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VOLUME 25 - FEBRUARY 27, 2009

1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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4 IN THE MATTER OF THE CONTEST
5 OF GENERAL ELECTION HELD ON
6 NOVEMBER 4, 2008 FOR THE
7 PURPOSE OF ELECTING A UNITED
8 STATES SENATOR FROM THE
9 STATE OF MINNESOTA,

FILED
Court Administrator

APR 30 2009

By *[Signature]* Deputy

10 CULLEN SHEEHAN AND NORM COLEMAN,
11
12 CONTESTANTS,

13 VS.

FILE NO.
62-CV-09-56

14 AL FRANKEN,

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16
17 CONTESTEE.

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1 THE AFOREMENTIONED court session took place on the 27th day
2 of February, 2009, before the Honorable Judges Elizabeth A.
3 Hayden, Kurt J. Marben and Denise D. Reilly at the Minnesota
4 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd.,
5 St. Paul, Minnesota 55105, and reported by Linda K. Renner,
6 Registered Professional Reporter.

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1 FRIDAY FEBRUARY 27, 2009 9:00 A.M.
 2 JUDGE MARBEN: Counsel, is Ms. Howell here?
 3 MR. FRIEDBERG: She is.
 4 JUDGE MARBEN: Ms. Howell, will you please
 5 come forward?
 6 THE WITNESS: (Complying.)
 7 THE CLERK: I'm just going to readminister
 8 the oath. Please raise your right hand.
 9 PAMELA K. HOWELL,
 10 the witness herein, being first duly sworn, was examined and
 11 testified as follows:
 12 JUDGE MARBEN: And for the record,
 13 Ms. Howell's testimony is reinstated.
 14 Mr. Lillehaug, you may resume your
 15 cross-examination.
 16 MR. LILLEHAUG: Thank you, Your Honor.
 17 CROSS-EXAMINATION (continuing)
 18 BY MR. LILLEHAUG:
 19 Q. Good morning, Ms. Howell. Before we return to the
 20 place where we stopped on Wednesday, I was intrigued
 21 by your statement that you were an independent
 22 contractor for a firm that does pedestrian studies.
 23 A. Yes.
 24 Q. What are -- what are pedestrian studies?
 25 A. Essentially counting people.

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1 Q. Can you pull the microphone toward you a little bit
 2 more?
 3 A. Counting people.
 4 Q. Counting people. And I've walked through the skyway
 5 and I've seen people with clickers that seemed to be
 6 counting pedestrians as they go by. Is that what that
 7 is?
 8 A. That might have been us.
 9 Q. So, yes, that is pedestrian studies?
 10 A. That's what we -- umm-hmm. That's part of the
 11 business.
 12 Q. Have you done the clicking before?
 13 A. Yes.
 14 Q. And -- and of course with that kind of work you want
 15 to make sure those counts are accurate?
 16 A. Exactly.
 17 Q. So I've always wanted to ask one of the clicker people
 18 one of these questions. Let's say you see a group of
 19 people walking by and you click say seven times and
 20 then you realize, oh, there were only five in a group.
 21 what do you do about that?
 22 A. You need to subtract in order to get the accurate
 23 count.
 24 Q. All right. So the next group that comes by you might
 25 do two less?

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1 A. You mentally click those to get the accurate number.
 2 Q. All right. So when you make a mistake, then you
 3 compensate the next time around?
 4 A. The next -- immediately.
 5 Q. Yeah, the next group of people that --
 6 A. Umm-hmm.
 7 Q. -- that come by, correct?
 8 A. Correct.
 9 Q. All right. And then what if you're out on Nicollet
 10 Mall on a beautiful fall day and -- and you're
 11 clicking and you realize, boy, there are a lot more
 12 people here than usual, do you have some kind of
 13 formula that you adjust when you furnish the number to
 14 the client?
 15 A. You would get the actual data.
 16 Q. All right. And then are you involved in providing the
 17 pedestrian studies reports to the client?
 18 A. In the clerical work.
 19 Q. All right. So your job is clerical and then you're
 20 out there clicking from time to time?
 21 A. Managing the temporary workers as well.
 22 Q. So -- oh, you -- you manage the other clickers that
 23 are out there?
 24 A. Umm-hmm.
 25 Q. Yes?

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1 A. Yes, sorry.
 2 Q. And do you provide some training for them so they know
 3 how to go about the work?
 4 A. Yes.
 5 Q. And do they report to you after they're done clicking
 6 through the pedestrians?
 7 A. Yes.
 8 Q. And do you find sometimes that the less experienced
 9 they are the more mistakes they make in the clicking?
 10 A. Not usually.
 11 Q. So you can give anyone a little bit of training and
 12 have a high degree of confidence they're going to do
 13 well -- as well as an experienced clicker?
 14 A. They're often put in lower volume locations.
 15 Q. All right.
 16 A. They're managed.
 17 Q. So they don't have to worry as much about the group of
 18 seven coming by?
 19 A. Right.
 20 Q. Have -- from time to time though has some of the less
 21 experienced clickers told you this larger group came
 22 by and I had real trouble counting?
 23 A. Not usually.
 24 Q. Okay. All right. Now since Wednesday have you had
 25 any discussions with the attorneys for Norm Coleman?

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1 A. They told me of the rescinding of the Judges' order.
 2 Q. Did they --
 3 A. That -- that I'd --
 4 Q. -- tell you anything else?
 5 A. That I'd be coming back.
 6 Q. Did they tell you anything else?
 7 A. They inquired as to whether I would permit them to
 8 release my statement to the press and I declined.
 9 Q. And did they talk to you about anything else?
 10 A. No.
 11 Q. Now in connection with your discussions with the
 12 coleman attorneys, and I'm talking from the first time
 13 that you had contact with them to the present, did
 14 they ever show you any kind of affidavit?
 15 A. They had some working papers of it but I never signed
 16 anything.
 17 Q. So they had some working papers that they showed you?
 18 A. E-mail.
 19 Q. They e-mailed you something?
 20 A. Yes.
 21 MR. LILLEHAUG: Your Honor, may we approach
 22 the bench?
 23 JUDGE MARBEN: You may.
 24 (Whereupon, a brief discussion off the
 25 record.)

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1 JUDGE MARBEN: We'll take a short recess.
 2 (Whereupon, a brief recess was taken.)
 3 JUDGE MARBEN: Counsel, are you ready to
 4 proceed?
 5 MR. LILLEHAUG: Your Honor, if the Court
 6 wishes to deal with this issue, I would request that
 7 the witness be requested to remain in the hallway.
 8 JUDGE MARBEN: Any objection?
 9 MR. FRIEDBERG: There's no objection to
 10 that.
 11 JUDGE MARBEN: Ms. Howell --
 12 THE WITNESS: Certainly.
 13 JUDGE MARBEN: -- you're excused but remain
 14 available.
 15 THE WITNESS: Okay.
 16 (Whereupon, the witness is leaving the
 17 courtroom.)
 18 MR. LILLEHAUG: Your Honor, it's my
 19 understanding that during the break counsel for the
 20 Contestants reviewed their e-mails and that there are
 21 e-mails. They have not been presented to me and I've
 22 not seen them. So with the Court's agreement, I will
 23 sit down and wait to see what counsel for the
 24 Contestants has to say.
 25 MR. FRIEDBERG: The only difference is, that

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1 I did not review them. As soon as they came off the
 2 printer, I gave them to the Court.
 3 JUDGE MARBEN: Well, the Court has not
 4 looked at those e-mails. I don't know if they're
 5 something we should look at at this point. Can you
 6 review those e-mails and find out if any of those
 7 should be disclosed and if any of them are claimed to
 8 be work product or anything like that?
 9 MR. FRIEDBERG: I will look at them.
 10 JUDGE REILLY: As a point of clarification,
 11 are these all e-mails sent by Mr. Haapoja to the
 12 witness?
 13 MR. FRIEDBERG: I believe so, Your Honor.
 14 JUDGE REILLY: Okay. Thank you.
 15 MR. FRIEDBERG: They don't all necessarily
 16 say that but I believe they all are that.
 17 JUDGE REILLY: Thank you.
 18 (Whereupon, Mr. Friedberg is reviewing the
 19 e-mails.)
 20 MR. FRIEDBERG: I think they should all be
 21 disclosed.
 22 JUDGE MARBEN: Then do you want to give
 23 those to Mr. Lillehaug and give him an opportunity to
 24 review those?
 25 MR. FRIEDBERG: Certainly. And those are

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1 the only copies, so at some point if we're going to
 2 use them, we can have them copied.
 3 JUDGE MARBEN: Approximately how many are
 4 there?
 5 MR. FRIEDBERG: A lot of it is repetitive.
 6 You get chains.
 7 JUDGE MARBEN: Well, why don't we stand in
 8 recess for 15 minutes, Mr. Lillehaug, give you an
 9 opportunity to look at those and then we'll reconvene.
 10 MR. LILLEHAUG: Thank you, Your Honor.
 11 (Whereupon, a 15-minute recess was taken.)
 12 JUDGE MARBEN: Mr. Lillehaug, are you ready
 13 to proceed?
 14 MR. LILLEHAUG: I am, Your Honor. The
 15 record should reflect that before the break I was
 16 presented with a group of e-mails and attachments. I
 17 was given those e-mails by counsel for the
 18 Contestants. What I would like to do is lay some
 19 foundation for a request, a motion to make to the
 20 Court, and I would like permission to mark several of
 21 those e-mails as Court exhibits and then display them.
 22 There was only -- apparently only one copy and I'd
 23 like to display them on the Elmo if I could?
 24 JUDGE MARBEN: Any objection, counsel?
 25 MR. FRIEDBERG: It would appear to be the

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1 best way to do it, Your Honor.
 2 MR. LILLEHAUG: All right. Your Honor, I
 3 will be asking the clerk to mark as -- may I just call
 4 it Court Exhibit 1?
 5 JUDGE MARBEN: (No response.)
 6 (whereupon, the clerk is marking Court
 7 Exhibits 1, 2, 3, and 4.)
 8 MR. LILLEHAUG: Your Honors, the clerk has
 9 marked as Court Exhibit 1 an e-mail. It appears that
 10 it was printed off this morning at 9:16 a.m. and the
 11 subsequent e-mail is from Tony Trimble, although the
 12 signature is Matt and Tony, to Pamela Howell, dated
 13 January 6, 2009, at 10:53 a.m., and I will ask that
 14 that be displayed on the screen.
 15 THE PARALEGAL: (Complying.)
 16 MR. LILLEHAUG: And I direct the Court's
 17 attention to the e-mail that is outlined from the Tony
 18 Trimble e-mail address to Pamela Howell, dated January
 19 6, 2009, and it says, "Pam: The legal team and
 20 campaign have made a strategic litigation decision to
 21 hold off having you sign, and us file, your affidavit
 22 at this time.
 23 To avoid tying you down to any particular
 24 testimony and to avoid having to disclose your name or
 25 statement, we will therefore not" -- with italics not

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1 -- "be meeting to sign the affidavit.
 2 However, we will likely wish to have the
 3 same signed, and conduct a deposition of you, once the
 4 Court establishes protocols and procedures for
 5 evidence and witnesses. Your name will therefore stay
 6 private at this time but Tony or I will be in touch
 7 soon to discuss how you can further help.
 8 Sorry for any inconvenience. Please know
 9 how much we will definitely be using you and your
 10 story in this process, just not yet at this point.
 11 Again, we greatly appreciate your willingness to help.
 12 Thanks, Matt and Tony."
 13 And I would represent to the Court that
 14 Tuesday, January 6, 2009, was the date that the Notice
 15 of Contest was filed and served in this matter.
 16 We will now put on the screen what has been
 17 marked as Court Exhibit Number 2.
 18 THE PARALEGAL: (Complying.)
 19 MR. LILLEHAUG: This appears to be an e-mail
 20 from Mr. Haapoja through the Tony Trimble e-mail
 21 address to Pamela Howell, Thursday, January 22, 2009,
 22 at 6:49 p.m., with the subject being "Trial." And I
 23 will represent to the Court that this would be the
 24 Thursday immediately before this trial started on
 25 Monday, January 26, 2009. And it says, "Pam: FYI -

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1 we will begin serving trial subpoenas for potential
 2 witnesses in the election contest tomorrow. The Court
 3 is having a pretrial conference tomorrow regarding
 4 dates and other matters; however, no dates or timing
 5 has yet been finalized. Therefore, you should expect
 6 service tomorrow or Monday of a trial subpoena.
 7 Thanks again for your help. Matt."
 8 And now we'll move up to the response.
 9 THE PARALEGAL: (Complying.)
 10 MR. LILLEHAUG: This appears to be an e-mail
 11 from Pamela Howell to the Tony Trimble e-mail address,
 12 dated Sunday, January 25, 2009, at 12:23 a.m. on the
 13 subject of "Trial." And it reads: "Matt, please fill
 14 me as to what a trial subpoena is, what it means for
 15 me, and how it is served. Does this mean my name is
 16 then a matter of public record? When am I obligated
 17 to speak to Franken lawyers? Thanks for the heads
 18 up." Signed "Pam Howell."
 19 I marked as Court Exhibit Number 3 an e-mail
 20 from the Tony Trimble e-mail address to Pamela Howell,
 21 apparently at two e-mail addresses, and the subject is
 22 "Testimony." And the e-mail reads, "Pam: It looks
 23 like we may schedule your court testimony on Thursday
 24 - what is your availability? There will be no
 25 depositions prior to testimony by the Franken

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1 attorneys. Your testimony will consist largely of
 2 matters related to your affidavit.
 3 Have you been served with the trial subpoena
 4 by the Dorsey Whitney attorneys yet? They are working
 5 closely with us on these matters." Signed
 6 "Matt/Tony."
 7 I'm now showing you what has been marked as
 8 Court Exhibit 4 and at the bottom of this exhibit is
 9 the e-mail that was part of Court Exhibit Number 3.
 10 And can you move up from there, Leslie?
 11 THE PARALEGAL: (Complying.)
 12 MR. LILLEHAUG: This part of Exhibit Number
 13 4 is an e-mail from Pam Howell to Matt Haapoja, dated
 14 Wednesday, January 28, 2009, at 8:52 a.m. regarding
 15 "Testimony" and it reads, "Hi Matt, Yes, I was served
 16 on Monday. Gretchen Agee and her staff have been
 17 keeping me posted regarding scheduling - as of Tuesday
 18 night they were thinking Thursday at 1:00 p.m. They
 19 said they would call today with an update. Thursday
 20 is fine for me.
 21 I appreciated hearing from you. Will I be
 22 coached at all or enter the courtroom cold? I assume
 23 I am to show up at the scheduled time and wait to be
 24 called. Will it be made known that I prepared a
 25 statement for Coleman attorneys?" Signed "Pam

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1 Howell."

2 And here is the response. This is an e-mail
3 as part of Court Exhibit 4 from the Tony Trimble
4 e-mail address, sent wednesday, January 28, 2009, at
5 5:43 p.m. to Pam Howell at her Blackberry address,
6 again regarding "Testimony." And it reads: "Thanks,
7 Pam. Gretchen will continue to keep you in the loop.
8 We have not disclosed your statement; you may be asked
9 in the trial and just answer truthfully. Otherwise no
10 other discussions before testimony - will be along the
11 lines of the questions I asked you on the phone when
12 we first talked." signed "Matt."

13 And I would now like to display for the
14 Court the letter from counsel for the Contestants,
15 dated February 26, 2009, after the problem with Ms.
16 Howell's testimony became apparent on wednesday and
17 after the Court had ordered her testimony stricken
18 from the record. This letter is signed by Mr.
19 Friedberg, Mr. Trimble, and Mr. Langdon.

20 In the letter counsel said, "The record does
21 not reflect any evidence of bad faith or misconduct on
22 the part of counsel. Indeed, there was no effort to
23 hide anything and no bad faith whatsoever. The
24 failure to produce the notes Ms. Howell provided to
25 Mr. Haapoja was inadvertent. Neither party produced

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1 any documents at all to the other before trial.
2 Discovery focused on responses to interrogatories; the
3 document request which purportedly required the
4 production of this document was an extremely broad
5 catch-all. If the Court has any doubt about counsel's
6 good faith, it should give us the opportunity to
7 present evidence to satisfy any concerns."

8 And, Your Honors, may I now make a few
9 comments regarding the Court exhibits that we have
10 seen? How would the Court like me to proceed?

11 JUDGE MARBEN: Please proceed.

12 MR. LILLEHAUG: There was really no question
13 that the statement of Ms. Howell should have been
14 produced before trial and most certainly before her
15 testimony. And as the Court will recall, Ms. Howell
16 created the document on her computer and it was
17 labeled "Testimony." There could not be anything more
18 relevant to be produced to opposing counsel. When
19 that fact came out on cross-examination, I asked to
20 approach the bench in the hope that this might not be
21 as serious as it first appeared to me.

22 And in connection with that bench
23 conference, it was represented to the Court and I --
24 this was not on the record. I probably should have
25 asked to have the court reporter come to the bench,

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1 but it was represented that counsel had three things
2 with respect to Ms. Howell. The first was the
3 statement which was then produced. That was the
4 computer file called "Testimony."

5 The second thing was a draft affidavit and
6 counsel represented that was work product. And that
7 led me to believe, I think quite reasonably, that an
8 affidavit had been prepared for potential use but had
9 not been displayed to her, had not been reviewed with
10 her, and I said very clearly, I'm not asking for
11 counsel's work product.

12 And then the third thing was some attorney
13 notes for her examination and of course I'm not
14 entitled to that and I said I don't want counsel's
15 work product.

16 So when we left that bench conference, I had
17 the definite belief, and the Court can recall that
18 bench conference by itself, that there was only one
19 thing that should have been produced that was not
20 produced and that was the statement.

21 And then as the Court will recall, I found
22 that the statement ended up in Ms. Howell's hands
23 during the break while we were getting that figured
24 out and I made a motion to have her testimony stricken
25 from the record. The Court granted that motion.

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1 The next morning, yesterday morning, the
2 Court provided us with an order. I do not believe the
3 Court could have been more clear with respect to the
4 obligations of counsel and with respect to the fact
5 that Ms. Howell's statement should have been produced.
6 I don't think anyone could read that order and come to
7 any different conclusion. And so I came here this
8 morning prepared to fully cross-examine Ms. Howell and
9 then the Court saw what happened. It turns out that
10 statement wasn't the only thing. It turns out that an
11 affidavit was prepared and was in fact reviewed with
12 her.

13 And then it is also clear from these
14 e-mails, that a very conscious decision was made by
15 counsel for the Contestants not to disclose Ms.
16 Howell's statement, not to disclose the draft
17 affidavit. And let me make sure I have the words
18 right here: And the purpose of that, "strategic
19 litigation decision" was to, "avoid tying you down to
20 any particular testimony." And this is the part that
21 -- well, "and to avoid having to disclose your name or
22 statement." It is difficult for me to believe that
23 after the Court's order that was issued yesterday,
24 that an effort was not undertaken to determine whether
25 there were any other documents that should be turned

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1 over to counsel for the Contestee. And I don't know
2 if there was any effort undertaken but I do know that
3 when we walked into court this morning, I had not been
4 given anything. And I did not know when I was asking
5 Ms. Howell these questions whether there were any
6 other documents. I just happened to put that in my
7 outline and I assumed the answers would be no, no, and
8 no. Instead, the answer turned out to be yes and
9 there are these documents and others that were now
10 produced this morning.

11 The Court has had an opportunity in the last
12 48 hours to review the law on the exclusion of
13 evidence and indeed the striking of claims when there
14 has been this kind of failure to comply in good faith
15 with discovery.

16 The record will also not reflect that the
17 Court has expressed concern on occasion that counsel
18 make sure that they furnish the discovery that has
19 been called for. It seems to me now under these
20 circumstances, that the -- the remedy is not only to
21 strike Ms. Howell's testimony but to strike the claim
22 to which it relates.

23 And it is clear from Contestants' strategy
24 in this regard, that Ms. Howell was their star witness
25 on the issue of original and duplicate ballots. They

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1 picked out one election judge from one precinct.
2 she's the only election judge that they're presenting
3 on this claim. And then yesterday documents were
4 offered and admitted into evidence with respect to
5 that precinct and nine other precincts. It is clear
6 that her testimony was the linchpin for the Coleman
7 original and duplicate ballots claim. It turns out
8 that linchpin has been tainted. It's been corroded by
9 the failure to produce evidence and we should not have
10 to be in a position now for the second time to be
11 trying to figure out what Ms. Howell has said and when
12 she said it and how we now have to go back to the
13 drawing board yet again and figure out how to
14 cross-examine her.

15 So, Your Honors, my motion is that Ms.
16 Howell's testimony be stricken and that the duplicate
17 and original ballot claim be dismissed. Thank you.

18 JUDGE MARBEN: Mr. Friedberg, if you or Mr.
19 Trimble or Mr. Haapoja would like to respond?

20 MR. FRIEDBERG: I think it's my
21 responsibility, Your Honor. First of all, to correct
22 the record slightly, the three documents that I came
23 to the bench with the other day were not some work
24 product and my own notes and the document, the
25 statement of Ms. Howell. what I brought to the bench

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1 and I think, although there's no record at the bench,
2 what I said I had was some notes. They weren't mine.
3 I don't make notes. Second was the unsigned affidavit
4 and third was the statement of Ms. Howell. I offered
5 all of those to both the bench and the other side and
6 I said you can have them. You can look at them.
7 There's nothing here that needs to be hidden. But one
8 of the documents was the unsigned affidavit. I said,
9 first, I have an affidavit. I think somebody at the
10 bench inquired, Is it signed? I said, no, but it's
11 the affidavit of Ms. Howell. It's unsigned. So at
12 that point the trial team was disclosing everything
13 that it knew existed and including things that I
14 suspect we had no obligation to turn over.

15 I did have some discussion with Mr. Langdon
16 about this. I suspect it was my obligation at that
17 point to say, do we have anything else? I assumed I
18 had everything that we had. I have never sent a
19 witness an e-mail in my life. I doubt that I ever
20 will. I was unaware that she had been communicated
21 with any way but orally which is the only way I ever
22 talk to a witness.

23 If we look at those things closely, first of
24 all, as opposed to what the e-mail seems to say, that
25 we can avoid putting you on our witness list, we did

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1 put her on our witness list. And when she was
2 subpoenaed, the subpoena was disclosed to the other
3 side. So we didn't hide her identity in any way,
4 shape or form. Since a couple of days ago, they've
5 known there's been an unsigned affidavit. If anybody
6 would of asked me, why have you got an unsigned
7 affidavit? I would have told them, I don't know but I
8 guess I can find out. I suspect somebody drafted it
9 and then decided it wasn't a good idea to have the
10 witness sign it. And it is a very bad idea to have a
11 witness sign an affidavit. There's no reason to do
12 it.

13 They know what they need to know about Ms.
14 Howell. They have known right along that she was
15 going to appear in this case. why a young lawyer
16 would put a strategic decision that was made by I
17 believe the lawyers at the Dorsey firm that would --
18 that it would be a bad idea to sign the affidavit, why
19 you would put that in an e-mail back to the witness, I
20 don't know but I think too much information was being
21 given to the witness. By the same token, I don't know
22 how the other side can use a communication to the
23 witness that we've decided not to have you sign the
24 affidavit. I think that that's blown a little bit out
25 of proportion. I don't know what else they could want

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1 to know about Ms. Howell other than what they know
2 now.

3 Clearly these e-mails should have been
4 disclosed. I think if you look at them in substance
5 and they begin to question Ms. Howell about, you know,
6 do you know why they didn't have you sign the
7 affidavit? Her answer is clearly going to be, how
8 would I know that? But they told me I didn't have to
9 sign it or shouldn't sign it. There were discussions
10 back and forth but I don't think any of them go to the
11 substance of her testimony. They're free to
12 cross-examine her about anything they want. I don't
13 think there's anything that's been disclosed in these
14 e-mails that would be really useful in getting at her
15 credibility. They now have her statement that was
16 made. That clearly should have been disclosed.

17 But I have to add, in the context of this
18 case, and I think Mr. Langdon can answer this, I don't
19 believe that we've been exchanging documents. I don't
20 think we've turned over things that people have said.
21 I know that I've not seen anything from any of the
22 witnesses that they cross-examined and I'm sure there
23 must be communication between them and Ms. Reichert.
24 Just the nature of her testimony yesterday indicated
25 that.

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1 I can tell you that if I'd known these
2 things existed, I would have disclosed them. Mr.
3 Haapoja has never tried a case in his life and I doubt
4 very much if he was sitting there thinking I should
5 have printed out these e-mails. This is a mistake.
6 It's an innocent mistake but by the same token, they
7 get Ms. Howell as she is and I don't think that
8 there's anything that's in here that they can use
9 which becomes that crucial in this case. Clearly we
10 made a mistake. I have never said to anybody working
11 with me, we need to purge our files, which is
12 apparently the instruction that I should have given.
13 I did not know anybody is supposed to do that and it's
14 my mistake. The buck stops here. Those things were
15 not in the Dorsey files. They were in Tony Trimble's
16 files which is who Matt Haapoja works for. If I had
17 thought about it or knew of their existence, they
18 certainly would have been here. They are here now. I
19 don't believe there's anything else.

20 And I would be glad to answer any questions
21 that you want to pose to me.

22 JUDGE MARBEN: Thank you. Any response?

23 MR. LILLEHAUG: Not with respect to Ms.
24 Howell. But to the extent there was any suggestion
25 there have been communications with Cindy Reichert

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1 that the other side does not have, I do not believe
2 that to be the case. We know when we communicate with
3 any public official, it's subject to the Minnesota
4 Data Practices Act. There have been subpoenas to Ms.
5 Reichert and enormous volumes of documents produced,
6 some of which were letters from the Fredrikson firm
7 urging that voters be put on the recommended list and
8 opposing counsel has had those. So I'm not really
9 sure where that one is coming from.

10 I think with respect to the rest of the
11 issues and the record, the record is now clear unless
12 the Court has any questions. Thank you.

13 JUDGE MARBEN: We'll take a short recess.

14 (Whereupon, a brief recess was taken.)

15 JUDGE MARBEN: Counsel, the panel is going
16 to take this matter under advisement. We will hear no
17 further testimony from Ms. Howell today. She is to
18 remain available and we'll have a decision for counsel
19 late today or Monday on the motion that's been made by
20 Mr. Lillehaug to both strike her testimony and the
21 motion he's made to strike the claim based upon her
22 testimony.

23 MR. LILLEHAUG: Your Honor, under these
24 unusual circumstances, I would request that the clerk
25 notify Ms. Howell of her status and at this point it's

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1 not known whether she will be recalled and that there
2 be a direction that counsel for neither party or any
3 representatives of either party have any contact with
4 Ms. Howell.

5 JUDGE MARBEN: I'll direct the clerk to
6 notify Ms. Howell of that.

7 What's your position on the request that
8 counsel not have contact with her?

9 MR. FRIEDBERG: I think that will be --

10 JUDGE MARBEN: I mean, there's certain
11 contact is going to be necessary to advise her whether
12 to appear on Monday to testify depending on what our
13 decision is. That can be done by the courtroom clerk
14 unless there's an objection by counsel.

15 MR. FRIEDBERG: I think that's fine.

16 JUDGE MARBEN: Okay.

17 MR. LILLEHAUG: Thank you, Your Honor.

18 (Whereupon, the clerk has left the courtroom
19 to speak with Ms. Howell.)

20 JUDGE MARBEN: What we intend on doing now
21 is to proceed with the motions that were noted for
22 hearing today and move right into them unless counsel
23 needs a brief break but we have five motions that are
24 set for today. First we have the Contestants' Rule
25 60.02 motion to vacate judgment.

1 The second motion is Petitioners' notice of
2 motion and renewed motion for summary judgment, and
3 Mr. Nauen is present.

4 MR. NAUEN: Yes, Your Honor.

5 JUDGE MARBEN: The third motion we have is
6 Contestants' motion for rule applying the February
7 13th, 2009 order to previously counted absentee
8 ballots.

9 The fourth motion is Contestants' motion to
10 strike counterclaims made by Contestee.

11 And, finally, at 1:00 or 1:30 this afternoon
12 we have the motion by the City of Duluth to quash the
13 Franken subpoena. So that's the order that we will
14 take these motions.

15 With regard to Contestants' Rule 60.02
16 motion to vacate judgment, Mr. Langdon, will you be
17 arguing that on behalf of the Contestant?

18 MR. LANGDON: I will, Your Honor.

19 JUDGE MARBEN: And, Mr. Nauen, are you ready
20 to proceed on that motion?

21 MR. NAUEN: I am, Your Honor.

22 JUDGE MARBEN: Mr. Langdon?

23 MR. LANGDON: Thank you, Your Honor. I can
24 be very brief. As I've told you before, we would
25 prefer to be in the position of enfranchising voters

1 rather than disenfranchising voters. However, we
2 appreciate the Court's February 13th ruling and the
3 other advice or guidance that it's given us in
4 chambers with respect to what requirements a ballot
5 needs to be -- needs to meet in order to be considered
6 a legally cast vote by this Court. And the purpose of
7 this motion is simply to ask the Court to apply those
8 same standards to the group that it had granted
9 summary judgment to earlier in the case. We
10 respectfully believe that of that group of 23 voters,
11 there were eight whose declarations, ballots,
12 applications, and the like disclosed that they had not
13 met the Court's standards for what was an appropriate
14 ballot to be considered as a legally cast vote.

15 We've set forth in our memorandum those
16 eight voters, why we think each of them failed. I
17 freely say that some of them appear to be very
18 technical reasons but they do, at least as we read
19 Your Honors' ruling of February 13th, these eight
20 ballots would appear not to comply, four of them
21 because the voters did not sign the certification for
22 their ballot and, one, because the voter, Ms. Gorski,
23 that the Court has already heard about, it turns out
24 was mistaken in averring that she had signed her own
25 application. Her mother signed her application and so

1 for that reason she wouldn't meet Your Honors' test.

2 And then the other three; one, Mr. McCool,
3 with respect to his name, his name was incorrect on
4 the ballot envelope, on the sticker. He did not
5 correct it. We have seen in evidence other voters who
6 did correct their names when they were misspelled on
7 the sticker. That I think is the most technical issue
8 and I leave that to Your Honors.

9 And then two voters whose addresses were
10 different from their ballot application, to their
11 ballot envelope, to their registration. One because
12 she put a different street address and the other
13 because she moved from one apartment to another.
14 There's no doubt that they were registered in the same
15 precinct but we understand Your Honors' rulings to
16 require that the addresses have to match and so that's
17 why we bring it to your attention.

18 We leave it in your hands, simply thinking,
19 that -- that a legally cast vote is a legally cast
20 vote is a legally cast vote and so that's why we make
21 the motion. Thank you.

22 JUDGE MARBEN: Mr. Nauen?

23 MR. NAUEN: Thank you, Your Honor. Your
24 Honor, we disagree. Four weeks ago we moved for
25 summary judgment and Contestant in writing and in

1 argument didn't object to any of the 61 votes in our
2 motion. And after consideration, this Court allowed
3 24 votes to eventually be open and counted in this
4 election. Now they changed their view, kind of took
5 the opposite view. And in our brief yesterday, which
6 we e-mailed to the Court and then it was delivered
7 early this morning, we address each and every one of
8 the eight. They also make an argument that somehow
9 all of them should be thrown out but of course they
10 have no facts or anything to suggest that any but
11 these eight now are the subject to their Rule 60
12 motion.

13 Now I think we address whether a Rule 60 is
14 an appropriate motion in this context or not in the
15 brief. I'm not going to go into that.

16 But I am going to go into the facts of the
17 eight to make sure the Court is aware. The first two
18 are Thomas and Leona Quinlan and we addressed the
19 facts of their situation in my original summary
20 judgment motion at Exhibit 18 and 19. And they did
21 everything right. They went in person to Northern
22 Dakota Government Center together. They
23 simultaneously did everything, filled out the
24 application, and then filled out their -- their ballot
25 in the presence of a witness who was the clerk at the

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1 Government Center. The only thing that happened is
 2 that somehow they were handed each other's envelope.
 3 That's all. Everything else was exactly accurate.
 4 Under this Court's order, there's no problem at all
 5 with any of it. The local official was the witness.
 6 The certificates match the applications. Every single
 7 spot was signed. And, you know, the technical issues,
 8 if all, certainly fall within that category the
 9 Court's already observed, that this is an error, a
 10 very minor error, that has not anything to do with the
 11 Quinlans but, rather, something just happened in this
 12 -- at this spot at the Northern Dakota. And I think
 13 the Court probably saw that and put that in the list
 14 of 24 initially. So there's nothing wrong under the
 15 February 13th order. These ballots should be --
 16 continue to be counted.

17 Second, Greg McCool. I thought for a moment
 18 Mr. Langdon might even withdraw their argument on
 19 McCool because the only thing that happened here was
 20 that his name was mistyped in the label and became
 21 suddenly McCurl rather than McCool. Everything else
 22 was done precisely right by Mr. McCool and there's
 23 absolutely no reason why his vote should not be
 24 counted and this Court should not change its earlier
 25 order.

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1 Same for Audrey Verlo, address doesn't
 2 match. Well, that's not true. She was registered in
 3 her precinct where she cast the vote and the addresses
 4 on both the application and the eligibility
 5 certification were the same. She just had a different
 6 address within that same precinct and that we proved
 7 to the Court. I mean, it's just the same exact
 8 precinct where she can vote and that I think is why
 9 the Court allowed that vote to -- initially to be
 10 counted and there's absolutely nothing in the February
 11 13th order that would change that.

12 Donna Mortenson, addresses on the
 13 certificate doesn't match the address on the
 14 application. Well, the -- and also certificate was
 15 not dated. These are the arguments being made by
 16 Coleman now after they agreed with everything a month
 17 ago. Look, dates aren't required so that can be
 18 thrown away and the addresses on the certificate did
 19 in fact match the address on the application. The
 20 only thing that happened is that there was a -- the
 21 address was changed in the vote -- in the voter record
 22 of the Secretary of State and then in the affidavit,
 23 from 507 to 705 or vice versa, and then that's no
 24 reason to throw out that ballot. Everything was
 25 complied with by Ms. Donna Mortenson. And that's it

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1 on the first five.

2 Absolutely no basis under any of the Court's
 3 orders so far that any of these votes should be looked
 4 at anew and suddenly not counted. The Court was right
 5 in the order of February 10.

6 Now there are three others and you should
 7 remember, Your Honors, that we brought those to the
 8 Court's attention last Friday as part of our renewed
 9 motion for summary judgment. The first one is Hannah
 10 Gorski and we have talked about Hannah Gorski a lot.
 11 She made a mistake and we've heard a lot of issues
 12 about mistakes here today and there's been some
 13 mistakes in this -- in this case, you know, we don't
 14 know the exact number of votes here and there but here
 15 we have a college student voting for the first time in
 16 Florida trying to do everything right. She went in to
 17 Dakota County -- I guess it's Hennepin County and
 18 signed her voter registration application in person
 19 and that's really what she thought she was saying when
 20 she signed the affidavit back in December. She had
 21 that affidavit notarized. And when it became clear,
 22 no, there's another step in there and your mom had
 23 signed it, she -- she submitted a new affidavit, again
 24 a notarized affidavit that was submitted to this Court
 25 last Friday. She did authorize her mom to sign her

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1 application. And on the certificate she signed it
 2 herself. She had a notary in Florida witness it and
 3 everything was done properly and we leave it to the
 4 Court now to determine exactly what order and what
 5 rules apply to that. But we present it to the Court
 6 and there's nothing we can extrapolate from that.
 7 It's just a mistake made and when a witness thought
 8 she was saying something, she really meant -- thought
 9 she was testifying to what she meant and then it was
 10 revealed that in fact what she was talking about was
 11 signing the registration application, not the absentee
 12 ballot application.

13 The other two that we brought to the Court's
 14 attention were Charles Quinn and Kim Falde, both in
 15 Dakota County, and they didn't sign their certificate
 16 envelopes. That's -- that -- those are the facts.
 17 They did it all in person. They relied on the
 18 personnel at Dakota County to make sure they did it
 19 right. They did the application, the ballot, all at
 20 the same time. Everything was done properly but
 21 ultimately they did not sign that envelope and we
 22 wanted to bring that to the Court's attention for the
 23 Court's decision on what to do.

24 I think that's it. Those are the eight.
 25 There's no argument on any other ones, and I would ask

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1 that this Court deny the motion of the Contestant to
2 vacate any of the previous order. Thank you.

3 JUDGE MARBEN: Any response, Mr. Langdon?

4 MR. LANGDON: Yes, Your Honor. Really two
5 points. One, listening to Mr. Nauen felt like I was
6 having deja vu all over again as they say. I felt
7 like I was listening to myself a few weeks ago in
8 arguing to you why a variety of ballots should be
9 counted because in fact the mistakes were good faith.
10 They were relatively minor in the circumstances, et
11 cetera, et cetera. And frankly I still believe that
12 but I also accept Your Honors' ruling. And so it
13 seems to me that those mistakes, that Mr. Nauen freely
14 admits, do not fit within the Court's category of
15 either strict compliance or a mistake made solely by
16 an official. No mistakes made by the voter at all.

17 The other point that I'd like to make is
18 with respect to Ms. Gorski. It wasn't really Ms.
19 Nauen -- or Mr. Nauen rather who brought it to the
20 Court's attention. It was Contestants, after Mr.
21 Friedberg -- after we had looked at Hannah Gorski's
22 materials very closely and determined that there was
23 no way in the world in our view that those signatures
24 were more similar than dissimilar and so Mr. Friedberg
25 sent his investigator out, as he's told the Court, and

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1 talked with Ms. Gorski's mother who freely said, no,
2 of course she signed the application and that led to a
3 series of events which ultimately Mr. Nauen has
4 amended his papers as well. We have no doubt that Ms.
5 Gorski thought she was being absolutely truthful, nor
6 do we have any doubt that her mother thought that she
7 was doing the right thing in being truthful. We're
8 not accusing them of anything.

9 But there is somebody from the Franken
10 campaign who went out and secured affidavits from all
11 of these people who had the absentee ballot and the
12 application and may or may not have shown them to the
13 people that they procured affidavits from and among
14 those people are the 61 that Mr. Nauen represents. I
15 rather doubt that Mr. Nauen had any involvement in
16 getting these affidavits. Some of them date back
17 months, certainly weeks. But we think that the
18 circumstances as disclosed by Ms. Gorski's situation
19 casts some doubt on the value of those affidavits and
20 that's why we made the motion with respect to the
21 remainder. And frankly that's why we're opposing the
22 motion that Mr. Nauen is bringing with respect to the
23 19. We have substantial concerns about the veracity
24 as a result of the situation. That's all. Thank you.

25 MR. NAUEN: could I briefly respond?

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1 JUDGE MARBEN: (Nodding affirmatively.)

2 MR. NAUEN: Your Honor, I just disagree with
3 that chronology regarding Ms. Gorski and it brings up
4 a very sore point with me. As the Court knows, that
5 last week I was in chambers and talked about contact
6 being made directly with my clients by representatives
7 of the Coleman campaign and we've learned about that
8 and we're trying to investigate things about that.
9 But the chronology of Ms. Gorski is a lot different
10 than what was represented to you just now by Ms. (sic)
11 Langdon. Be that as it may, the facts are there and
12 it certainly was an innocent mistake made by a
13 first-time voter.

14 I also wanted to clarify one thing with
15 regard to Charles Quinn and Kim Falde. All the facts
16 that we are now bringing to the Court's attention, in
17 the aftermath of the February 10 and February 13
18 order, were presented absolutely accurate and
19 completely in our initial summary judgment materials.

20 And in terms of the slippery slope argument
21 if you want on that, you know, these -- these voters
22 have been identified since January 13. I brought my
23 initial summary judgment motion about a week later. I
24 supplemented it about a week later. It was argued on
25 January 30. They got no other facts here. They're

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1 just speculating about it and these are all affidavits
2 under oath and government materials have been
3 submitted to the Court. Thank you, Your Honor.

4 JUDGE MARBEN: Okay. The Court will take
5 that motion under advisement.

6 The next motion for argument on the
7 calendar, Mr. Nauen, this is Petitioners' notice of
8 motion and renewed motion for summary judgment.

9 MR. NAUEN: Thank you, Your Honors. This is
10 Petitioners' renewed motion under Rule 56 for summary
11 judgment. And as the Court is aware, it follows this
12 Court's order dated February 10 in which 24 votes were
13 accepted but 37 votes were not, with leave to come
14 back with information that demonstrates on an
15 individual basis that these votes should be counted in
16 this Senate election. Well, that's what we did, Your
17 Honors, and we did it very carefully. We looked at
18 the issues that the Court identified as to the 37.
19 And then we also looked at all the issues that have to
20 be demonstrated in order for this Court to accept an
21 individual vote. And we presented all that and we
22 tried to do that in an organized as fashion as
23 possible. We combined the information that had
24 already been provided to the Court in our initial
25 summary judgment motion into a packet of materials

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1 about each one of the 19 that we are bringing summary
2 judgment for. And each and every one qualified to
3 have their vote counted in this election.

4 Now there has been no response from any
5 respondent county or the Secretary of State to any of
6 these. The only response that has -- we've received
7 was received yesterday afternoon from the Contestant.
8 And in an about face from their earlier position, they
9 suddenly now have complaints about some of this group
10 of 19. Well, for 11 of the group of 19 they didn't
11 come up with anything at all. So there is nothing on
12 the record to prohibit this Court from granting
13 summary judgment. And those 11 are, Arvid Blackbird,
14 Donald Applebee, Donelda Applebee, Dennis Erickson,
15 Craig Lindquist, Todd Toner, Eila Nelson, Judith
16 Conlow, Emma Bruggeman, Josephine Garcia, and Sophie
17 Hall. Nothing at all, no complaints, no issues.

18 And as the Court can tell from I hope the --
19 the particular nature of this -- of the information
20 that we provided the Court, we've tried to been very
21 careful to make sure we have addressed each and every
22 issue that the Court has raised in its various orders
23 in this -- in this matter to show that these votes
24 should count and they've been vetted now to the kind
25 of a new view of the world, the Coleman group, and

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1 they've come up with nothing at all. So I would ask
2 those 11 certainly be counted.

3 But for the other eight, there really were
4 no issues raised by the Contestant that would suggest
5 the other vote should not be counted and I will go
6 through them briefly individually. The first is
7 Brenda Rengo at tab 1 and really they make two
8 arguments. One is that there's no application to --
9 in the record because we haven't been able to find an
10 application but we did have her own testimony in her
11 declaration under oath saying that she signed the
12 application and completed it, signed it with her
13 genuine signature and completed it according to the
14 rules. And the Court accepted that for six of the
15 original group of 24 as being evidence to support that
16 those matters had been properly done by the voter.
17 All right? And, again, I'm not privy to all the data
18 practice requests and all the information that's being
19 done but the Contestant or nobody has brought the
20 actual application to this Court to say there's
21 anything incorrect about that. So that issue is
22 addressed.

23 The second issue has to do with whether she
24 was a registered voter and I forgot to put in the
25 Lookup from our original summary judgment motion in

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1 the packet in -- in the subsequent summary judgment
2 motion. But in fact in -- at tab 1-D of our original
3 summary judgment motion, in fact there was a Lookup
4 that we provided the Court that showed that Ms. Brenda
5 Rengo was a registered voter as of November 4th, 2008.
6 Those are the only issues raised. That vote should be
7 counted.

8 Second, Shirley VanDyck. It's not
9 completely clear what the objection is now. You might
10 remember because I've talked about Shirley VanDyck
11 every opportunity I've had. She suffers from Lou
12 Gehrig disease. She is in a -- a facility in Cass
13 Lake. She really wants her vote counted and she has
14 done everything required to have the vote counted.

15 Now the issue -- the only issue the Court
16 raised regarding Shirley VanDyck was whether her
17 witness was a registered voter. And just to make
18 absolutely sure, we submitted a declaration from her
19 son who was her witness saying, yeah, he's a
20 registered voter. And we also provided the Lookup
21 from the Secretary of State's office that showed, yes,
22 indeed he was a registered voter. That was the only
23 issue.

24 And remember too that Cass County put this
25 in pile 5 and this was a ballot that had been objected

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1 to by the Coleman side way back one as far as the
2 recount process.

3 Now what is the issue with Shirley VanDyck?
4 She signed her application, not her application but
5 her -- her ballot envelope. She signed her
6 declaration. Very hard to sign but she did it and you
7 can see it on there and she had her daughter -- she
8 instructed her daughter at her facility to sign the
9 application for her and then got the application then
10 filled out because she thought it was important. All
11 that evidence is presented to the Court. And now we
12 presented the one piece the Court thought was missing
13 and, that is, that her son, the witness, was indeed a
14 registered voter.

15 Laurence Engebretson at tab 4 of the -- of
16 my current summary judgment motion. You know, I guess
17 Coleman's argument can be described this way: well,
18 they just -- the signatures don't look alike. All
19 right? well, Mr. Engebretson, an elderly gentleman
20 from Dakota County, has said in his affidavit that
21 those are indeed my signatures. I did everything
22 right. I signed the application. I signed the
23 ballot. And the only issue the Court had raised was,
24 is this the only time Mr. Engebretson had voted? And
25 we've submitted an affidavit from him saying, yes,

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1 indeed, it was his only ballot in the November 4, 2008
2 election. That vote should be counted.

3 Caitlin Heinz is a -- there's really no
4 reason why her vote should not be counted except that,
5 I believe that her registration is in the inner
6 envelope and I don't know that she's on the list from
7 the order yesterday, to be -- be honest. I didn't get
8 a copy of that order to double-check it but I think
9 she should go into that same category that this Court
10 put Ms. Saad, that -- subject to opening the inner
11 envelope, the secrecy envelope, and determining that
12 there is a registration that's been properly filled
13 in, that Ms. Heinz vote should be counted. That's the
14 only issue there.

15 Dennis Peterson, everything is complete. He
16 did everything in person. This is the only issue,
17 Your Honors, his address is not on the -- on the
18 ballot but what is on the ballot, filled in by the
19 judge, is his registration number and we've given all
20 that information to the Court at tab 16, tab 16 of my
21 affidavit in support of the renewed motion. And if
22 you track that registration number and put it into the
23 Secretary of State's data base, there's his address,
24 and it's the same address that's on the application.
25 Now that -- and I'm putting this toward the Court.

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1 I'm being very frank about Dennis Peterson. He is a
2 named plaintiff in this matter because he did
3 everything right. He showed up. The only issue is
4 the address. True enough, the address is not on
5 there. But what's on there is the functional
6 equivalent of that address and filled in by the
7 election person, the official, in -- in St. Louis
8 County. That voter I.D. number exactly matches up
9 with his address and I would ask that the vote be
10 counted.

11 June Srok, I think the only issues raised by
12 Mr. Coleman are, there are dates regarding --
13 different dates by the witness and the voter. That's
14 the only issue. All right? Well, I think the Court
15 has already ordered I believe that dates aren't
16 mandatory on the application -- I guess on the -- on
17 the certification, if you will. But we also submitted
18 an affidavit from Ms. Srok saying that the witness was
19 right there when she completed her absentee ballot and
20 did everything proper at the time and that is enough
21 to have her vote counted.

22 Next, 7th, Lora West. I just want to make
23 very clear to the Court that the Coleman memorandum
24 really misstates the facts there completely about what
25 happened to Ms. West. She and her husband had

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1 received an absentee ballot, had applied for it
2 properly and received an absentee ballot, and he had
3 sent his back. Before she had sent her absentee
4 ballot in, they got a replacement ballot because there
5 was a mistake on the original absentee ballot and that
6 was the only ballot that she submitted in this
7 election. She did everything right. Now there were
8 some discussion in her -- in her declaration about the
9 circumstances of her husband's ballot but that didn't
10 have any effect on her ballot. She only submitted one
11 and she says that in her declaration and she did it
12 properly and this was the replacement ballot. It was
13 just a mistake made in rejecting it because this was a
14 replacement ballot that she was supposed to use.

15 Finally, Orin Ottman. The issue raised by
16 -- by the Contestant is that there was not a "complete
17 witness address." Well, Mr. Ottman, who is an elderly
18 gentleman from southeastern Minnesota, lives in St.
19 Charles which you probably all know is a little bit
20 past Rochester on the way to -- toward Winona. His
21 brother who is another elderly gentleman was the
22 witness and he's in Oronoco which is right outside
23 Rochester, very near St. Charles, all in the same
24 area. And he put Oronoco, Minnesota for his address
25 and that was enough to find him in the -- in the data

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1 base of Secretary of State's and was enough in a small
2 community like that to certainly complete his address.
3 And most importantly, we presented the individualized
4 facts to support all of that on behalf of my client,
5 Mr. Ottman.

6 So those are the 19. 11, no argument made
7 at all. 8, the arguments all fail, with the one
8 footnote is on Heinz. I think it probably goes into
9 the Roxana Saad category of -- unless somehow in this
10 trial this -- her registration has come up, it's I
11 think in that envelope or so that's what the facts
12 show. And if it is and it complies, then we believe
13 that vote should be counted.

14 That's all I have, Your Honors. Thank you
15 very much.

16 JUDGE MARBEN: Thank you.

17 Mr. Langdon?

18 MR. LANGDON: Thank you, Your Honors. I
19 have no intention of standing up here and arguing
20 against individual voters. We don't have an interest
21 in doing that. I'm content to rely on our brief for
22 that -- for the specific facts with respect to each of
23 them. Our only interest here, our only goal, is to
24 have the Court's standard apply to all absentee
25 ballots and we trust that the Court will, with respect

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1 to each of these 19, apply its standards
2 appropriately.
3 The one issue that I do want to raise,
4 however, is with respect to registration and Mr.
5 Nauen's reliance on what he terms Voter Lookups. I
6 think there is a substantial issue that has been
7 raised with respect to the efficacy of those raised by
8 Mr. Poser during his testimony and so we certainly do
9 object to those as the be all and the end all on
10 registration and would simply call that to Your
11 Honors' attention. Thank you.

12 JUDGE MARBEN: Thank you.

13 Okay. The next matter on the calendar this
14 morning is Contestants' motion for rule applying the
15 February 13th, 2009 order to previously counted
16 absentee ballots.

17 Mr. Langdon, will you be arguing on behalf
18 of the Contestant?

19 MR. LANGDON: I will, Your Honor.

20 I guess I'll pick up right where I left off
21 because that's what this motion is all about,
22 Contestants' view that Your Honors' February 13th,
23 2009 ruling ought to be applied to all absentee
24 ballots cast in the election and not merely to the
25 rejected absentee ballots that are at issue with

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1 respect to the Contestants' claim. Our view is that
2 the Court has ruled what the law is, what 203B.12 and
3 what 203B.24 require, before an absentee ballot can be
4 considered a legally cast vote and that the law is the
5 law is the law. That's what it means now. That's
6 what it meant on election day, and that's what it
7 meant before then. And so all votes -- all absentee
8 ballot votes cast on election day have to have that
9 law applied to them. They have to be treated
10 precisely the same. There's no basis to distinguish
11 between them.

12 And it's for that purpose that we have
13 introduced evidence and will be making offers of proof
14 with respect to various ballots, not only within the
15 933, and we understand Your Honors' ruling on that
16 issue, but also ballots that were accepted, cast on
17 election day that did not meet the standards of
18 203B.12 as the Court has announced them. And you may
19 say why is that important? Why is that before us?
20 But this election contest was filed because there's a
21 dispute as to which party received the highest number
22 of legally cast votes and is, therefore, entitled to
23 the election Certificate. That's precisely what the
24 statute says. That's the precise language of 209.12.

25 And as we understand the purpose of the

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1 election contest and how it will be concluded, this
2 Court is going to enter a judgment which says party A
3 got the highest number of legally cast votes in this
4 election and is, therefore, entitled to the
5 Certificate. And it seems to Contestants that once
6 the Court has defined what a legally cast vote is,
7 then it has to apply it across the board. And to the
8 extent that the Court is made aware of votes cast on
9 election day by absentee ballot that don't meet that
10 standard, are therefore illegal, the Court cannot
11 certify a count that contains those illegal votes.

12 JUDGE MARBEN: Mr. Langdon, let me ask you a
13 question relating to the case of *Bell versus Gannaway*.

14 MR. LANGDON: Yes.

15 JUDGE MARBEN: In *Bell*, that was an election
16 that was decided by one vote. It was undisputed by
17 the parties in that case that a voter's absentee
18 ballot didn't meet the statutory requirements; in
19 other words, was an illegal ballot but, nevertheless,
20 it was cast and counted on election day. And the
21 statute in this case and the one that was at issue in
22 *Bell* are similar. And in *Bell* the Supreme Court
23 stated, "We construe the statute to mean that an
24 absentee ballot may not be challenged after the ballot
25 has been deposited in the ballot box." How would you

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1 square that language and position by the Supreme Court
2 with what you're asking us to do in this motion?

3 MR. LANGDON: My understanding, Your Honor,
4 is that the statute was significantly different in the
5 respect with respect to challenges back then than it
6 is now. And in those circumstances, because of the
7 nature of the election, there were -- each candidate
8 had parties right there and it was capable of
9 knowledge, that in fact that particular absentee
10 ballot didn't meet the standard. Somebody looked at
11 it and let it go through and there was a waiver in
12 that respect. That's not how either the statute here
13 says that things are done or, as a matter of practical
14 fact, how the election was conducted. No one had the
15 opportunity to challenge these absentee ballots
16 because as a matter of course, election judges looked
17 at them, determined that they were accepted, and
18 opened up the envelope, took out the ballot and put it
19 into the machine if it fit or made a duplicate if it
20 was damaged but there was no way for anybody to look
21 at that envelope and make a challenge. It simply
22 was -- it's not physically possible that it could
23 happen.

24 JUDGE MARBEN: Well, how can we undo
25 something once these votes have been cast and counted?

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1 I mean, we're not going to be able to tie ballots to
2 particular absentee envelopes.

3 MR. LANGDON: I realize that, Your Honor,
4 but the fact that there -- that a remedy is
5 challenging and perhaps difficult doesn't mean that it
6 can't be done. I mean, certainly one remedy, and
7 we're not advocating this at this point but one remedy
8 is certainly to do a pro rata reduction based on vote
9 tallies within that county, within that precinct,
10 wherever illegal votes are found. I don't think the
11 Court, just because you can't tie a specific vote to
12 an envelope that shows that the vote was illegally
13 cast under the application of 203B.12, can say there's
14 nothing that can be done about it in these
15 circumstances.

16 Now as I understand Contestee's opposition
17 and their position here, it's really three-fold. They
18 say, well, what happened during the election is out of
19 bounds here. It's beyond the scope of the contest.
20 This contest is only about 4739 absentee ballots and
21 they look for that to Your Honors' ruling on the
22 motion in limine that they made earlier in the case to
23 restrict the number of absentee ballots at issue and
24 they rely on Your Honors' ruling in excluding the
25 testimony of Professor King Banaian. And I've gone

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1 back and looked at all of those things and I think
2 Your Honors' rulings make very clear that this case is
3 not just about rejected absentee ballots but, and I'm
4 quoting from your order on the motion to dismiss, it
5 also includes "ballots from absentee ballot envelopes
6 which were improperly and wrongfully accepted by local
7 officials on election day." You go on to say, "The
8 Notice of Contest is not based on speculation," citing
9 *Christenson*, "nor are the claims contained therein too
10 general, uncertain and indefinite. The Court finds
11 the notice sufficiently specific."

12 Contestee's motion in limine, when they
13 sought to -- to limit the rule -- the number of
14 ballots at issue was for an order excluding from trial
15 the over 10,000 rejected absentee ballot copies. They
16 go on specifically to describe why they think that --
17 that Contestants ought to be limited to only 650 of
18 those rejected absentee ballots.

19 In its order on the motion in limine the
20 Court says, "Contestants seek in part an order
21 directing the recounting and retallying of all ballots
22 cast during the general election." Then the Court
23 goes on later to say, "in order for Contestee to be
24 given a fair opportunity to meet the asserted claims,"
25 and it's talking about rejected absentee ballots.

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1 There you've limited us to those that we said were
2 wrongfully rejected before the trial, that is, that
3 were disclosed in the summary judgment motion.

4 And in the order excluding Professor
5 Banaian's testimony, the Court reiterated that the
6 only question that it can decide is which candidate
7 received the largest number of legally cast votes,
8 which is what we submit is precisely the issue here.

9 Contestee then goes on to assail our equal
10 protection claim. This motion really is largely not
11 about equal protection. This is -- this motion is
12 about the law is the law is the law and if you're
13 going to decide what is a legally cast vote for an
14 absentee ballot, then it has to be applied to all
15 absentee ballots cast in the same election. There's
16 not a retroactivity issue. There certainly is an
17 equal protection overlay but we're not relying on that
18 now. For purposes of this motion at least, we
19 understand that the Court has indeed made clear that
20 it doesn't consider the equal protection claim to be a
21 viable claim here, at least that's how we understand
22 your rulings and comments thus far.

23 And, finally, they say there's no remedy
24 available, precisely the question that you raised,
25 Judge Marben, and it seems to me that there are

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1 remedies. There is the pro rata reduction. There is
2 -- well, that's the primary remedy that we think would
3 be available at this point because you can't tie them
4 back and I assume we can't even tie back the 933 now
5 as a result of Your Honors' ruling. I assume that the
6 redaction of the envelopes has been complete. But at
7 the end of the day, the Court is left with a
8 conundrum, it seems to me, in determining how it can
9 issue a judgment that says who got the highest number
10 of legally cast votes unless it applies it across the
11 board. And if the sole remedy is a pro rata
12 reduction, then so be it. We would still prefer to
13 have the obverse and, that is, to have the standard
14 that was applied on election night, which clearly I
15 think the evidence has demonstrated is a substantial
16 compliance standard, one that differed frankly from
17 county to county. We think that standard should be
18 applied to these group of rejected absentee ballots
19 and that would take care of the issue but we
20 understand and accept Your Honors' ruling to the
21 contrary. But given these circumstances, we think
22 that the Court should rule that -- that a legally cast
23 vote is a legally cast vote is a legally cast vote,
24 with apologies to Gertrude Stein. Thank you.

25 JUDGE MARBEN: Mr. Elias?

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1 MR. ELIAS: Your Honors, I want to begin by
2 apologizing. I have tried mightily to follow the
3 argument that is being made and it may be as has
4 become clear through this trial, there are some very
5 experienced litigators to my left and to my right and
6 I am largely a regulatory lawyer. So as I listen to
7 Mr. Langdon, I feel quite at home because in federal
8 agency work we do audits. We sort of all get in a
9 room with documents and we sort of sort them through
10 together and we try to divine sort of what -- what
11 comes out.

12 Here, however, though, as I understand it,
13 we're in a court process where parties plead their
14 claims and they filed a Notice of Contest, perhaps
15 more hastily than they now wish they had. They filed
16 on the first day they could. They could have waited a
17 few days perhaps, sort of sort these things out
18 internally, but they chose not to do that. They chose
19 to file on the first day and when they did, they made
20 their claims.

21 We did in fact file a motion in limine
22 because we had concerns that they were trying to
23 expand the universe of ballots that they thought were
24 improperly rejected from what they pled. They never
25 raised that in fact it was not 12,000 ballots that

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1 they were seeking to have reviewed, which the Court by
2 that motion limited to approximately 4800, but in fact
3 it was 290,000 ballots that they sought to have
4 reviewed. And in fact during five weeks of testimony,
5 as I watched auditor after auditor after auditor take
6 the stand, they chose to pursue a claim about
7 improperly rejected ballots.

8 I listened to counsel tell this Court that
9 we are near done. Indeed, I believe they said that
10 they have only left whatever the Court decides with
11 respect to Ms. Howell and some final testimony with
12 respect to Mr. Poser and then they're done. So I read
13 this motion and I'm not quite sure I understand what
14 they wish to do. I mean, it seems what they wish to
15 do is have this Court sort of go off on its own in
16 kind of a rule making or an audit process like we
17 would do in a federal agency. Have you all sort of
18 sit down with stacks of ballots and paper and then
19 come back to us and tell us what you have found in
20 applying the law as the Court finds it to balance, not
21 in an adversarial process, not with witnesses, not
22 with cross-examination, but rather in sort of
23 quasi-rulemaking or audit circumstance.

24 I am frankly almost without words, which is
25 rare for me I might add, very rare for me. I'm almost

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1 without words to know quite what to do in response to
2 this motion. They say that they -- they would like to
3 be in the position that all -- they could enfranchise
4 voters and yet they stand here to say that they want
5 to go through 280,000 ballots to disenfranchise
6 voters.

7 They say that the highest court of this land
8 -- of this -- I'm sorry -- of this state issued an
9 opinion but it didn't really mean what it meant
10 because that was -- that was a different circumstance.
11 well, there are election judges that reviewed all
12 these ballots, one of them was a Democrat, one was a
13 Republican or at least no two were of the same party
14 to look through these. So there was a process under
15 this review where -- where at least two people
16 reviewed each ballot and if a -- if an election judge
17 of two different parties thought that the ballot
18 shouldn't be counted, it wasn't.

19 They didn't before January 23rd, 2009,
20 suggest a list of ballots that they now want to claim
21 were illegally cast and that was under the Court's
22 February 3rd order limiting in the other direction
23 the date by which we would have had notice. We would
24 have been able to prepare a case. I stand here
25 frankly utterly confused as to what their claim is. I

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1 couldn't even begin to tell you which ballots out of
2 the 280,000 ballots that were cast by absentee they
3 believe were im -- were illegally cast. I don't think
4 they know. I don't think that -- I think that what
5 they want is we'll sort of take all of the 280,000,
6 we'll sort of get a big forklift, we'll take them,
7 we'll plop them here in the courtroom, and then the
8 Court will do something with that. And that simply
9 isn't an appropriate ask that -- request that they
10 make. It's not an appropriate motion that they make.
11 And it certainly does not meet the standards that --
12 that this Court has adopted in terms of the
13 specificity of pleading their claims before this case
14 begins. This comes on the heel of -- or not on the
15 heel. This comes at the very conclusion of their
16 case. If they thought that they had a viable claim
17 for illegal votes being cast on election day, the time
18 to have brought that claim was at the beginning, not
19 after they've announced they have no further
20 witnesses, not on the eve of us being told that we
21 have to subpoena witnesses, which we have started to
22 do, in fact the Court's going to hear from one of
23 those later today, starting next week. So I don't
24 quite know what to make of their claim.

25 Let me say a word about their remedy. We

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1 filed as one our first pleadings in this Court a
 2 motion to dismiss and we moved to dismiss because we
 3 believed that their claim, their genuine claim, the
 4 claim they were really getting at, was that there was
 5 systematic problems in this election, there were
 6 systematic irregularities in the election, and that
 7 they did not -- they were going to ultimately come to
 8 a place where they said nobody can tell what happened
 9 because it was systemic problems. And we said if
 10 that's the case, the proper forum for that is not this
 11 courtroom but, with all due respect, it is the United
 12 States Senate. They professed that that was not the
 13 case. In the strongest terms possible they told us
 14 that was not the case. That what they were seeking to
 15 do was not -- not claim that there were systemic
 16 irregularities, not claim that the system broke, but
 17 rather they were going to bring back -- bring forward
 18 on a ballot by ballot basis instances of ballots that
 19 were improperly rejected or were double counted or met
 20 the other things they pled in their Complaint and we
 21 lost that motion to dismiss. We lost that motion to
 22 dismiss because this Court accepted their
 23 representations that they were in fact not asking this
 24 Court to do what the senate's role is.

25 If Mr. Langdon believes that this Court

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1 cannot determine who won more -- who received more
 2 lawfully cast votes, then he ought to dismiss his
 3 Complaint and take it to the proper forum, which is
 4 the United States Senate. That is not something that
 5 they pled. It is not something they have ever
 6 mentioned until the end of their case.

7 And I dare say the reason why it came at the
 8 end of their case is because they looked at their
 9 evidence, they looked at their case, and they made a
 10 strategic decision, not a decision based on this
 11 Court's order. This Court's order came out on
 12 February 13th. It is now two weeks later than that
 13 and now we have the -- we have to go through 280,000
 14 ballots.

15 Their papers don't speak as to what the
 16 remedy is. And I appreciated the Court asking that
 17 question. It was a question I myself was -- was
 18 interested in knowing the answer to. Pro rata
 19 reduction? Where -- where in the contest statute is
 20 pro rata reduction? Where in their pleadings is pro
 21 rata reduction? Pro rata reduction on a statewide
 22 basis? On a county basis? On a precinct basis? On a
 23 subprecinct basis, on a street basis, targeted using
 24 the cherry-picked data base they used to do the rest
 25 of their pleadings? what basis are we to decide to --

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1 to take votes and just say, oh, we're going to take
 2 this one out, we'll take this one out, we'll take this
 3 one out? If they believe that this Court cannot do
 4 the job that they've asked it to do, they ought to
 5 dismiss their Complaint. They ought to dismiss their
 6 Complaint. And not on the eve of them resting come up
 7 with a new theory, an entirely new theory of what they
 8 ask from this Court.

9 There is, as this Court has ruled several
 10 times, clear standards as to what the law requires for
 11 an absentee ballot to be counted. Those standards
 12 were clear during the recount. They were clear on the
 13 morning of January 6th when they filed their election
 14 contest. They were clear when they stood up in
 15 opening statements. They were clear when Mr.
 16 Friedberg asked the first witness be sworn and they
 17 have been clear ever since. They cannot use the
 18 excuse of this Court's order as a predicate to first
 19 seek to undo a stipulation that they'd entered into
 20 unsuccessfully and now try to reorder this case in its
 21 entirety from a case about what ballots were
 22 improperly rejected into some type of administrative
 23 audit review of every ballot cast on election day by
 24 absentee. I would suggest that the silence in their
 25 papers on what the proper remedy is deafening. And

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1 Mr. Langdon's edition today is quite tepid and it's
 2 tepid for a reason, they don't have a remedy.
 3 Instead, they wish to simply cast doubt on this
 4 process as it comes to a conclusion of their case and
 5 the Court ought not to consonance that and ought to
 6 deny their motion. Thank you. I'll answer any
 7 questions. (Pausing.) Thank you.

8 JUDGE MARBEN: I have one question, Mr.
 9 Elias, and it relates to the *Be'll versus Gannaway* case
 10 that I asked Mr. Langdon about. Are you aware of any
 11 authority that in an election contest this Court can
 12 look at votes that have been cast and counted already?

13 MR. ELIAS: Not within Minnesota, no. No,
 14 Your Honor. In other states there are but those are
 15 states that pro -- whose laws specifically provide for
 16 that.

17 JUDGE MARBEN: Any response, Mr. Langdon?

18 MR. LANGDON: Yes, Your Honor. To respond
 19 to Your Honor's last question, I believe there are
 20 such authorities in Minnesota and I believe we cited
 21 them in our brief but there are a series of cases that
 22 talk about the fact that the Court cannot sanction an
 23 illegal vote. These are -- all contests, to the
 24 extent that they don't deal with absentee ballots, are
 25 always in a situation where the votes have already

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1 been cast and sometimes have to be undone.

2 JUDGE MARBEN: I mean, isn't there a
3 distinction though between challenging a ballot on its
4 face after its been cast and a distinction between
5 that and actually challenging the vote by an absentee
6 voter, you know, the voter envelope and the
7 registration requirements and whatnot?

8 MR. LANGDON: Well, yes, there's a
9 difference between voting absentee and voting in
10 person but I'm not --

11 JUDGE MARBEN: Well, what it -- I'm probably
12 asking the question poorly but once the votes are cast
13 and you have all these ballots, you can certainly look
14 at the ballots and see whether or not they've been
15 marked properly or whether there are any identifying
16 marks on the ballots that would disqualify them?

17 MR. LANGDON: That's correct.

18 JUDGE MARBEN: But once you take a ballot
19 out of an absentee ballot envelope and it's cast, are
20 you aware of any case law that would allow us to
21 address that particular vote?

22 MR. LANGDON: I believe that I am but I
23 can't pull it out off the top of my head and I guess I
24 would request an opportunity to submit that to you yet
25 today because I believe the answer is yes. I don't

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1 believe that you can have a statutory scheme that
2 essentially says then that what the election judge
3 decides in accepting an absentee ballot can never be
4 reviewed because it seems to me that would be the
5 logical result of what you're saying, that a contest
6 Court could then only ever address rejected absentee
7 ballots and never accepted absentee ballots because
8 there's no way to tie them to the envelope and the
9 envelope is what determines in this instance whether
10 such a ballot was illegally cast or legally cast.
11 Essentially the Court would be saying there is no
12 review in those circumstances.

13 JUDGE REILLY: We've spent most of our time
14 looking at envelopes and --

15 MR. LANGDON: Yes.

16 JUDGE REILLY: -- not at ballots themselves,
17 although we've seen some ballots themselves. And so
18 maybe you can help me out. I don't remember in the
19 ballots that I've seen and evidence in this trial that
20 AB is stamped somewhere on the ballot?

21 MR. LANGDON: It's not.

22 JUDGE REILLY: And so if we were to bring in
23 all 2.9 million ballots cast in this election that
24 have been counted, there would be no way to say this
25 was cast at the polls or this was cast absentee, is

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1 that right?

2 MR. LANGDON: That is my understanding, with
3 the possible exception that I think the evidence
4 suggests that you can make a strong inference that in
5 any situation in which there are originals and
6 duplicates, there're likely to be absentee ballots
7 because of the way they were folded in the envelopes.
8 But, generally speaking, to answer your question is --
9 is, no, you cannot. So there is no way to trace it
10 either to a particular vote or even to an absentee
11 ballot.

12 JUDGE REILLY: And in fact would there be
13 any way to trace it to a location? Are they still
14 segregated ward and precinct or not?

15 MR. LANGDON: Well, I don't -- I don't know
16 the answer to that. I doubt that -- I mean, you still
17 can't trace the specific ballot. You can trace the
18 absentee envelope to a specific location and precinct.

19 JUDGE REILLY: But not to a ballot if it's
20 been counted?

21 MR. LANGDON: No, absolutely not. You
22 cannot trace it to a ballot which is why Courts have
23 used in these circumstances pro rata reductions.

24 JUDGE REILLY: I have read a lot of the
25 election cases in Minnesota. I can't remember reading

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1 one that talks about a pro rata reduction.

2 MR. LANGDON: I may be wrong in my memory
3 but I'm remembering one and I'd like the opportunity
4 to be able to tell you whether I'm right or wrong yet
5 today if that's acceptable?

6 JUDGE REILLY: (No response.)

7 MR. LANGDON: The other issue that I'd like
8 to respond to is the notion that somehow we're coming
9 up with an entirely new theory, that we're changing
10 gears at the end of our case. It's just not so. It
11 seems to me, as I understand our theory from day one,
12 has been that similarly situated absentee ballots
13 should be treated similarly. That's what we started
14 talking about. We thought the -- the correct standard
15 was substantial compliance. The Court has now said,
16 no, the correct standard is strict compliance, with
17 the minor exception where the voter has made no
18 mistake and is solely the result of official error
19 that a ballot has been rejected. All we're saying now
20 is, whatever the standard is, it has to be applied
21 equally to all similarly situated ballots. That's
22 simply what we're asking for here. It's what we've
23 asked for from the beginning. And to the extent that
24 it's not, then what we have is a situation where on
25 election day the rules of the game were one thing as

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1 they were applied by election judges throughout the
2 state, essentially as we've proven, a substantial
3 compliance standard.

4 Now with respect to these ballots, the rules
5 are strict compliance and, you know, whether the Court
6 intends it or not, and I'm sure that you don't, it is
7 changing the rules in the game and that to us
8 signifies an equal protection issue, among other
9 things, and that's the result. I mean, that's --
10 that's what we're concerned about. That's why we
11 bring this motion. Thank you.

12 JUDGE MARBEN: Thank you.

13 MR. ELIAS: May I have just 30 seconds to
14 respond to one thing?

15 JUDGE MARBEN: Mr. Elias?

16 MR. ELIAS: I think there's one point that
17 is just fundamental to -- to their -- the place that
18 we find ourselves. They had choices to make. Every
19 litigant has choices to make about what claims to
20 bring, what claims not to bring, what claims to
21 abandon, what claims to pursue, and we cannot have a
22 judicial system that works if litigants get to change
23 those choices based on how they feel things are going
24 at trial. The fact is, there was never a substantial
25 compliance standard in this state, never, ever, ever.

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1 And if Mr. Langdon believes so, then he simply misread
2 the law. It's not this Court's ruling that said there
3 was not a substantial compliance standard. The
4 Supreme Court of this state had said on several
5 occasions there was not a substantial compliance
6 standard. So there was no mistake. This is now I
7 feel like the second time I -- we stand up here with
8 the other side alleging there was a mistake of law by
9 both sides that now gives them the extraordinary right
10 to go back and uncount votes. That isn't true. There
11 was no mistake of law. We understood what the law is
12 and I suspect they did too. So there was never a
13 substantial compliance standard in this case.

14 If they wanted this law -- this lawsuit that
15 they brought, that they brought on the first day they
16 could have, if they wanted this lawsuit to be about
17 going through 2.9 million ballots, then they should
18 have pled it. And if they wanted it to be about a
19 subset of ballots, they should have pled it. And if
20 they wanted it to be about accepted ballots in certain
21 counties, they should have pled it. And when the
22 witnesses were here, they should have asked them about
23 it. But to wait until the close of their case to drop
24 this on the Court and say, well, Your Honor -- not
25 even, Your Honor, we're going to put on a case, not

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1 we're going to put on the case, no. Your Honor, we'd
2 like you, we'd like this Court to go apply its order
3 to all these ballots. I think that that is
4 extraordinary and it is not something that should be
5 granted. Thank you.

6 JUDGE MARBEN: Thank you, counsel.

7 The next motion that's on the calendar for
8 argument is the Contestants' motion to strike
9 counterclaims made by Contestee. Who will be arguing
10 this motion on behalf of the --

11 MR. LANGDON: Your Honor, I would be arguing
12 it but my understanding is that my esteemed boss, Mr.
13 Friedberg, has made a stipulation with someone who
14 fits the same bill on the other side taking care of
15 this motion. Am I correct, counsel?

16 MR. LILLEHAUG: You are.

17 May I address the Court?

18 JUDGE MARBEN: Mr. Lillehaug?

19 MR. LILLEHAUG: My understanding, that I'd
20 like to state for the record and obtain Mr.
21 Friedberg's agreement, is that with respect to the
22 amended counterclaims, that the Contestee withdraws
23 the counterclaim with respect to Becker County and
24 that in all other respects the amended counterclaims
25 will stand as pleaded. In other words, they've

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1 withdrawn some claims during the course of this
2 proceeding. We're withdrawing the Becker County
3 claim.

4 JUDGE MARBEN: And, Mr. Friedberg, I assume
5 that's agreeable?

6 MR. FRIEDBERG: May I have a second?
7 (Whereupon, a brief discussion off the
8 record.)

9 MR. FRIEDBERG: That's fine. I can hardly
10 object to that.

11 JUDGE MARBEN: Well, that stipulation will
12 be noted.

13 JUDGE REILLY: And happily received.

14 JUDGE MARBEN: And happily, yes.

15 JUDGE REILLY: When I read the City of
16 Duluth papers, it noticed the motion for 1:00. We
17 thought it was 1:30. Does -- what time do you all
18 think it is?

19 MR. HAMILTON: I didn't receive a specific
20 notice for when it was -- it was going to be presented
21 to the Court, so I --

22 MR. ELIAS: We were going to be here anyway.

23 MR. HAMILTON: We're here. We're prepared
24 to argue it now, at 1:00, at 1:30, or whenever the
25 Court would like.

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1 JUDGE REILLY: We should probably have the
2 City of Duluth here.

3 MR. HAMILTON: It would probably be better.

4 JUDGE REILLY: Okay.

5 JUDGE MARBEN: Okay. We'll stand in recess
6 until 1:00 o'clock.

7 (Whereupon, the noon recess was taken.)

8 JUDGE MARBEN: Okay. This is the motion to
9 quash the subpoena of Jeffrey Cox. Is there a
10 representative from the City of Duluth present.

11 MS. LUTTERMAN: There is, Your Honor. Good
12 afternoon. I'm Alison Lutterman. I am the Deputy
13 City Attorney for the City of Duluth.

14 JUDGE MARBEN: And who is going to be
15 arguing the motion on behalf of the Contestee?

16 MR. HAMILTON: It will be I, Your Honor.

17 JUDGE MARBEN: Okay, Ms. Lutterman, we've
18 had an opportunity to review the memorandum that you
19 submitted to the Court. You may proceed.

20 MS. LUTTERMAN: Thank you, Your Honor. And
21 thank you for taking the time to review our memorandum
22 on such short notice and, therefore, I will try and
23 take as little time of the Courts as possible.

24 We are here today because Mr. Cox and the
25 City of Duluth have chosen to assert the rights of a

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1 witness under Rule 45.03(d) of the Minnesota Rules of
2 Civil Procedure.

3 I have had an opportunity before the Court
4 came into session to have review Mr. Franken's
5 response to the City's motion and it appears to be
6 that the two principal objections to the request to be
7 reasonably compensated, as is required by the rules,
8 relate to the fact that this is a proceeding under a
9 state law and that officials from other communities
10 who have been subpoenaed to testify have done so
11 without asserting the rights afforded witnesses
12 pursuant to the Rules of Civil Procedure.

13 I note that counsel does not accuse the City
14 of having a position unsupported by the rule,
15 especially its express language, nor does counsel seem
16 to suggest that the movant's position is unsupported
17 by the case law interpreting the rule. Instead, the
18 opposition seems to be an accusation that the movants
19 have been ambitious. And I would suggest to the Court
20 that if asserting one's right is ambitious, then
21 everyone here is equally guilty because this obviously
22 is a proceeding where these two candidates for the
23 office of Senator are asserting their rights.

24 The language of the rule is very clear. The
25 language of the rule does not contain an exemption

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1 when it is a statutory proceeding. The language of
2 the rule does not contain an exemption just because
3 the litigants are seeking the office of Senator. The
4 language of the rule does not indicate that public
5 employees are not entitled to the protections of the
6 rules. In fact the only case where the Court was
7 discussing public employees and whether they are
8 entitled to the protection of the rules was the *Howard*
9 case which I have cited in our memorandum. And in
10 that case the Court of Appeals held that the police
11 officers in an implied consent proceeding would not be
12 entitled to compensation under the rules because they
13 were in fact critical agents of a party to the action,
14 the party being the Commissioner of Public Safety, and
15 in fact the officers being the agents that essentially
16 commence the proceeding by arresting the individual
17 and revoking the license. And, therefore, the court
18 concluded that because the police officers in that
19 very unique situation was an agent of a party, that
20 the rules did not provide for compensation to the
21 police officers.

22 We do not have such a case here. The city
23 clerk of the City of Duluth is not a party to this
24 action. The City of Duluth is not a party to this
25 action. Neither the City of Duluth or its employee

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1 are agents of a party to this action. What the City
2 of Duluth and Mr. Cox are, Mr. Cox is employed by a
3 city suffering a financial crisis. Every year for the
4 last ten years its employees have been asked to figure
5 out how to cut the City's budget. There are empty
6 desks all over City Hall. We run a lean, small staff
7 machine and when we have to lose one of our employees
8 for who knows how long, a day, two days, we don't know
9 because we don't know when he's going to be called, we
10 don't know if he'll have to come down the night
11 before, we don't know if he will have to stay in a
12 hotel, we don't know if he will be called till late in
13 the day and have to spend another night in a hotel.
14 when we lose the time of our staff, it costs the City.

15 And that's all the City and Mr. Cox are
16 asking Mr. Franken to recognize, that we have a right
17 under the rule for reasonable compensation. We
18 figured out Mr. Cox' hourly rate based upon what we
19 pay him, plus his benefits. It's \$60 an hour. And,
20 I'm sorry, but the 28 cents a mile in mileage that's
21 offered by the statute is wholly inadequate, even the
22 IRS agrees so because right now the IRS says the
23 compensation rate is .505 miles per gallon. This is
24 what the City pays its employees to travel. It's what
25 the IRS concludes is the cost of running a vehicle.

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1 It's a reasonable compensation. We need compensation
2 for the parking that has to be paid because I just
3 parked over at that ramp and it was a buck 50 an hour.
4 That's expensive. Hotels are not cheap. Meals and
5 restaurants are not cheap. All we're asking is for
6 the City of Duluth and its citizens not to finance
7 this litigation. We already have enough money
8 troubles.

9 And so, Your Honors, we've made a demand for
10 payment in advance of what we reasonably predict to be
11 the cost to the City and Mr. Cox of having to appear
12 in court as a witness to testify in this case. We are
13 not being ambitious. We are asserting our rights
14 which the rules and the laws allow us to do. Thank
15 you.

16 JUDGE MARBEN: Thank you.

17 Mr. Hamilton?

18 MR. HAMILTON: Thank you, Your Honor. Over
19 the course of the last five weeks this Court has heard
20 testimony from a variety of state, county, and local
21 officials from across the state, from the smallest
22 counties to some of the most senior election
23 officials. The Court's considered thousands of
24 documents and heard from citizens who appeared here
25 and testified all in an effort to provide evidence

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1 relevant to the task before this Court, to determine
2 which candidate received the highest number of votes.
3 Testimony here has no doubt been inconvenient for many
4 of those witnesses who've given up their time and
5 traveled great distances in some cases to appear
6 before the Court. But it is critically important
7 testimony for this Court that calls those witnesses to
8 the stand here to provide relevant evidence.

9 As you know, the Contestants' case is
10 winding up and over the course of the last several
11 days Contestee has began serving subpoenas in
12 anticipation of presenting its own testimony. We
13 subpoenaed several large counties, including Hennepin,
14 Ramsey, St. Louis, and the City of Duluth. In each
15 instance, Contestee, with the subpoena, has served the
16 appropriate statutory witness fee and mileage
17 allowance allowed by statute, together with a cover
18 letter that has explained that we would of course
19 offer every accommodation to the witness in terms of
20 scheduling, advanced notification, scheduling at
21 whatever time of the day would minimize the burden on
22 the counties. To date, the only witness that we know
23 of that's objected in five weeks of this trial is Mr.
24 Cox, who objected and insisted on an advance hourly
25 payment of \$60 an hour to be charged 24 hours a day

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1 with a minimum \$1,000 advance payment. When Contestee
2 refused to make those payments, Mr. Cox filed a motion
3 at bar seeking to quash the subpoena and then began a
4 bargaining session, perhaps, you know, if you can
5 guarantee us that we would be on and off in one day,
6 then we would only require \$600. Minnesota law does
7 not require the payment of these sums over and above
8 the statutory witness fee to a public election
9 official who is required to provide testimony in this
10 statutory election contest.

11 There have been auditors from Crow wing,
12 Lyon, Becker, Beltrami, and in a large number of other
13 counties throughout this state, not one of which has
14 received additional payments. Senior election
15 officials, including Mr. Poser and Mr. Gelbmann, have
16 appeared in this court. They have received no
17 additional payments. So I believe the motion to quash
18 should be denied. It is not well-founded.

19 And let me -- let me address counsel's point
20 and to be clear, the statute does not -- the rule does
21 not require payment in these circumstances. The rule
22 mandates that, "One who is required to give testimony
23 or produce documents relating to 'a profession,
24 business or trade, or relating to knowledge,
25 information or facts obtained as a result of

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1 activities in such profession, business or trade, is
2 entitled to reasonable compensation for time and
3 expense." It's Rule 45.03, sub (d).

4 The rule does not apply to election
5 officials called to testify in a statutory election
6 contest and there is no law in the State of Minnesota,
7 no case, no statute, no interpretive rule, that's ever
8 applied this to an election official called to testify
9 by activities occurring within the scope of their
10 duties. The auditors from other counties, it's not
11 that they didn't assert their rights. It's that they
12 didn't have the right to seek compensation for giving
13 testimony. It's their obligation. It's part of their
14 job as election officials of the state.

15 The case law cited by counsel, *Howard versus*
16 *City of St. Louis Park*, dealt with a police officer
17 and it was a statutory implied consent proceeding. In
18 that case the Court held no additional compensation
19 was required, as was demanded by the police officer in
20 that case who claimed it was his right. The Court
21 disagreed. There is no other case law that I've found
22 in the State of Minnesota applying this statute to
23 public officials when called to testify with respect
24 to their public duties. And so to be clear, our
25 position is, the statute does not require it.

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1 Now we will do everything we can to
2 accommodate the City of Duluth, as well as the other
3 auditors and indeed the citizens who have been called
4 to testify before this Court. We've issued subpoenas
5 and in every case included a cover letter encouraging
6 them to call, if the time is inconvenient, to schedule
7 a convenient time, to give them directions, to do
8 everything we can to make this as painless and smooth
9 as possible, and of course we offer the City of Duluth
10 and Mr. Cox no less.

11 But the rule should not be applied to a
12 statutory election contest and particularly one of
13 this significance. The issues raised here go straight
14 to the core of Mr. Cox' job as the city clerk and as
15 the senior election official for the City of Duluth.
16 His testimony here will be limited to those areas of
17 which this Court has heard ballots, ballot envelopes,
18 absentee ballot envelopes. It may well be
19 inconvenient for Mr. Cox to come here and we'll do
20 everything we can to minimize that. But for an
21 election official testifying in an election contest is
22 fulfilling one of the core responsibilities of that
23 election official's job. Mr. Cox is a salaried
24 employee. He will be out no out-of-pocket costs for
25 his time spent here.

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1 The -- the \$60 an hour, 24-hour rate,
2 according to counsel's -- according to the motion,
3 appears calculated to design to compensate him for,
4 among other things, time lost with his family. I dare
5 say that there are a large number of people that have
6 been involved in this election contest from the
7 beginning, from Your Honors themselves, to counsel, to
8 clerks, to public officials, to citizens who've
9 testified in this court that have lost time with their
10 family and incurred the inconvenience of testifying
11 before them. This statute does not require these
12 kinds of payments. I'm sorry that -- that we are
13 before you on this kind of a dispute in this kind of a
14 case but respectfully submit the motion should be
15 denied.

16 JUDGE MARBEN: Mr. Hamilton, what would be
17 your position if the testimony of this witness takes
18 more than one day?

19 MR. HAMILTON: I'm sorry?

20 JUDGE MARBEN: What would be your position
21 on costs that he'd be entitled to if his testimony
22 takes more than one day?

23 MR. HAMILTON: I believe it would be the
24 same, Your Honor. The rule doesn't make a distinction
25 between extended testimony, as we've heard from some

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1 of the witnesses who've been called to testify and
2 gone on for two or three days. In this case I can
3 almost guarantee that it won't take more than one day.
4 We -- we don't anticipate a lengthy examination of Mr.
5 Cox or representatives from the City of Duluth. There
6 are 35 or so ballots that are directly at issue in
7 this case that come from the City of Duluth. We
8 intend to streamline the presentation of that evidence
9 and we'll do everything we can, as I said, to -- to
10 accommodate him.

11 One last point I should make before I sit
12 down. Counsel complained that the 28 cents statutory
13 mileage fee is wholly inadequate. We didn't design
14 the statutory mileage fee. That -- that is set by the
15 legislature. The legislature of the State of
16 Minnesota can adjust that and I've no doubt that
17 counsel's comments will find their way to the ears of
18 the legislature. But unless and until the statute
19 changes, that is the mileage requirement required for
20 a witness, not only in this proceeding but in every
21 proceeding in the state.

22 So if there are no further questions?

23 (Pausing.) Thank you, Your Honor.

24 JUDGE MARBEN: Thank you. Okay. We'll get
25 out an order on that matter or --

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1 MR. GILBERT: Your Honor, could I be heard
2 on behalf of the Secretary of State's office?

3 JUDGE MARBEN: And your --

4 MR. GILBERT: Alan Gilbert with the Attorney
5 General's office.

6 JUDGE MARBEN: I knew who you were. I meant
7 your involvement in -- in this subpoena issue --

8 MR. GILBERT: Yeah. Perhaps I could --

9 JUDGE MARBEN: -- your standing?

10 MR. GILBERT: Yes. Perhaps I could just
11 explain? I --

12 MR. HAMILTON: If I might voice my objection
13 before you begin your --

14 MR. GILBERT: Yeah.

15 MR. HAMILTON: -- argument? I do object to
16 Mr. Gilbert appearing here in this matter in the fifth
17 week of this election contest. There have been county
18 officials -- first of all, I just don't believe that
19 the Secretary of State or Mr. Gilbert has standing to
20 intervene and -- and speak and address this issue.
21 The City of Duluth and Mr. Cox are ably represented by
22 competent counsel and I don't believe that having the
23 solicitor general of the state address these issues at
24 this point is appropriate.

25 MR. GILBERT: Thank you. Your Honor, I was

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1 apprised of this motion yesterday by the administrator
2 of the court and at least there was some indication
3 that the Court might have an interest in knowing what
4 the position was of the Secretary of State on this
5 issue and perhaps I misunderstood that. But to the
6 extent the Court has an interest in hearing the
7 position of the Secretary of State, I'm here to
8 communicate that. I understand that I have not
9 formally intervened on behalf of the Secretary of
10 State in this particular matter and the Court
11 concludes it's not appropriate at this time to
12 communicate the Secretary's position, I certainly
13 won't do that. But it was based upon my understanding
14 that there were some interest on behalf of the Court
15 to understand what the Secretary's position is that --
16 that I am here. And if I misunderstood that, that --
17 that's fine.

18 JUDGE MARBEN: We're going to take a short
19 break.

20 (Whereupon, a brief recess was taken.)

21 JUDGE MARBEN: Mr. Gilbert, the panel has
22 discussed the matter and we appreciate your being here
23 but the panel does not need to know the Secretary of
24 State's position in the matter to make a decision on
25 the issues that have been raised but thank you very

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1 much and we apologize for any misunderstanding.

2 MR. GILBERT: No problem. Thank you.

3 JUDGE MARBEN: And then, counsel, if we
4 could see you in chambers to discuss scheduling issues
5 for next week? We'll stand adjourned until 9:00 a.m.
6 on Monday. But, Mr. Gilbert, this will include you.

7 MR. GILBERT: Okay. I'm glad I'm here then.

8 (Whereupon, the trial proceedings
9 adjourned.)

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