d 652 (Minn. 1955) (reviewing whether to include votes from precinct where major irregularities occurred); *O'Ferrall*, 1858 WL 2544, at *3 (reviewing clerk's decision to exclude votes from one precinct). Nor is the Court bound by the determinations of the MSCB.

Burden Of Proof

210. Contestants have the burden of proof to show by a preponderance of the evidence that Mr. Coleman in fact received more legally cast votes than Contestee. A

preponderance does not require clear and convincing evidence or anything approaching certainty.

211. Ballots in Minnesota are judged by a substantial compliance standard, and not the strict compliance standard set out by the Court in its February 13 Order. Because Minnesota's statutory goal is to enfranchise rather than disenfranchise voters, a strict compliance standard has never been in place in Minnesota elections, including on November 4, 2008 as the counties and cities counted votes.

212. With respect to specific claims, such as wrongly rejected absentee ballots and double-counting, Contestants must prove them by a preponderance of the evidence. They must prove by a preponderance that a rejected absentee ballot is in fact a legally cast vote. They must prove by a preponderance of the evidence that election judges neglected to mark duplicates in ten Minneapolis precincts and that as a result double-counting occurred. They must prove by a preponderance of the evidence that certain missing ballots cannot be found and therefore cannot be counted and inspected as required by Minnesota law in a recount.

Rejected Absentee Ballots

213. As a matter of election law it is appropriate to apply the following presumptions when determining whether the preponderance of the evidence demonstrates that any particular absentee ballot is a legally cast vote. The overwhelming majority of Minnesota's counties and cities applied these presumptions when determining whether to accept absentee ballots on election day, and the MSCB accepted the same presumptions in January 2009.

- a. If a voter received a registered voter's envelope, the presumption is he or she was a registered voter;
- b. If a witness has a Minnesota address, the presumption is he or she is registered in Minnesota;
- c. If a voter received an absentee ballot, the presumption is he or she applied for it;
- d. If a person signed the application or ballot, the presumption is it is his or her genuine signature;
- e. If a county does not reject for an application or certification deficiency, the presumption is the legal requirements have been met;
- f. If a county does not reject for voter registration deficiency, the presumption is the voter is validly registered; and
- g. If there is no evidence of double-voting, the presumption is the voter only voted once.

As for absentee ballots specifically, a return envelope which was marked rejected and noted a specific reason should be presumed to have satisfied all other requirements of Minn. Stat. § 203B.12 unless it is apparent from the face of the envelope that it fails to meet one or more other requirements of the statute. In other words, a ballot that does not call into question one of the requirements should be presumed to have met that requirement unless and until a party established that it did not.

Certain Rejected Absentee Ballots Must be Opened

214. Contestants have presented compelling evidence that thousands of Minnesota absentee ballot voters have been disenfranchised. Even under the strict compliance standard outlined in the Court's February 13, 2009 Order and its other rulings, Contestants have presented sufficient evidence that approximately 1360 rejected absentee ballots should be opened and counted subject to confirmation by the Secretary

of State's Office that the voter is registered and did not otherwise vote on election day in person or by another absentee ballot. These are set forth in the attached spreadsheet entitled "Contestants' Spreadsheet Detailing Evidentiary Support For Counting Ballots". For each such voter, Contestants have provided sufficient documents and/or testimony to establish, when the presumptions referenced above are applied, that his or her ballot meets the requirements of Minn. Stat. § 203B.12 as interpreted by the Court.

215. In addition, the remaining 413 rejected absentee ballot envelopes that were identified by local election officials as having been improperly rejected in response to the Minnesota Supreme Court's December 24, 2008 Order shall be opened and counted subject to confirmation by the Secretary of State's Office that the voter is registered and did not otherwise vote on election day in person or by another absentee ballot.

216. The ballots and absentee ballot envelopes in Anoka County recited at ¶ 125 above, in Washington County recited at ¶ 126 above and in Maple Grove recited at ¶ 127 above shall be opened and counted subject to confirmation by the Minnesota Secretary of State's Office that each voter is registered and did not otherwise vote on election day in person or by another absentee ballot.

217. A federal write-in ballot should be counted even if no Federal Post Card Application (FPCA) is received or on file with election officials. *See Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp.2d 1305, 1317 (N.D. Fla. 2000). The Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") allows a military or overseas voter to submit a federal write-in ballot after submitting an FPCA as a safeguard against the "unreliability of the overseas mail system." *Id.* at 1316.

“Consistent with the congressional recognition of the problems with the mail system is the possibility that state election officials may not receive overseas applications for state absentee ballots.” *Id.* UOCAVA “merely requires that the overseas citizen submit an [FPCA], not that the state election official receive it.” *Id.* To condition the counting of federal write-in ballots on election officials’ receipt of FPCAs would conflict with both the letter and spirit of UOCAVA. *Id.* at 1317. The 33 rejected UOCAVA ballots from Anoka County must accordingly be counted.

218. The opening of the rejected absentee ballots we have ordered is well supported by Minnesota law. When voters who possessed “the qualifications prescribed by the Constitution,” have “cast their votes in a good-faith attempt to exercise the right secured to them by the Constitution,” and have not engaged in “fraud or bad faith,” the Minnesota Supreme Court “has never held such votes illegal and void for failure to comply with some statutory regulation, unless required to do so by the unequivocal mandate of the law-making power.” *McEwen v. Prince*, 147 N.W. 275, 276-77 (Minn. 1914). To implement this policy, Minnesota election law prescribes that “[a] ballot shall not be rejected for a technical error that does not make it impossible to determine the voter’s intent.” Minn. Stat. § 204C.22; *see generally Fitzgerald v. Morlock*, 120 N.W.2d 339, 345-47 (Minn. 1963).

219. As the Supreme Court noted in *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 734 (Minn. 2003), “[t]he purpose of the absentee ballot is to enfranchise those voters who cannot vote in person.” The requirements for absentee voting may be quite stringent, but the Supreme Court has insisted that courts must not place unfair burdens on the

fundamental right of those voting by absentee ballot to vote—that is, to avoid disenfranchising “the very people the absentee voter laws are intended to benefit.” *Id.*

220. Justice Anderson, in his dissent to the December 18, 2008 Order, emphasized the importance of construing the election laws so as to enfranchise, rather than disenfranchise, voters:

We have said that in order to protect this precious right election laws should be liberally construed. In *Quealy v. Warweg*, in reference to an election law, we said that “[t]he statute must be liberally construed so as to effectuate legislative intention and to fully secure to the people their right to express their choice.” 106 Minn. 145, 146, 118 N.W. 673 (1908); see also *Peterson v. Holm*, 243 Minn. 38, 40, 66 N.W.2d. 15, 16, (1954). “A technical construction of the language used would be objectionable on general principles, and tend to subvert the purpose sought to be attained.” *Dougherty v. Holm*, 232 Minn. 68, 71-72, 44 N.W.2d. 83, 85 (Minn. 1950); *Quealy*, 106 Minn. at 146, 118 N.W. at 673.

December 18, 2008 Order, dissenting at page C/D-2.

More Ballots Should be Opened and Counted Because Minnesota Law Recognizes a Substantial Compliance Standard.

221. On election night, and then as adjusted during the recount, election officials rejected approximately 11,000 absentee ballots for purportedly failing to comply with the four technical standards in §§ 203B.12 and 203B.24.

222. As the Court applies standards derived from § 203B.12 and § 203B.24 to determine the preliminary legality of each rejected absentee ballot, the Court must be mindful that those technical provisions apply only in their “substantial requirements,” *Bell*, 227 N.W.2d at 803, not in all their literal detail. Minnesota courts have adopted the rule that voters need only “substantially comply” with technical voting requirements in order for their votes to be counted.

Procedural statutes governing elections are intended to safeguard the right of the people to express their preference in a free election by secret ballot and to have the results of the election governed by the votes so cast. Elections are conducted, for the most part, by people in our communities who are unfamiliar with the niceties of legal verbiage. As long as there is substantial compliance with our laws and no showing of fraud or bad faith, the true result of an election, once ascertained, ought not be defeated by an innocent failure to comply strictly with the statute.

Andersen, 119 N.W.2d at 8; *accord Bloedel v. Cromwell*, 116 N.W. 947, 948 (Minn. 1908) (“The intent of the voter, accordingly, to be effective, must be shown and indicated by markings on the official ballot substantially in the manner provided by such law, and in bona fide attempt at compliance therewith.”); *In re Contest of School District Election*, 431 N.W.2d 911, 915 (Minn. App. 1988) (“As a general rule, as long as there is substantial compliance with the laws, and no showing of fraud or bad faith, the true result of an election should not be defeated by an innocent failure to comply strictly with the statute.”).

223. An absentee ballot substantially complies with the statutory requirements of §§ 203B.12 and 203B.24 if it meets the two criteria deemed mandatory by the Minnesota Supreme Court: the voter must affirm his or her eligibility to vote and must have applied for an absentee ballot. *See Bell*, 227 N.W.2d 797 at 804 (absentee voter must attest to his residence and eligibility to vote); *Wichelmann v. City of Glencoe*, 273 N.W. 638, 640 (Minn. 1937) (absentee voter must file verified application for an absentee ballot). The eligibility requirement at issue in *Bell* is designed “to insure . . . that only properly qualified voters will exercise the privilege of absentee voting.” *Bell*, 227 N.W.2d at 804.

Similarly, the application requirement at issue in *Wichelmann* is to prevent “[f]rauds and corrupt elections.” *Wichelmann*, 273 N.W.2d at 640.

224. A voter may demonstrate his qualifications to vote in ways not literally specified by the applicable statute. *See Clayton v. Prince*, 151 N.W. 911, 912 (Minn. 1915) (counting votes of 2,316 voters who failed to submit affidavits of registration required by statute but took oaths they were legal voters); *McEwen*, 147 N.W. at 276-77 (counting votes of voters whose affidavits of registration were defective for lack of official signatures, for lack of voter signatures, and for factual errors).

Impact of SVRS Incompleteness

225. In any event, as the Findings of Fact amply demonstrate, election officials throughout the state applied a de facto substantial compliance standard in the November 4, 2008 election in determining whether to accept or reject an absentee ballot.

226. The evidence has demonstrated that the Secretary of State Office’s SVRS is not sufficiently up to date to establish definitive registration status or voting history in the November 4, 2008 election. Nor is it sufficiently accurate to be reliable as to other data including that which purports to have been updated. *See* Testimony of Mr. Poser 3/3/09. The database is updated on a rolling basis so that it had less valid information on January 26 than it had on March 13. Until the counties and municipalities have finished inputting and correcting information related to the November 4, 2008 election, the preponderance of the evidence has not established—one way or the other—any question of registration, certainly as to voters and witnesses who do not appear as registered. As a result, the absence of specific documentary evidence related to voter registration and

witness registration can not be dispositive until the Secretary of State certifies the database.

227. Indeed, until the database is properly updated and verified, there can be no sufficient evidence. Whether offered by Contestants or Contestee, forms regarding individual voters cannot be assured of accuracy. If and when the Secretary of State's Office certifies that the database is sufficiently complete—and accurate—with respect to the November 4, 2008 election, it will provide a CD of all data to the parties and to the Court. It is that data which should be the best evidence—the only acceptable evidence—as to registration for voters and witnesses (and, to the extent the Court deems it necessary to know, whether a voter has already voted in that election elsewhere in the state) and even then it may require the Court to accept as registered any voter whose name is in the system as active regardless of the date the information was entered.

228. In these circumstances, once the SVRS is certified, the Court should review all ballots rejected for lack of registration by either voter or witness, and open them if the voters were indeed registered and had not already voted in the election.

Establishing a Set of Rules Different from that used by Minnesota's Jurisdictions for Counting Absentee Ballots on Election Day and in the Recount Results in Due Process Violations and the Inclusion of "Illegal" Votes in the Certified Totals

229. The Court must ensure that only legally cast votes are counted as a matter not only of consistency but also of the integrity of the election. The Court in its February 13, 2009 Order set forth a set of standards for what constituted an "illegal" vote under Minnesota law. By setting this standard, the Court both changed the rules of the game as

they were applied by the counties and municipalities on election day and raised the danger of allowing votes it has defined as “illegal” to be included certified totals of legally cast votes since “illegal” votes are currently included in the election day and recount tallies.

230. Legally cast votes should not be diminished in value by the inclusion of votes that are illegal. As the U.S. Supreme Court has noted, “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). In other words, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

231. The Court’s February 13, 2009 Order states that the Court cannot count ballots it defines as “illegal” under Minnesota law. This changes the rules of the game after it has been played on election day since it will now apply a more rigorous standard to the remaining unopened absentee ballots that is at odds with what has come before. *See Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995).

232. Evidence shows that such votes are included in the election day and recount totals, meaning that the court will impermissibly be certifying as “legally case ballots” ones that by its own definition are not.

233. The waiver analysis in *Bell v. Gannaway*, 227 N.W.2d 797 (Minn. 1975), cannot be applied in the present circumstances because Contestants never had the ability

to challenge the determination by local boards or election judges whether to accept or reject any absentee ballot. In the context of a one-precinct nonpartisan election for municipal supervisor which had been “hotly contested,” the 4-3 majority in *Bell* held that the failure of the contestant to have challenged a patently illegal absentee ballot before it was placed in the ballot box was a waiver of his right later to argue that the vote’s obvious illegality required the court not to count it. The majority used broad language in dicta, but reached a very narrow holding. The holding was limited to the circumstances: a one-precinct nonpartisan hotly contested election in which either candidate could have had a challenger present in that precinct, and an obviously illegal ballot cast by a voter who was eligible to vote in person.

234. No Minnesota case—whether it involved a statewide race or not and whether it was under the current statutes or not—that has ever cited *Bell* for the proposition that any challenge to an absentee ballot’s legality must be made before the ballot is counted. Indeed, one case citing *Bell* for another proposition went on to make clear that illegal votes cannot be included in determining which party received the highest number of legally cast votes. *See Kearin v. Roach*, 381 N.W.2d 531 (Minn. Ct. App. 1986).

235. Nor has the Secretary of State ever taken the position that any challenge to an absentee ballot’s legality must be made before the ballot is counted. The election Rules promulgated by the Secretary of State’s Office reflect this reality. They do not discuss challenges at all in the context of absentee ballots. Chapter 8210 is absolutely silent about the possibility of a challenge to an absentee ballot based on whether the

return envelope satisfies the requirements of Minn. Stat. § 203B.12. The Rules do, however, discuss challenges in the context of mail balloting. *See* Rule 8210.3000, subp.11 (party challengers appointed under Minn. Stat. § 204C.07 may be present while the election judges are and accepting or rejecting the return envelopes, with challenges to be made in accordance with § 204C.13, subd. 6). This makes perfect sense in the context of mail ballots given that there is no physical precinct in which to observe and challenge these voters' eligibility.

236. In contrast, the 2008 Election Judge Guide itself, which is promulgated by the Secretary of State's Office, clearly states (at Section 3.3) that the sole role of a challenger in a physical precinct is with respect to the eligibility of a voter to vote in the particular precinct. The Guide makes clear that challengers are restricted in their access to areas within the precinct and are forbidden from touching certain documents, including registration materials (§ 204C.07) and the ballots themselves (§ 204C.19). Similarly, the publication "Election Day 'Challengers,'" also promulgated by the Secretary of State's Office, delineates the same purpose and the same restrictions, as does the Ramsey County Election Day Procedure Manual (at pages 69 -70). In other words, a party challenger never gets the opportunity to challenge an absentee ballot return envelope.

237. Election law is to enfranchise voters, such a procedure makes sense here.

The Evidence Requires that Additional Rejected Absentee Ballots be Opened to Ensure Equal Protection of the Law.

238. In any event, as the Findings of Fact amply demonstrate, election officials throughout the state applied a de facto substantial compliance standard in the November 4, 2008 election in determining whether to accept or reject an absentee ballot.

239. Contestants have presented overwhelming evidence of disparate treatment throughout the state of similarly situated absentee ballots. Election official after election official testified to different applications of the statutory standard for absentee ballots. Many confirmed that they operated under a substantial compliance regime. Others admitted they simply disregarded requirements this Court now insists must be met for any more ballots to be counted as “legal”. The preponderance of the evidence reflects not merely minor errors or isolated inconsistencies, but the wholesale disregard of some requirements and the bending of others, such that a voter’s ability to have his absentee ballot counted depended on where in the state he lived and cast his ballot.

240. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). The U.S. Supreme Court has held that if the state fails to adopt “specific standards” during a statewide recount that will ensure “equal application” to all votes, the lack of uniform standards violates the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 106. Similarly, the Minnesota Supreme Court has concluded that “treating similarly-situated voters differently with no rational explanation . . . violates equal protection guarantees.” *Erlandson v. Kiffmeyer*, 659

N.W.2d 724, 732 (Minn. 2003) (ordering mailing of revised absentee ballots to all voters, including those who already voted).⁵

241. In *Bush v. Gore*, the Supreme Court noted that there was considerable evidence in the record demonstrating that “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.” *Id.* at 106. The Court concluded that “[t]his is not a process with sufficient guarantees of equal treatment,” and ultimately held that the Florida recount mechanism was “unconstitutional.” *Id.* at 107, 110. When a “statewide remedy” is implemented, the Court held, “there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” *Id.* at 109.

242. Here, the statutory criteria for rejecting absentee ballots under Minn. Stat. §§ 203B.12 and 203B.24 were applied differently in different counties on election night. Despite limits placed by the court on the evidence that could be introduced at trial, the testimony showed that regardless of how clear the statutory standard may be, it was applied inconsistently—regularly and not just in isolated incidents—by various counties and municipalities throughout the state. One compelling example is witness registration; many counties, and the majority of populous ones, testified that they simply do not check so long as the witness provides a Minnesota address; others, like Carver County, rejected an astonishing 181 absentee ballots for this purported deficiency. This lack of uniformity

⁵ The Minnesota Constitution “embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment to the United States Constitution.” *State v. Russell*, 477 N.W.2d 886, 889 n.3 (Minn. 1991). Indeed, the state constitution may require even more “stringent” review and a more robust guarantee of equal protection. *Id.* at 889.

was exacerbated during the recount when counties applied additional differing standards to determine what ballots they may have wrongfully rejected on election night. The result was different standards being applied to ballots exhibiting the same types of characteristics.

243. To remedy these equal protection violations, the Court will apply uniform standards to all rejected absentee ballots to ensure that all legal votes are counted.

Double-Counting Of Ballots

244. The principle of “one person, one vote” is a hallmark of the United States Constitution; no person is entitled to two (2) votes. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote”) (internal quotation omitted); *Bush v. Gore*, 531 U.S. 98, 105 (2000) (“The right of suffrage can be denied by a debasement or the dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise”). The Notice alleged the canvassing board certified a result whereby a candidate received two votes for one ballot (by counting an original and unmarked duplicate during the Recount). That issue can and should be remedied by this Court, as the Minnesota Supreme Court directed, *Coleman v. Minn. State Canvassing Bd.*, 2008 WL 5352937, at *2, because a double-counted vote is *not* a “vote legally cast.”

245. Minnesota law requires the accurate creation of duplicate ballots in circumstances in which the original ballot is unable to be read by the tabulation machines

(such as torn and damaged ballots and UOCAVA/overseas ballots). Minnesota law also clearly requires that only the duplicate be counted, while preserving (but not counting) original ballots. Minn. Stat. § 206.86, entitled “Counting Electronic Voting System Results,” provides the procedure for the election-night counting of votes where a precinct uses an electronic voting system (emphasis added):

Subd. 5. Damaged, defective ballot cards. If a ballot card is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, a true duplicate copy must be made of the damaged ballot card in the presence of two judges not of the same major political party and must be substituted for the damaged ballot card. Likewise, a duplicate ballot card must be made of a defective ballot card which may not include the votes for the offices for which it is defective. Duplicate ballot cards must be clearly labeled “duplicate,” indicate the precinct in which the corresponding damaged or defective ballot was cast, bear a serial number which must be recorded on the damaged or defective ballot card, **and be counted in lieu of the damaged or defective ballot card.**

246. Minnesota Rules 8230.3850(E), relating to the duplication of ballots, provides as follows (emphasis added):

E. All original ballots which require duplication must be placed in an envelope marked “ballots for which duplicates were or are to be made.” **The duplicate ballot must be placed with the other valid ballots to be tabulated.**

247. The above statute and Rules establish the definition of a “valid ballot”: only the duplicate ballot is a valid and legally cast ballot which was counted by the voting machines on election night.

248. With respect to the counting of these duplicate and original ballots during the recount, the recount rules adopted by the MSCB provided in part as follows (emphasis added):

9. As the Table Official sorts the ballots, he or she shall remove all ballots that are marked as duplicate ballots and place those duplicate ballots in a fourth pile. At the conclusion of the sorting process, the Table Official shall open the envelope of original ballots for which duplicates were made for that precinct *and sort the original ballots in the same manner as they sorted all other ballots*. **The Table Official shall disregard this step if there is not an envelope of original ballots, in which case the duplicate ballots will be sorted.**

249. Rule 9's underlying assumption—that election judges would follow the law—failed. The testimony during this trial of several of Minnesota's most experienced election officials, including Deputy Secretary of State Jim Gelbmann, State Elections Director Gary Poser, Ramsey County Election Director Joseph Mansky and Minneapolis Election Director Cynthia Reichert, evidences beyond any doubt that the counting of original ballots in situations where the number of original ballots exceeded the number of duplicate ballots had the potential to create significant problems in the recount.

250. Under Rule 9, if the number of originals did not match the number of marked duplicates, the marked duplicates were set aside and only the originals were counted. As the evidence in this trial has demonstrated, a strict application of Rule 9 caused double-counting where the number of originals exceeded the number of marked duplicates. Therefore, adherence to Rule 9 created an inaccurate count and the results of the recount, if not corrected by this Court, are wrong. As a result, Rule 9 must be disregarded by this Court in its determination of which party received the highest number of legally cast votes.

251. Regardless of the agreement or presuppositions of the campaigns, adherence to Rule 9, and ratification of such adherence to Rule 9 by this Court, would

plainly violate Minnesota election law. Minn. Stat. § 206.86, subd. 5 dictates that only duplicate ballots are run through the machine on election night. Under Minnesota law, the originals for which duplicates were made are not legally cast ballots. Accordingly, in a recount of the ballots cast on election night, recount officials should have counted the duplicate ballots, and not the originals. Neither the Secretary of State's Office nor the parties can abrogate this clear statutory requirement by agreeing to handle the recount another way.

252. Contestee's counterclaim and affirmative defense based on Rule 9 fail as well. Parties to litigation cannot agree to render legal a vote that is illegal. *Cf. McCauley v. Michael*, 256 N.W.2d 491, 498 (Minn. 1977) ("A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.") (citation omitted); *Ray v. Homewood Hosp.*, 27 N.W.2d 409, 412 (Minn. 1947) ("The good faith or intention of the parties in entering into such an agreement does not purge it of its illegality."); *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 356 (Minn. Ct. App. 1995) ("A contract violating law or public policy is void. When a contract offends a value of great public importance, the principle of freedom of contract must give way.") (citations omitted). Indeed, no party can stipulate a statute away. Moreover, there was no evidence of reliance by Contestee or of any prejudice to him.

253. Rule 9 accordingly is invalid as a matter of law.

254. Where there are more ballots counted in the recount than voters who cast ballots on election day, such excess ballots are illegal and, therefore, cannot be certified by this Court to constitute legally cast ballots. *See Johnson v. Tanka*, 154 N.W.2d 185,

187 (Minn. 1967) (noting that where there are more ballots than voters who voted on election day, the votes cast over the number of voters “cannot be said to be legal.”). “The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes.” *Id.*

255. The record contains the election day pre-registered voter sign-in rosters, same-day registration rosters and absentee ballot and UOCAVA rosters, as well as machine tapes from election night, for ten Minneapolis precincts. *See* Exhibits C55-57 and C 59-62; C85-87 and C89-92; C93-95, C97-98 and C100; C101-103 and C105-06 and C108; C109-111 and C113-115; C116-18 and C120-22; C137-39, C140-42 and C144; C145-47 and C149-51; C152-54 and C156-58; C159-61 and C163-65. The record also reflects the number of ballots actually counted during the recount. *See* Exhibit C603.

256. By simple math, the number of votes counted during the recount exceeded the number of persons actually casting ballots at those precincts on election night, often by precisely the number of challenged original ballots counted. The preponderance of the evidence, then, demonstrates that double-counting occurred. It is far more likely that the election judges created duplicates and forgot to mark them than that they went to the trouble of marking originals, putting them in special envelopes, and then forgot to make a duplicate at all. Any other explanation is but unsubstantiated speculation. Contestants accordingly have proven this claim as to those ten Minneapolis precincts.

257. The appropriate remedy for having improperly applied Rule 9 during the recount is either to conduct an inspection of the ballots in those precincts so as to recount those run through the machines excluding the originals or to uphold the challenges to the

original ballots and subtract those votes from the totals certified by the MSCB. A limited inspection of the precincts in which the number of ballots totals more than the number of voters pursuant to Minn. Stat. § 209.06 subd. 3, in effect another recount, is the most accurate way to resolve the problem. The Court accordingly orders that such an inspection be held in the ten Minneapolis precincts noted and that the new totals from that recount be substituted for those accepted by the Canvassing Board.

The Missing Ballots From Minneapolis W3 – P1

258. Certification of “results” relative to ballots which were not located during the recount results in certification of votes which were not “legally cast,” even if suspicion exists that such ballots indeed existed at some point but have now been destroyed or gone missing. Minn. Stat. § 204C.35 (requiring a manual hand-recount). If a ballot is missing, has no foundation, or its chain of custody is suspect, that ballot cannot serve as the “best evidence” of how the person casting that ballot voted on election day. *See, e.g., Newton v. Newell*, 26 Minn. 529, 6 N.W. 346 (1880) (where ballots have not been carefully preserved so as to place their identity beyond a reasonable doubt, they can not be relied upon in a subsequent recount); *see also Purcell v. Sparks*, Mower County District Court File No. C5-02-1938 (Jan. 6, 2003); *DeBroux v. Board of Canvassers for the City of Appleton*, 557 N.W.2d 423 (Wis. Ct. App. 1996) (ballots which were unsecured at print shop for a week lacked proper foundational basis to be counted and tallied in recount).

259. In cases where all of the ballots from a precinct are missing, the courts have defaulted to election night numbers as *prima facie* evidence of numbers. However,

where only *some* ballots are alleged to be missing, there should be no “default” to election night numbers, because the ballots themselves are the best evidence—indeed, in this case the sole evidence—of the voter’s intent and they are gone. This means Contestants did not have the opportunity to challenge any of these ballots in the recount.

260. The decision in *Moon v. Harris*, 142 N.W. 12 (Minn. 1913), is not to the contrary. In that case, the Supreme Court affirmed a trial court’s decision not to overturn the canvassed result based on an argument that the ballots had been tampered with after the canvas. Similarly, in *Schultz v. Shelp*, 155 N.W. 97 (Minn. 1915), the issue was merely chain of custody—the ballots at issue were produced and counted during the recount. Neither decision stands for the proposition that if ballots are lost the election day result must stand.

261. The evidence shows that some unknown number of unreviewed ballots are missing. These unreviewed ballots—whatever number of them there were—may not be counted. Accordingly, the totals from the administrative recount shall be substituted for those accepted by the MSCB.

262. Contestee’s Second, Third and Fifth Amended Counterclaims are dismissed for lack of sufficient evidence. The totals accepted by the MSCB for all precincts referenced therein shall remain unchanged.

263. Finally, any absentee ballot voters presented by Contestee who were not listed in his Amended Counterclaims, or have already had their vote counted, shall not have their absentee ballot opened or counted.

THE ELECTION CONTEST PANEL

Dated: _____

THE HONORABLE ELIZABETH A. HAYDEN

Dated: _____

THE HONORABLE KURT J. MARBEN

Dated: _____

THE HONORABLE DENISE D. REILLY