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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,
 10 CULLEN SHEEHAN AND NORM COLEMAN,
 11 CONTESTANTS,
 12 VS.
 13 AL FRANKEN,
 14 CONTESTEE.

FILED
Court Administrator
 APR 30 2009
 By *[Signature]* Deputy

FILE NO.
 62-CV-09-56

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 17 VOLUME 35
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1 THE AFOREMENTIONED court session took place on the 13th day
2 of March, 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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W I T N E S S E X A M I N A T I O N I N D E X

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C O N T E S T A N T S ' & C O N T E S T E E
E X H I B I T I N D E X

EXHIBITS:

OFFERED

RECEIVED

C412, C413, C414, C421, C422, C423		8
C411 & C502 (withdrawn, page 8)		
C1100 through 1158	9	
C1156, C1157, C1158	10	
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1 FRIDAY MARCH 13, 2009 9:00 A.M.
 2 JUDGE HAYDEN: We will start with the issues
 3 regarding exhibits that may or may not have been
 4 addressed and have not been received. The panel
 5 appreciates your having worked with the clerk to
 6 determine what matters are still unresolved and at
 7 this time, Mr. Friedberg, I'll allow you to begin. I
 8 understand there have been some exhibits that were
 9 preliminarily received? Mr. Langdon?

10 MR. FRIEDBERG: Your Honor, Mr. Langdon is
 11 handling this issue.

12 JUDGE HAYDEN: Thank you.
 13 Mr. Langdon?

14 MR. LANGDON: Thank you, Your Honor. That's
 15 my understanding as well. I think that we resolved
 16 most of them yesterday afternoon with Mr. Lillehaug
 17 and I but there are a few that are still open as I
 18 understand it.

19 JUDGE HAYDEN: I will begin with the list
 20 that I've been given by the clerk. Then I will ask
 21 counsel if that is consistent with your findings:
 22 C412, C413, C414, C421, C422, and C423. My
 23 understanding from the clerk's information is that
 24 those were preliminarily received. I don't have them
 25 separated in front of me but I understand they're

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1 dealing primarily with Carver County?

2 MR. LANGDON: That is correct. And Scott
 3 County as well, Your Honor.

4 JUDGE HAYDEN: Scott and Carver.

5 MR. LANGDON: They are collections of
 6 ballots from each of those counties related to
 7 particular issues or categories.

8 JUDGE HAYDEN: If my memory serves me, the
 9 exhibits were used individually to identify
 10 information that was available or not available
 11 pertaining to the individual voter?

12 MR. LANGDON: That is my understanding.

13 JUDGE HAYDEN: Mr. Lillehaug, your objection
 14 was, if you can repeat that?

15 MR. LILLEHAUG: The objection with respect
 16 to all of those exhibits was foundation and
 17 authenticity. As the Court will recall, that came
 18 pretty hard on the heels of the issues at the
 19 beginning of the case with respect to how the
 20 Contestants' exhibits were assembled, copied, and in
 21 some cases with handwritten additions and redactions.
 22 So we made it -- we objected to those exhibits on
 23 foundation and authenticity grounds.

24 JUDGE HAYDEN: Thank you. That was the
 25 essence of the panel's discussion earlier this

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1 morning. Based upon that information, the Court is
 2 now going to receive those exhibits and will determine
 3 what weight they shall be given.

4 Moving then, I understand, Mr. Langdon, the
 5 Contestant intends to withdraw two exhibits. Tell me
 6 if I have this correct, C411 and C502?

7 MR. LANGDON: You have it correct, Your
 8 Honor.

9 JUDGE HAYDEN: And are they now withdrawn?

10 MR. LANGDON: They are.

11 JUDGE HAYDEN: Thank you.

12 For purposes of the record, the Court
 13 returned to the Secretary of State's office disks
 14 yesterday containing the data base of the Secretary of
 15 State. I believe I saw Mr. Friedberg do the same. I
 16 just simply want to make a record that that
 17 information is no longer in the hands of the -- the
 18 Court or counsel?

19 MR. LANGDON: That is correct, Your Honor,
 20 for Contestants.

21 MR. HAMILTON: For Contestees, we have the
 22 -- the disk and we will return it --

23 JUDGE HAYDEN: Thank you very --

24 MR. HAMILTON: -- by the end of the day.

25 JUDGE HAYDEN: All right. Thank you very

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1 much.

2 There are some issues remaining. Mr.
 3 Langdon, you may be heard on those.

4 MR. LANGDON: We simply had the additional
 5 exhibits that were talked about yesterday morning to
 6 be offered this morning. At Mr. Friedberg's
 7 suggestion and the panel's request, we collated them
 8 by voter. These are all VRA secrecy envelopes and
 9 there are Exhibits 1100 through 1158 that we provided
 10 to the Court in a notebook and to opposing counsel.
 11 And these simply collate what we offered yesterday but
 12 putting them voter by voter to make it easier for the
 13 Court to see it.

14 I would point out that there are three
 15 exhibits, the last three, 1156, 57, and 58, that as I
 16 told Mr. Lillehaug, the certifications from the
 17 counties for those three voters came back yesterday
 18 morning but it was after the book was already in the
 19 courtroom this morning or yesterday morning. I wanted
 20 to alert the Court and opposing counsel to that. We
 21 still believe they're timely and do offer them but I
 22 wanted to make that clear.

23 JUDGE HAYDEN: The final three
 24 certifications that were late in being filed, are they
 25 corrections of earlier filed certifications or are

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1 they new since the deadline?

2 MR. LANGDON: These are all -- these are all
3 outside of the other set that we talked about with
4 respect to the deadline, Your Honor. These all have
5 to do with the VRA voters and the -- and the
6 registration applications that were found within the
7 secrecy envelopes.

8 JUDGE HAYDEN: Okay. Thank you.

9 MR. LANGDON: And it was the subject I
10 believe of Contestee's motion to quash an in limine
11 that was argued in court the other day.

12 JUDGE HAYDEN: Thank you. That -- I believe
13 they're here. I haven't located them just yet.

14 Then the response to that offer, Mr.
15 Lillehaug?

16 MR. LILLEHAUG: Your Honor, we object to
17 Exhibits C1100 through C1158 on several grounds.
18 First, as the Court recalls, Mr. Friedberg did
19 represent that everything except envelopes would be
20 removed. That turns out not to be the case. For
21 example, in the very first exhibit there's an absentee
22 ballot application and there are a variety of
23 certifications.

24 Second, and most importantly, we object on
25 the ground that all of this evidence, with the

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1 exception of the voter registration applications
2 themselves, is beyond the scope of Contestee's case.
3 The Contestants made their decision as to what they
4 were going to prove up in their case and by in large
5 these envelopes and absentee ballot applications were
6 not offered, were not received, were not submitted in
7 connection with Contestants' case.

8 Now the fact that voter registration
9 applications were discovered, most certainly the VRAS
10 themselves, can be offered and are admissible but they
11 cannot use that to bootstrap reopening their case in
12 chief and putting in envelopes and absentee ballot
13 applications that were not offered and received during
14 the case.

15 And then finally, we object to the last
16 three exhibits. There was a deadline that was
17 established and we appreciate Mr. Langdon's candor in
18 noting that these certifications arrived after the
19 deadline.

20 JUDGE HAYDEN: Thank you. The panel will
21 look at those exhibits before making a decision as to
22 their admissibility and that is as to C1100 through
23 C1108.

24 MR. LILLEHAUG: 58.

25 JUDGE HAYDEN: 58? Thank you.

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1 I neglected to ask you about the exhibits
2 regarding Hennepin County voters that were offered
3 through Pamela Howell and, I'm sorry, I don't have
4 that number.

5 MR. LILLEHAUG: Your Honor, we inquired with
6 respect to Exhibit C152 --

7 JUDGE HAYDEN: Thank you.

8 MR. LILLEHAUG: -- which were certain
9 ballots from Precinct 12-8 that were offered by the
10 Contestants, objection was made, and we wanted to
11 clarify the ruling on that.

12 JUDGE HAYDEN: Thank you.

13 C152 is now in front of the panel and we
14 looked at it this morning; wanted further information
15 before making a decision.

16 Tedious as it may be, I would like the
17 Contestant to go through each of these to tell us what
18 we have, whether we have a duplicate, whether we have
19 an original, and then offer them as to their
20 relevance.

21 MR. LANGDON: My understanding, Your Honor,
22 is that these are the challenged originals from
23 Minneapolis Precinct 12-8, the precinct in which Ms.
24 Howell was an election judge. These were offered
25 through Ms. Reichert and, as I understood it, they had

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1 been accepted but then there was an issue that Mr.
2 Lillehaug raised asking to have certain exhibits
3 stricken as a result of Ms. Howell's testimony. I
4 think this was among them. We understood that the
5 exhibit had been admitted.

6 JUDGE HAYDEN: Thank you.

7 Do you have a different recollection, Mr.
8 Lillehaug?

9 MR. LILLEHAUG: My recollection is the same
10 and that's why I wanted the clarification. My
11 recollection though is that it was not admitted.

12 JUDGE HAYDEN: That it was not admitted?

13 MR. LILLEHAUG: Yes.

14 JUDGE MARBEN: Counsel, do you have the date
15 that it was offered or not offered?

16 THE CLERK: February 25th at 4:07 in the
17 afternoon.

18 JUDGE MARBEN: February 25th?

19 MR. LILLEHAUG: February 25th at 4:07 in the
20 afternoon.

21 (Laughter.)

22 JUDGE HAYDEN: very well done.

23 (whereupon, a brief discussion off the
24 record between the Judges).

25 JUDGE HAYDEN: we're trying to verify from

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1 either our notes or the transcript. We have no
2 indication that it was received but we have no
3 indication firmly that it was found to be
4 inadmissible. What we will do is check the transcript
5 to verify that.

6 Mr. Lillehaug?

7 MR. LILLEHAUG: Your Honor, I checked the
8 transcript on that last night. This came hard on the
9 heels of the Court's ruling with respect to striking
10 Pamela Howell's testimony and that's why I made the
11 motion or, more accurately, objected with respect to
12 the admissibility of C152 and the Court indicated in
13 the transcript, which I do not have with me today,
14 that it would consider that matter. And so I think it
15 -- it is truly an open issue. The exhibit has not
16 been admitted nor has the objection been sustained.

17 JUDGE HAYDEN: We'll take a look at that and
18 get a ruling to you very shortly.

19 Are there other preliminary matters, and
20 I'll start with the Contestant once again, matters
21 this morning?

22 MR. FRIEDBERG: Nothing, Your Honor.

23 JUDGE HAYDEN: Mr. Lillehaug?

24 MR. LILLEHAUG: Nothing further, Your Honor.

25 JUDGE HAYDEN: We'll take a very short

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1 recess and move then to final arguments?

2 (Whereupon, no response from counsel).

3 JUDGE HAYDEN: All right. Very good.

4 (Whereupon, a brief recess was taken.)

5 JUDGE HAYDEN: My apologies on behalf of the
6 Court for the delay but I just want to assure everyone
7 that because these matters are serious, the rulings on
8 exhibits, the rulings on testimony and exhibits
9 generally, have been taken very seriously by this
10 Court. We have tried very hard not to make rulings in
11 haste and, again, that is what we have been doing now.
12 We have reviewed your offers and the Court makes the
13 following as its rulings:

14 Exhibit Number C152 will be received, with
15 the Court determining the weight that will be given
16 that exhibit.

17 As to Exhibits C1100 through 1158,
18 consistent with Contestants' representations at the
19 time the exhibit was offered, the Court will receive
20 into evidence C1100 through C1155, to include only the
21 voter registration application and the absentee ballot
22 return envelope.

23 As to C1156, C1157, C1158, those exhibits
24 will not be received as they are untimely.

25 I believe those are all of the unfinished

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1 matters.

2 Mr. Lillehaug?

3 MR. LILLEHAUG: Your Honor, with respect to
4 C1100 to 1155, may I add a foundation objection to
5 that as well?

6 JUDGE HAYDEN: You may. Thank you.

7 Overruled. They are received.

8 (Laughter.)

9 With that, are we prepared for final
10 arguments?

11 MR. HAMILTON: Yes, Your Honor.

12 JUDGE HAYDEN: Mr. Hamilton, you may begin.

13 MR. HAMILTON: Thank you, Your Honor.

14 Before I begin, I'd like to take just a moment to
15 thank the Court and staff for the courtesy and
16 patience that you've shown to all of us during the
17 course of this long trial. We collectively have
18 nearly buried the Court in paper and notebooks, filed
19 innumerable motions, many on short notice, and
20 generally imposed burdens on this Court and its staff
21 that perhaps can only be truly appreciated by the
22 counsel sitting at the two tables before you. It's
23 been an honor to appear before you and on behalf of
24 the Franken litigation team, I thank you for the
25 opportunity.

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1 This Court was convened over two months ago
2 for the purpose of hearing an election contest filed
3 by the Contestants to challenge the Certificate issued
4 by the Secretary of State declaring and formally
5 certifying that Al Franken received the highest number
6 of votes in the United States Senate election held on
7 November 4, 2008.

8 Over the course of the last seven weeks
9 Contestants have called a variety of witnesses and
10 election officials, offered copies of absentee ballot
11 envelopes and absentee ballot applications and
12 advanced arguments to challenge that Certificate
13 (indicating). They've argued that some votes should
14 have been counted but weren't. They've argued that
15 some votes were counted but shouldn't have been. And
16 perhaps most audaciously they've argued that the
17 entire electoral system in the State of Minnesota is
18 broken and unreliable and that the state's electoral
19 data base is in their words garbage and corrupt. To
20 put it charitably, Contestants advocacy has rather
21 dramatically outrun their evidence.

22 Minnesota's electoral system is, as the
23 evidence presented over the course of this trial has
24 shown, a model for the nation. Minnesota was among
25 the first states to create a statewide electronic data

1 base which served as a model for the requirement in
 2 the Help America Vote Act that every state create and
 3 maintain such a system. It has detailed, consistent,
 4 and uniform standards for evaluating absentee ballots.
 5 It has robust anti-fraud protections built into the
 6 fabric of the statute governing elections in this
 7 state.

8 Minnesota's auditors and election officials,
 9 many of whom testified in this courtroom, devote an
 10 enormous amount of time, energy, and expertise to
 11 ensuring that elections in this state run smoothly,
 12 accurately, and lawfully. Minnesota has one of the
 13 highest rates of voter turnout in the entire nation
 14 and for good reason, Minnesota's electoral system
 15 works and it works well.

16 And of course elections in Minnesota depend
 17 upon the efforts of thousands of citizen volunteers
 18 who staff polling places throughout the state, working
 19 from very early in the morning till long after dark in
 20 the evening.

21 In seven weeks of trial the evidence has
 22 demonstrated that there were a small number of errors
 23 in this election. One of the voters called by the
 24 Contestants, for example, testified that she signed
 25 the roster page but voted in absentee ballot. Gayle

1 Kecker so testified on February 3rd (indicating).
 2 Election officials have testified to errors
 3 in sending the wrong materials to a registered voter
 4 or overlooking hyphenated names in a poll book or
 5 misplacing relatively small numbers of ballots after
 6 election day. As I said in opening statement, no
 7 election is perfect. No election has ever been
 8 perfect. No election ever will be perfect. That's
 9 the way our democracy works. It relies on citizens.
 10 It relies on volunteers. It enforces rules against
 11 fraud and it recognizes that any inhuman institution
 12 is and always will be imperfect. But the record
 13 simply could not be clearer, that this election was no
 14 different than the many elections that this state has
 15 conducted throughout its history. It was fairly
 16 administered, carefully run, and featured a large
 17 voter turnout.

18 The meticulous hand recount involved
 19 thousands of citizens, elections officials and
 20 campaign volunteers recounting by hand 2.9 million
 21 ballots. In the course of this trial we've developed
 22 a much better sense of just how monumental,
 23 time-consuming and commendable a task that was. The
 24 result of that recount, the Certificate signed by the
 25 Canvassing Board was accurate, complete, and

1 definitive.

2 So to those who would challenge the way we
 3 run our elections and challenge the Minnesota
 4 electoral system that has for years stood as an
 5 example of one of the best run systems in the nation,
 6 to disappointed candidates who would seek to tear down
 7 the system in an attempt to overturn results that they
 8 wish were different, I say to them, prove it. Indeed,
 9 that's precisely why Minnesota law, like the law of
 10 virtually ever other state in the union, requires
 11 Contestant seeking to challenge the Certificate of
 12 Election to demonstrate not just that mere error has
 13 occurred but that if error occurred, it made a
 14 difference in the outcome of the election. And that
 15 is exactly what's missing from the record before this
 16 Court.

17 In all these binders piled up all over this
 18 courtroom and all the testimony from that witness
 19 stand (indicating) over the long seven weeks, after
 20 all of that, Contestants stand bereft before the Court
 21 with virtually no evidence to support any of their
 22 claims, no evidence to support the incendiary
 23 accusations and allegations leveled against Minnesota
 24 and its electoral system and no evidence to overturn
 25 the Certificate issued by the State Canvassing Board.

1 As I mentioned at the outset seven weeks
 2 ago, overturning the results of the recount, the hard
 3 work of the local and State Canvassing Boards and the
 4 State Canvassing Board certification of the results
 5 would be a breathtaking exercise of judicial power.
 6 It should be undertaken only in the rarest of cases
 7 and only on the most powerful evidentiary records.
 8 Nothing close to that has been presented in this
 9 courtroom. Contestants have dropped most of their
 10 claims and to those remaining they have woefully
 11 failed to carry their burden of proof and I'd submit
 12 that their claims must be dismissed.

13 Now as the Court is aware, this trial
 14 commenced on January 26, seven weeks ago, 35 court
 15 days. In that time the Court has heard from 134
 16 witnesses and reviewed 2,182 individual exhibits,
 17 excluding those just admitted this morning, comprising
 18 thousands of pages and compiled in hundreds of binders
 19 scattered throughout this courtroom. 69 voters have
 20 appeared and testified in defense of their ballots.
 21 38 counties and cities have appeared, some after
 22 driving long hours through snowstorms that shut down
 23 interstate highways with drifting snow. Since the
 24 trial began a new federal government has formed,
 25 Congress has convened and even winter seems to be

1 loosing its grip.

2 We'll be submitting a final set of proposed
3 findings of fact and conclusions of law and in some
4 considerable detail reviewing all of the evidence and
5 all of the applicable law. But I'd like to take a
6 moment to review at least some of the more fundamental
7 principles that govern this election contest. First,
8 as this Court has repeatedly noticed -- noted, there
9 is a strong presumption of regularity that attaches to
10 every election. Minnesota Court of Appeals said in
11 the *Kearin versus Roach* case in 1986, "The certificate
12 of the proper canvassing board declaring the result of
13 an election is prima facie evidence of the result in
14 places on the Contestants the burden of showing that
15 the person elected did not receive a majority of the
16 legal votes." And there's a good reason for that
17 legal principle. Election officials charged with
18 administering elections are presumed to act in good
19 faith and to do what the law requires of them. As a
20 result, in an election contest Contestants have the
21 burden of showing that an election is invalid and that
22 if errors occurred, they were sufficiently serious to
23 change the outcome of the election. The law requires
24 proof that an error did in fact change the outcome and
25 that's a heavy and demanding burden.

1 And there appear to be three primary claims
2 advanced by Petitioners (sic) remaining for decision
3 by this Court. First, the claim that a number of
4 absentee ballots were improperly rejected and should
5 be counted. Second, the claim that there was double
6 counting of duplicate ballots in several precincts in
7 Minneapolis. And, third, the claim that the State
8 Canvassing Board committed error in determining that
9 132 ballots in Minneapolis ward 3, Precinct 1, were
10 missing and reverted to the machine tapes as the best
11 evidence of the vote totals from that precinct. I'd
12 like to address each of the Contestants' claims in
13 turn.

14 First of course is the absentee ballot claim
15 and that is the Contestants' central claim before this
16 Court at this point. Contestants contend that there
17 were improperly rejected absentee ballots on election
18 day or during the recount following the Supreme
19 Court's December 18 order. Contestants claim that the
20 opening of such ballots during the recount but changed
21 course once Senator Coleman fell behind and then began
22 arguing there were ballots that should have been
23 opened but were not.

24 Contestants began this trial with a universe
25 of about 4,800 ballots. In its February 13 order this

1 Court made it clear that in order to prevail on having
2 those ballots opened and counted, the Contestants and
3 indeed the Contestees would need to show that the
4 ballots were legally cast and not simply wrongfully
5 rejected. As the Court emphasized in an order ten
6 days later, February 23rd, "The Court cannot order
7 these ballots opened and counted until it is
8 satisfied, based on the evidence, that such ballots
9 have been legally cast."

10 And the Court made it clear in those orders
11 precisely what Minnesota law requires for an absentee
12 ballot to be lawfully cast. This is no secret and it
13 hardly was a new set of rules. Counsel for
14 Contestants in fact had identified most of these rules
15 as far back as December of 2008. Mr. Trimble's e-mail
16 recites in a letter complaining that no absentee
17 ballot should be opened, many of the very rules
18 identified by this Court in its order.

19 This Court made what was clear in Minnesota
20 law even more plain and obvious. It explained that to
21 demonstrate that a ballot was legally cast Contestants
22 must prove a number of facts through competent
23 evidence, through documents admitted, through evidence
24 from the witness stand. First they must show that
25 each ballot they wish to have counted was submitted by

1 a registered voter. To be valid, a registered -- a
2 registration application must contain all of the
3 information required by the statute. It must also
4 have been received by October 14, 2008 or submitted as
5 part of a same day registration application. As the
6 Court noted, even if the voter's failure to register
7 was a result of official errors of omissions, his or
8 her vote cannot count unless the voter was registered.
9 If a voter moves even within the same precinct, he or
10 she must re-register.

11 In addition, Contestants must demonstrate
12 that a voter complied with all the statutory
13 requirements for an absentee voting. And the Court
14 has in its orders made those clear. And through the
15 course of examining witnesses, we emphasized those
16 elements: That the voter has completed an absentee
17 ballot application; that the names and addresses
18 provided on the return envelope for the absentee
19 ballot matched the name and address provided on the
20 absentee ballot application; that the application
21 contained the voter's genuine signature; that the
22 absentee ballot was submitted in a return envelope
23 signed by the voter in the certification box unless
24 there was evidence that it was hand-delivered to the
25 counter and the election -- local election officials

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1 didn't provide the voter an opportunity to correct the
 2 certification. This Court has noted that the
 3 signature on the return envelope must match the
 4 signature of the individual who made the application
 5 for the ballot; the absentee ballot must be witnessed
 6 by a registered voter or a notary public or some other
 7 individual authorized to administer oath -- the oath;
 8 witness must have provided a name, address, and
 9 signature; proof of residence must be shown and
 10 provided on the envelope; the absentee ballot if
 11 witnessed by a notary, the notary must have provided
 12 the stamp; if the absentee ballot was submitted by a
 13 voter, it must have been -- the voter must have been
 14 registered in that particular precinct and at that
 15 address; the absentee ballot must have been timely
 16 received and properly delivered; the voter must only
 17 have voted once.

18 Now those rules I didn't just make up nor
 19 did this Court. They are clear. They are found in
 20 Minnesota law and it's settled Minnesota law and has
 21 been for years. Given these mandatory requirements,
 22 the question whether an absentee ballot was lawfully
 23 cast and improperly rejected must be determined on a
 24 case-by-case basis and on an individualized
 25 evaluation, precisely as this Court has done for the

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1 number of ballots it has reviewed over the course of
 2 Mr. Nauen's summary judgment motions.
 3 Contestants, in response to the Court's
 4 orders in February, withdrew over a thousand ballots,
 5 leaving just 3,687 at issue. As this trial has
 6 unfolded, Contestants have utterly failed to prove up
 7 even those ballots. They failed to offer specific
 8 admissible evidence to establish the necessary
 9 elements required by state law and highlighted by this
 10 Court in its series of rulings since the trial has
 11 begun. Many of the voters included by Contestants are
 12 simply and clearly insufficient, even the small
 13 handful who appeared in person. Peter Demuth, for
 14 example, failed to sign his absentee ballot
 15 application, instead used a computer mouse. Under
 16 settled state law, that's simply not sufficient.
 17 We provided the Court, in support of our
 18 motion to dismiss, with a series of spreadsheets
 19 analyzing the evidence presented during the course of
 20 this trial in specific detail to assist the Court in
 21 its task that lies before it. Contestants in turn
 22 provided their own spreadsheet just two days ago, on
 23 Wednesday morning, analyzing the same evidence. And
 24 I'd like to take a moment to take a close look at that
 25 spreadsheet because it alone, Contestants own

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1 spreadsheet, demonstrates the almost complete failure
 2 of proof. It is an admission of how little they have
 3 proven over the course of this trial. I'd like to
 4 look first at the legend for Contestants -- for
 5 Contestants' table. It's important in reviewing the
 6 table provided by Contestants on Wednesday to look at
 7 the definitions because they're not obvious and in
 8 fact often mean precisely the opposite what one might
 9 assume they mean. For example, in each place in the
 10 table provided by Contestants where they provide the
 11 abbreviation witness reg or wit reg, it actually means
 12 that the witness is not registered. Wit reg means
 13 nonregistered witness and then they have the argument
 14 that it should be counted in view of testimony. Well,
 15 what it means is, a nonregistered witness.

16 FPCA: Every place you see FPCA on
 17 Contestants' schedule, curiously it means, Contestants
 18 admit that there isn't a federal postcard application
 19 in the record. Voter for whom a federal postcard
 20 application could not be found, so FPCA oddly means
 21 they don't have an application.

22 SVRS: Notice that according to the key,
 23 anywhere the notation SVRS appears it means there is
 24 no record evidence to support the fact of registration
 25 for either the voter or the witness or both. SVRS

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1 means there is no evidence in the record.
 2 The notation D means that the voter
 3 registration application was found by the county and
 4 the Secretary of State to be deficient.
 5 NA means there was no absentee ballot
 6 application. This is perhaps the most important
 7 single document in reviewing the absentee ballot claim
 8 presented by the Contestees.
 9 So now let's take a look at -- at
 10 Contestee's spreadsheet and I'll just look at a couple
 11 of them because I want to make sure that -- to review
 12 the Contestants' version, the Contestants'
 13 understanding of their own evidence. (Pausing.) All
 14 right. This is one page out of a multi-page
 15 spreadsheet introduced and offered by Contestants on
 16 Wednesday. The spreadsheet's large. It's the
 17 left-hand column that you can't see that identifies
 18 the county. The columns B and C identify the names of
 19 the voter and then the evidence is summarized here.
 20 You can see column D provides a number. That's an
 21 exhibit number identified by the Contestants for every
 22 voter for which there's an envelope. As you can see,
 23 envelopes are missing for the majority of the voters
 24 identified -- the absentee ballots identified by
 25 Contestants. Again, it's not our spreadsheet. This

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1 is Contestants' spreadsheet.

2 The application, column E, again in most
3 instances there's no absentee ballot application.

4 Column F is proof that there was no -- that
5 the voter didn't otherwise vote. That typically comes
6 from the certifications provided by the counties. As
7 you can see, there's all -- very few boxes are checked
8 there.

9 Voter registration is a complete default.
10 In every instance on this page there's a notation SVRS
11 appears and of course as the key demonstrates, that
12 means there is no evidence that the voter is
13 registered.

14 witness registered in all but four instances
15 on this page. There's no evidence that the witness
16 was registered. In four they provided the exhibit
17 number, Exhibit 616.

18 Let's take a look at another page
19 (indicating to the paralegal). So here's another --
20 another page again from Contestants -- Contestants'
21 spreadsheet. Again, it's set up the same way. Here
22 there's more envelopes but almost no absentee ballot
23 applications. Nothing to compare the signatures.
24 Nothing to confirm whether address and signature are
25 the same. On this page there's a complete default

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1 with respect to any evidence that these voters didn't
2 otherwise vote. Simply nothing in the record.

3 Under Voter Registration, there's maybe 10
4 or 12 where there's a specific evi -- a specific
5 exhibit cited and the rest again a default. And an
6 utter default with respect to the registration of the
7 witness. There's simply no evidence provided for any
8 of these. I'd submit that -- that this is the
9 starting place for the analysis. The universe in fact
10 is much smaller.

11 Let's go on to the next one (indicating to
12 the paralegal). Another page again, some evidence --
13 in most -- in most cases they've been able to identify
14 an envelope. In only three instances have they been
15 able to provide the Court with an absentee ballot
16 application. In no instance have they been able to
17 prove the voter didn't otherwise vote. In no
18 instance, not one on the page, have they proved the
19 witness was registered. And in almost all cases they
20 failed to prove that the voter was registered.

21 In a large number -- in every one of these
22 there's a failure of one or more essential elements
23 identified by this Court. By Contestants own
24 reckoning they failed to prove that the ballots were
25 lawfully cast and improperly rejected.

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1 Many cases Contestants have failed to offer
2 admissible evidence that the voters completed absentee
3 ballot applications or if they did, that the
4 signatures and address matched the address and
5 signature on the absentee ballot envelope. Or they
6 failed to show that the absentee ballot envelope was
7 signed or that the ballot envelope is even in the
8 record, or that the voter was registered, or that the
9 witness was registered or an individual authorized to
10 administer the vote, or that the voter didn't
11 otherwise vote. It's just a failure of proof almost
12 completely with respect to those elements.

13 And I did want to point out in passing that
14 something's happened here during the course of the
15 trial. There were originally in the universe of 3600,
16 a very large number of signature mismatched ballots.
17 Over the course of the trial Contestants withdrew
18 hundreds of those signature mismatches in a concession
19 that in fact they weren't even close. At the last
20 moment, to inflate the number back up, those signature
21 mismatched ballots have all been added back in. I
22 don't contest their right to do that and to ask this
23 Court to review it but only point out that it deserves
24 -- the signature mismatch ballots may not be
25 specifically called out in the spreadsheets but every

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1 signature mismatch ballot should be closely examined
2 by the Court because there are several hundred in
3 there the Contestants at one point in this trial even
4 admitted didn't really match.

5 The failure of proof is simply breathtaking.
6 If you sort through their spreadsheet, which we've
7 done in a rebuttal spreadsheet filed yesterday using
8 their data just simply to help the Court analyze it,
9 there are a grand total of six ballots as to which
10 there is competent evidence before the Court meeting
11 all the requirements to show the ballots were lawfully
12 cast. That's it, six ballots as to which using their
13 data and their spreadsheet where they offered a
14 complete set of proof. It's breathtaking but it's not
15 surprising. In fact as the record has demonstrated,
16 Minnesota's system for reviewing and evaluating
17 absentee ballots works and it works well. It relies
18 on the consistent uniform standards applicable
19 throughout the state. It relies on consistent
20 statewide training offered by the Secretary of State
21 in every auditor's office across the state. It relies
22 on the hardworking citizen volunteers who staff
23 precincts across the state. So it just isn't
24 surprising that Contestants were able to demonstrate
25 only so few absentee ballots that were both lawfully

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1 cast but yet improperly rejected. There simply were
2 not that many to be found.

3 Indeed, as the evidence has shown over the
4 course of the trial, the ballots have been repeatedly
5 reviewed by local election officials, first when they
6 were received during the original canvassing board
7 process, during the recount, again during the Supreme
8 Court review process, and during the final canvassing
9 board meetings at the end of the recount. All of
10 those election officials applied the simple, clear and
11 mandatory requirements of Minnesota law applicable to
12 absentee voting. The law presumes that those
13 officials acted in good faith and did what the law
14 required of them and the testimony in this courtroom
15 has demonstrated that the vast majority of the ballots
16 were rejected because under settled Minnesota law they
17 should have been rejected. So at the end of the day,
18 Contestants' absentee ballot claim, after all this
19 paper, after all these ev -- all this evidence, fails.

20 Contestants' second claim concerns original
21 and duplicate ballots. Contestants refer to it as
22 their double-counting claim but that's really a
23 misnomer. There's been simply no competent evidence
24 at all of double counting. Instead, Contestants'
25 duplicate ballot claim consists of a mass of precinct

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1 level data, suggestions of minor paperwork errors or
2 inconsistencies and insistence by counsel that this
3 Court should on that basis alone conclude that ballots
4 were double counted. With respect to only a single
5 precinct did Contestants present anything else and for
6 that single precinct they presented nothing more than
7 unreliable hearsay. The evidence falls woefully short
8 of proving that claim.

9 And the history of the claim as it
10 progressed through this process makes its weakness
11 clear. In the Notice of Contest Contestants alleged
12 double counting in dozens of precincts. By the end of
13 their case the claim had shrunk to 10, not
14 coincidentally 10 precincts in Minneapolis which Al
15 Franken won by a large margin. And for each of those
16 precincts Contestants might have tried to present
17 evidence in the form of competent testimony to analyze
18 the ballots and help the Court determine what might
19 have -- what might have happened on election day in
20 those precincts but they didn't even try. Instead,
21 they introduced a jumble of paperwork, rosters,
22 machine tapes, challenged ballots, without
23 explanation. Those materials proved nothing.
24 Apparent discrepancies might have been due to any
25 number of reasons. It could be due to errors in

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1 voters signing in or failing to sign in at polling
2 places, differences in the way judges mark rosters,
3 accidental misplacement of ballots, failures to create
4 duplicate ballots or simple math errors in addition.
5 Without testimony from the election officials who were
6 there, the citizen volunteers who staffed those
7 polling places who were dealing with those original
8 source documents, we just don't know. What we do know
9 is that if every ballot tells a story, every roster
10 tells a hundred of them. These exhibits without more
11 do not prove double counting. They don't even come
12 close.

13 The one witness Contestants did offer to the
14 Court was Pamela Howell. Ms. Howell, a long time
15 Republican activist, apparently was eager to testify,
16 so eager that she called all three Coleman lawyers and
17 volunteered her testimony. Even while she refused to
18 speak with the Franken lawyers, she listened to the
19 advice given to her by Coleman's counsel how to best
20 avoid pinning down her testimony and to avoid
21 disclosing it. But the Court need not discount Ms.
22 Howell's testimony solely on the basis of bias. Even
23 on its own terms the testimony was unreliable and
24 unpersuasive. Ms. Howell provided hearsay from late
25 on election night after 15 hours of work. What she

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1 supposedly heard was vague and indefinite. What did
2 the judge mean when allegedly may -- she made the
3 out-of-court statement, "The ballots weren't labeled."
4 How many weren't labeled? What steps did she take to
5 find out? Why didn't she prepare an incident report?
6 If she did, why wasn't it introduced?

7 And there's more, the facts in the record
8 actually refute Ms. Howell's testimony. Contestants
9 introduced 14 challenged ballots. Ms. Howell on the
10 stand, under oath, testified that the judges at the
11 table next to her initialed the ballots. But if you
12 look at the ballots, they're in evidence, not one of
13 those ballots is initialed. In short, if there was a
14 problem in Precinct 12-8, it hasn't been proven. The
15 evidence just isn't there.

16 When you put Pam Howell aside, the only
17 thing you have for those Minneapolis precincts are
18 differences between the number of names on the roster
19 and the number of ballots. Those kinds of elec --
20 those kinds of discrepancies occur in every election.
21 Election judges aren't perfect, particularly in a busy
22 presidential year. Election judges work long hours
23 under heavy pressure long into the night. Errors in
24 precinct level paperwork hardly proves that ballots
25 were double counted. It doesn't even suggest it.

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1 Indeed, if double counting actually
2 occurred, then where is the actual evidence? where is
3 the witness who failed to mark the ballot? where was
4 the election judge who said, (snapping fingers
5 together), ah, we forgot to mark the ballots? The
6 failure to produce actual relevant evidence from
7 witnesses with firsthand knowledge from that witness
8 stand (indicating) is far more telling than the
9 hodgepodge of paper and secondhand hearsay that
10 actually was produced in this courtroom.

11 And of course there are better and far more
12 plausible explanations for what happened, lost
13 duplicates has happened in Minneapolis Precinct 8-7 or
14 original ballots that never got duplicated has also
15 happened in 8-7. And absentee or UOCAVA ballots that
16 arrived late are opened by tired election judges but
17 set aside and neither initialed nor counted nor marked
18 on the roster. That's a far more plausible
19 explanation for what happened in Pam Howell's
20 precinct. There are a number of open absentee ballots
21 that don't appear at all on the rosters.

22 But even if Contestants had presented
23 evidence, they couldn't prevail on their duplicate
24 ballot claim. The law is simply against them. The
25 recount was of original ballots which is entirely

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1 consistent with the law in Minnesota. As the
2 Minnesota Supreme Court said in late December, "There
3 can be no dispute that unmatched original damaged
4 ballots are valid ballots and the votes marked on
5 those ballots should be counted in the election." In
6 addition, of course the parties agreed and that
7 agreement was ratified by the State Canvassing Board
8 in the recount procedures, that original ballots
9 should be counted where there are differing numbers of
10 originals and duplicates. Contestants' attempt to
11 back out of their agreement both here and before the
12 State Canvassing Board is as cynical as it is
13 groundless.

14 It's undisputed that Contestants agreed to
15 the rule, Rule 9. It was an important part of
16 training their own recount representatives. And when
17 the issue of discrepancies arose between the number of
18 original ballots and duplicate ballots on the very
19 first day of the recount, they insisted in no
20 uncertain terms that Rule 9 be enforced. And they
21 asked the Secretary of State for clarification of the
22 rule and when they received it, they thanked the
23 Secretary of State's office and said the clarification
24 was "perfectly clear."

25 Only when the large number of original

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1 ballots in Wright County were recounted and the
2 recount ended and they determined that Rule 9 had not
3 benefitted them as they hoped, did they change their
4 tune. And now they stand before this Court and
5 declare it was all simply a mistake. Rule 9 had the
6 imprimatur of both candidates, the Secretary of State,
7 the Attorney General, and the State Canvassing Board.
8 Contestants are estopped from backing out of it. They
9 have waived any claim. Contestants duplicate ballot
10 claim is simply wrong as a matter of law and they've
11 shown nothing at all that begins to establish double
12 counting.

13 Contestants' final claim is a claim
14 challenging the certified results in the recount
15 totals in Minneapolis ward 3, Precinct 1. As Your
16 Honors know, the essential facts underlying the claim
17 here are simply undisputed. The Court's already ruled
18 on the law. There's nothing left for this Court.

19 After election day, 132 ballots went missing
20 in Minneapolis Ward 3, Precinct 1. You heard
21 Minneapolis elections director Cindy Reichert explain
22 what happened. A few days before the conclusion of
23 the recount a member of Ms. Reichert's staff voiced
24 concern over the collection of ballots that apparently
25 could not be found. On election day the officials in

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1 that precinct had placed them in five -- the ballots
2 in five Tyvek envelopes. They were labeled 1 of 5, 2
3 of 5, 3 of 5, all the way to 5 of 5. Several weeks
4 later, however, during the recount no one could find
5 the first one labeled 1 of 5. So officials counted
6 the ballots from Minneapolis 3-1 and compared that to
7 the total tally on the machine tape and it confirmed
8 the problem, 132 ballots had gone missing. So Ms.
9 Reichert conducted an extensive investigation. She
10 checked the incident log, she pulled check-in sheets.
11 She determined how many people were in the precinct
12 and she confirmed that in fact there were 132 ballots
13 that existed and went missing. So a search began and
14 it too was extensive. Officials and volunteers,
15 trailing hordes of media behind them, checked the
16 polling place, the storage warehouse, transport van,
17 City Hall, everything and everywhere they might have
18 been.

19 You remember Deputy Secretary of State Jim
20 Gelbmann testified to his own participation in that
21 extensive search. And indeed, Mr. Friedberg
22 stipulated at this podium, in open court, that an
23 envelope was missing and that "everything humanly
24 possible" had been done, that every conceivable place
25 had been searched and that nonetheless the ballots

1 couldn't be found.
 2 Ms. Reichert presented this testimony, this
 3 information, to the State Canvassing Board and
 4 representatives from both political campaigns had an
 5 opportunity to be heard on that question. Both sides
 6 submitted briefs. The State Canvassing Board
 7 considered the testimony, the parties' positions, and
 8 the briefing submitted to it and determined that 132
 9 ballots in fact had been cast and counted on election
 10 day and then gone missing. After seeking advice from
 11 Minnesota's Attorney General, the State Canvassing
 12 Board concluded that the proper way to account for the
 13 missing ballots was to use the Minneapolis 3-1
 14 election day totals from the machine tapes. The
 15 Board's conclusion on that point is entitled to
 16 deference in this proceeding.

17 And for the most part the facts underlying
 18 this are simply undisputed. The only argument
 19 half-heartedly advanced by Contestants is to question
 20 the number of ballots at issue. But there's really no
 21 genuine dispute here. Contestants have introduced no
 22 evidence calling into question the number provided by
 23 Ms. Reichert after her extensive investigation. In
 24 any event, Contestants concede that the ballots
 25 existed and are missing and that's the relevant point.

1 On February 23rd this Court's order
 2 addressed the governing law on this claim and in so
 3 doing recognized the applicability of *Moon v. Harris*.
 4 Under that precedent when missing ballots can't be
 5 found, election officials must turn to the next best
 6 evidence. Here, that is, as the Canvassing Board
 7 concluded, the totals provided by election officials
 8 on election day as a result of the machine tapes.
 9 We've heard extensive evidence from election
 10 officials, not one of them suggested the machine tapes
 11 are unreliable or anything less than a -- an
 12 extraordinarily precise tabulation of votes cast. And
 13 for that reason, the Canvassing Board embraced those
 14 machine tape totals.

15 Now in this Court's February 23rd order, the
 16 Court noted that Contestants had submitted an
 17 affidavit suggesting that the ballots might not
 18 actually be missing and as a result, the ballots might
 19 be available as evidence and left open that issue for
 20 trial. Since February 23rd, through the close of
 21 evidence in this case, Contestants have provided no
 22 evidence going on to that issue and certainly no
 23 evidence to prove the existence of those ballots or
 24 the numbers. To the contrary, Contestants, in their
 25 March 6 oppositions, again stipulated to the relevant

1 facts, there were 132 ballots that once existed that
 2 don't any more. And so the issue before the Court
 3 now, purely a legal one but the law on this point is
 4 clear. It was proper for the Canvassing Board to
 5 count the election day totals. The law demands the
 6 same and Contestants' claim simply has no merit.

7 Now I'd like to spend a few minutes talking
 8 about Contestee's two counterclaims advanced here. We
 9 frankly don't have a lot to challenge, a few isolated
 10 errors for an election in which Minnesota's election
 11 officials and citizen volunteers in the vast majority
 12 of cases accurately processed, recorded, and secured
 13 the nearly 3,000,000 votes cast. There are two claims
 14 that we've advanced. First, we've asserted a claim
 15 arising over ballots that have gone missing from a
 16 number of other precincts around the state. Second,
 17 we've identified a number of absentee ballots that
 18 were lawfully cast but improperly rejected around the
 19 state and I'll take those two claims in turn.

20 First, we've asserted a counterclaim
 21 involving missing ballots. Just as the 132 missing
 22 ballots in Minneapolis 3-1 required resort to election
 23 day totals, the missing ballots in 13 other precincts
 24 required the same treatment. For each of those 13
 25 precincts we presented considerable, competent, and

1 essentially unrefuted evidence of missing ballots.
 2 I prepared a summary table on this claim.
 3 First you heard testimony yesterday from the Oakport
 4 Township in Clay County. Five ballots went missing on
 5 election night from the -- from election night to the
 6 recount. Even though Norm Coleman won that precinct
 7 handily, all five of the missing ballots were for Al
 8 Franken. We proved a net 10 votes in Dakota County.
 9 Inner (sic) Grove Heights four lost, 24 ballots, a net
 10 loss to Al Franken of four votes. Rosemount four
 11 lost, nine ballots, with a net loss to Al Franken of
 12 six. In Hennepin County we proved 16 missing ballots
 13 from three precincts, Minneapolis 3-3, Plymouth 3-18
 14 and Richfield 1-14, all told, Al Franken lost eight
 15 votes. There were eight missing ballots in Olmsted
 16 County, Rochester 3-6, net loss to Al Franken two. In
 17 St. Paul 18 ballots missing for a net loss to Al
 18 Franken of 11 votes. Five missing ballots in St.
 19 Cloud with a net loss of two. And finally there were
 20 28 missing ballots in Washington County. Though Norm
 21 Coleman won Washington County by a 9 percent margin,
 22 Al Franken suffered the most from the missing ballots
 23 for a net loss of 14 votes. Most of these instances
 24 diligent searches were conducted and the missing
 25 ballots could not be found. In these precincts

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1 there's no evidence of machine jams. In fact in each
 2 evident -- in each instance the auditor testified that
 3 the machine and the machine totals were accurate. The
 4 best evidence in those precincts is the machine tapes.
 5 Based on that evidence, unrefuted by Contestants
 6 during the course of this trial, Al Franken's vote
 7 total should be adjusted and increased by 52 votes.

8 Now our second and primary counterclaim is
 9 contained in Exhibits X and Y to our amended answer.
 10 In those two tables we've identified a large number of
 11 absentee ballots cast around the state that were
 12 lawfully cast but wrongfully rejected by election
 13 officials. Of course the same standards apply to our
 14 counterclaims as to Contestee -- Contestants' absentee
 15 ballot claims and I of course won't repeat them all
 16 but this Court has carefully and specifically noted
 17 the requirements of Minnesota law with respect to
 18 lawfully casting an absentee ballot and those
 19 standards apply no less to the ballots we have
 20 identified. The voter has to sign the absentee
 21 ballot. The signature has to match the absentee
 22 ballot application. The addresses have to match. The
 23 voter and witness has to be registered. All of the
 24 other requirements imposed by Minnesota law must be
 25 established by specific admissible evidence in the

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1 record.

2 we've presented evidence with respect to
 3 hundreds of individual voters identified in our
 4 counterclaims. Over the course of this trial 69 of
 5 those voters testified before this Court. They came
 6 in one by one. They drove from large distances. Each
 7 one of them testified about how important their ballot
 8 was, why they took the time to come down here and
 9 appear before you to try and get their votes counted.
 10 Remember Fred -- Fredrick Amara? Mr. Amara's ballot
 11 was rejected because of a signature mismatch. He
 12 testified that he had one signature that he used when
 13 he was in a hurry and another when he had more time.
 14 Both of those were his genuine signature. He
 15 testified he was a citizen of Minnesota, more than 18
 16 years old. Met all the other requirements for
 17 lawfully casting an absentee ballot but his ballot was
 18 improperly rejected. With his testimony in this
 19 courtroom, that ballot should be counted. He was a
 20 registered voter, so was his witness.

21 Remember the Seeleys? Anthony and Rachael
 22 Seeley, they came into court with their newborn baby
 23 and passed the baby from hand to hand so that both of
 24 them could testify about both of their ballots. The
 25 Seeleys were both registered voters but were

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1 mistakenly given nonregistered ballot envelopes.
 2 Their ballots were rejected because election officials
 3 couldn't find a voter registration application inside
 4 the envelopes but the registration data base confirms
 5 that both Anthony and Rachael Seeley were in fact
 6 registered voters. Both of them met all the
 7 requirements for lawfully casting an absentee ballot.
 8 Their ballots were wrongfully rejected and should be
 9 counted. There's the application and the envelope for
 10 Anthony Seeley. He was a registered voter. There's
 11 the application and envelope for Rachael Seeley. She
 12 was a registered voter.

13 Remember Bette Narveson? She testified that
 14 she forgot to fill out the ballot envelope and was
 15 sent a replacement. There's her absentee ballot
 16 application. On the left is her first absentee ballot
 17 envelope. It was blank but she was sent a
 18 replacement. She properly filled it out, that's the
 19 one on the right, but it was rejected because someone
 20 thought she wasn't registered. That's the notation at
 21 the bottom but she was. She -- remember she brought
 22 in her election registration confirmation card. She
 23 even pulled it out of her purse on the stand to show
 24 the Court. We took a moment before she took the stand
 25 to copy that and staple it to the back of the exhibit

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1 and it's contained in the exhibit in evidence before
 2 the Court. That confirmed her registration. She
 3 properly complied with state law. She voted only once
 4 and her vote should count.

5 And there were others who because of health
 6 issues, age, or infirmity couldn't travel to this
 7 courtroom even from nearby suburbs but who testified
 8 in depositions. We went to them so that their votes
 9 could be counted. Like Jack Larson from Champlin
 10 whose ballot was rejected on account of a signature
 11 mismatch decision. He's lived in the same house for
 12 30 years and votes like clockwork in every election
 13 because it's important to him to participate in our
 14 elections. He testified that the signatures on the
 15 envelope and on his AB -- on his absentee ballot
 16 application matched and his testimony and the
 17 documents collected demonstrate that he was
 18 registered. His witness was registered and he did
 19 everything necessary to properly cast his ballot. It
 20 was a mistake to reject it and this Court has the
 21 power to correct that error.

22 Or Elizabeth Davies from Minneapolis. She
 23 testified by deposition. She's lived in the same
 24 house since 1973. She's fully registered to vote and
 25 her ballot was rejected for lack of a voter

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1 registration application. Trouble is, she didn't need
2 one. She and her witnesses were fully registered to
3 vote. She did everything right. We've established
4 all of the requirements with specific admissible
5 evidence. It's contained in her deposition transcript
6 and her ballot ought to count.

7 Every ballot tells a story and every witness
8 has a story and we've heard a lot of them in this
9 courtroom, voters -- voters who work hard every day
10 and did everything they could to lawfully cast a
11 ballot in the election.

12 Now in addition to these individuals who
13 appeared in the courtroom and testified, we presented
14 testimony from auditors and election officials and
15 collected the necessary documentation to prove our
16 case. As the city -- as the Court will recall, we
17 presented testimony from Duluth City Clerk, Jeff Cox.
18 We presented 35 ballots that were utterly proper in
19 every respect. As Mr. Cox admitted on the witness
20 stand, the only reason they'd been rejected was either
21 because the voter or the witness hadn't provided a
22 date when they signed it or the dates didn't match but
23 neither is required by state law. And yet a Coleman
24 attorney prevented those 35 ballots from being counted
25 during the Supreme Court review process. None of them

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1 should have been rejected and they should be counted
2 now. I won't go through 35 of them but I think it's
3 important to take a look at one. This is an example,
4 Guilford Lewis, from Duluth. This is the voter
5 registration application. Everything's right about
6 this as Mr. Cox confirmed. He signed it. There's his
7 absentee ballot envelope. You can see the date
8 mismatch and you see the explanation, different dates
9 provided in the box. Here they are side by side so
10 you can see the signatures match. The address
11 matched. The witness signed it. The witness provided
12 an address. Mr. Lewis was registered, so was his
13 witness. We went through this 35 times one afternoon.
14 I'm sure I probably put many of the reporters in the
15 room to sleep going through this but I'm sure the
16 Court understood the importance of what was going on.
17 35 ballots, 35 instances where a voter did everything
18 right and the ballot hadn't been counted. Every one
19 of them tells the same story. Every one of them
20 should have been counted but wasn't because of the
21 same problem.

22 Now in the compilations we provided to the
23 Court earlier this week, we provided tab exhibits
24 broken down by individual voters to assist the Court
25 in the task that lies before it. We've collected

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1 absentee ballot envelopes, absentee ballot
2 applications, and voter registration confirmations for
3 hundreds of voters who couldn't travel to this
4 courtroom or appear by deposition.

5 In addition, we have prepared and will be
6 submitting later today a comprehensive spreadsheet
7 summarizing the proof in the record with respect to
8 our counterclaim on absentee ballots and I'd like to
9 point out just a few things about that spreadsheet if
10 I could. This is the format that the spreadsheet will
11 appear in on the left. I apologize for the small
12 print. On the left-hand side we have the name of the
13 voter and then in progressive boxes marching across
14 the screen. The first column is testimony and we've
15 indicated the name of the witness providing testimony
16 and the date of the testimony if there's testimony
17 bearing on that particular absentee ballot.

18 Next column over provides a specific
19 identification of the exhibit and the date it was
20 admitted for envelopes.

21 Next column is application, the absentee
22 ballot application. Again, we provided the specific
23 exhibit number and the date it was admitted.

24 Next column over is voter registration.
25 Again, SVRS means, unlike the other spreadsheet, this

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1 means there actually is an SVRS printout and we've
2 given the exact exhibit number where you can find it
3 and the date it was admitted.
4 Next column over is the witness voter
5 registration lookup. Again, we provided the specific
6 identification of the exhibit number and the date.
7 Other evidence will largely be blank if there's other
8 evidence submitted relevant to the individual voter.
9 Then it will be added there but for the most part that
10 column isn't used much.

11 And then we've gone through each of the
12 elements required and identified where using EX as an
13 abbreviation. That means it's in the exhibit cited in
14 one of the first columns and the exhibit will identify
15 each of the elements required and you can see as we go
16 across we filled in almost everything.

17 T, down three columns up from the bottom,
18 you see that little indication means that point was
19 established not only by the exhibit but in addition by
20 the testimony in that case, Nicole Bowman's testimony.
21 So left to right identifies all the elements proven.

22 All told, we have fully established every
23 element -- every element required for at least 252
24 voters identified in our counterclaims. We've
25 provided specific identification of every fact

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1 necessary for every one of those voters. We've
 2 demonstrated that the voter was registered or properly
 3 completed a voter registration application. We
 4 demonstrated that they completed an absentee ballot
 5 application. That both the witness and the voter
 6 completed certification forms. That the signatures
 7 matched, that the address matched, and that the voter
 8 did not otherwise vote. All of the specific elements
 9 required by this Court have been met with respect to
 10 these 252 voters and they're identified in our
 11 spreadsheet and will be in our proposed findings of
 12 fact that we file either later today or next week I
 13 believe is when we're filing those. These are beyond
 14 dispute, along with the 47 ballots that the Court has
 15 already granted summary judgment with respect to,
 16 nearly 300 ballots should be opened and counted.

17 There were 2.9 million ballots cast in this
 18 election and approximately 280,000 of them were cast
 19 by absentee ballot. Of those, approximately 11,000
 20 were rejected. 933 were ultimately counted after a
 21 careful secondary review by the counties and the
 22 candidates pursuant to an order of the Supreme Court.

23 After seven full weeks of trial it should
 24 come as no surprise to anyone involved, that
 25 ultimately only a few hundred ballots have been fully

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1 proven to have been lawfully cast but wrongfully
 2 rejected. That's less than 1/10th of 1 percent of all
 3 absentee ballots cast in this election. That number
 4 is a testament to the accuracy of this election. It's
 5 a testament to the hard work of Minnesotan election
 6 officials and to the integrity of this election.

7 As I said in my opening statement seven,
 8 eight weeks ago, the vast majority of rejected
 9 absentee ballots were rejected because they should
 10 have been rejected. This Court has now the
 11 opportunity and the duty to correct the relatively
 12 small number of errors and to confirm that Al Franken
 13 received the highest number of votes cast in this
 14 election.

15 It's been a long road since November 4,
 16 2008. First, Minnesota conducted the largest
 17 statewide recount in American history. Hundreds of
 18 local and state election officials devoted thousands
 19 of hours to conduct a painstaking ballot by ballot
 20 manual recount of 2.9 million ballots. At the
 21 conclusion of the recount they forwarded their work to
 22 the State Canvassing Board which formally certified
 23 the results of the recount with this Certificate
 24 (indicating) signed on January 5th, 2009, that
 25 certified that Al Franken received the highest number

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1 of votes for the office of United States Senator.

2 Second, this Court presided over what is
 3 undoubtedly the most comprehensive election contest in
 4 history. 134 witnesses testified. 38 county and city
 5 officials appeared, and over 2,182 exhibits in
 6 countless binders have been admitted into evidence and
 7 piled up like snowdrifts on the bookshelves, tables
 8 and floors of this courtroom. With all that evidence
 9 now presented, it's clear that Contestants have
 10 utterly failed to prove their case.

11 This election undoubtedly the most closely
 12 scrutinized election in Minnesota history was
 13 carefully conducted, fairly administered, and
 14 accurately certified by the Minnesota Canvassing
 15 Board.

16 This effort to overturn the results of the
 17 hand recount and the certified results of the recount
 18 canvass should be rejected. As the record before this
 19 Court vividly demonstrates, Al Franken received the
 20 highest number of votes in this election. Al Franken
 21 is Minnesota's Senator Elect. He is entitled to the
 22 Certificate of Election.

23 Contestee respectfully submits that judgment
 24 should be entered rejecting the election contest in
 25 its entirety and entering judgment in Al Franken's

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1 favor on his counterclaims. Thank you.

2 JUDGE HAYDEN: Thank you, Mr. Hamilton.
 3 We will take a 15-minute recess and come
 4 back for further argument.

5 (Whereupon, a 15-minute recess was taken.)

6 JUDGE HAYDEN: Mr. Friedberg?

7 MR. FRIEDBERG: May it please the Court,
 8 counsel. We start with a case that is a statistical
 9 tie with Mr. Franken ahead by 225 votes. There have
 10 been mistakes. I'm not attacking the Minnesota system
 11 as a whole but even Mr. Franken's side have found 160
 12 mistakes that they want this Court to open and count.
 13 Our case consists of three sections. First
 14 is our allegation that either 132 or 133 ballots in
 15 Minneapolis 3-1 cannot be added to the recount and
 16 neither can approximately 35 to 40 others that
 17 Contestee has brought up.

18 Second, that when all the physical ballots
 19 that were counted on election night were present, they
 20 should be recounted; hence, the duplicates, both
 21 marked and unmarked, should be counted. These will
 22 equal election night totals, not because we want to
 23 revert to a machine count but because they're the most
 24 accurate count.

25 Third, that our approximately 1350 ballots

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1 set forth in our spreadsheet are presently
 2 disenfranchised honest Minnesota voters who should
 3 have their ballots counted, simply put, because we've
 4 sufficiently proved their legitimacy by a
 5 preponderance of the evidence which is an issue that
 6 neither Mr. Hamilton nor this Court has ever directed
 7 itself to from the beginning of this trial.

8 Overlaying these three specific areas is our
 9 claim that Minnesota voters who were alive on election
 10 day, signed the ballot envelope with their genuine
 11 signature, had a witness with a Minnesota address, had
 12 voted within the last four years or registered on
 13 election day with a VRA and sent in an application,
 14 should be enfranchised. From a philosophical
 15 standpoint, we don't try to keep voters from having
 16 their vote counted. We tried to enfranchise as many
 17 as possible and I don't think that could be clearer
 18 from the way that I cross-examined the voters called
 19 by the Contestee, if you could call it
 20 cross-examination, because it would be disingenuous
 21 for us to take the position that any of those people
 22 called by the Contestee should not have their vote
 23 counted. Of course they should and so should a lot of
 24 others.

25 Let me go in reverse order to the way that

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1 Contestee presented the defense. I'd like to deal
 2 first with the so-called issue of 132 or 133 in
 3 Minneapolis Precinct 3-1. The net result, if those
 4 132 or 133 or however many there were votes are not
 5 counted, it results in a reduction of Mr. Franken's
 6 lead of 44 votes.

7 When all else fails, as I address during my
 8 argument in relation to the invalidity of Secretary of
 9 State's Rule 9, when all else fails, turn to the law.
 10 In 2008 statute was amended, 204C.35, which talks
 11 about recounts and it was amended in the following
 12 way: The word "manually" was inserted into the
 13 statute in two places for the first time. The
 14 legislature, after reflecting on the issue, determined
 15 that a recount needed to be manual. Manual means by
 16 hand. In fact, that's been the situation for some
 17 time but the legislature made it clear in 2008.

18 If you add that insertion into the statute,
 19 let's talk about the issue of chain of custody. We
 20 heard testimony, witness after witness, how careful
 21 they are, how careful the officials are to protect the
 22 chain of custody of ballots. We put them in transport
 23 cases. We sealed them. We initialed the seals. We
 24 protect the chain of custody of ballots in this state
 25 and I suspect every other state as carefully, if not

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1 more so than we protect the chain of custody on drug
 2 evidence or blood evidence. The ballots are guarded.
 3 They're sealed. They're transported secured. They're
 4 surveilled. Both sides have the ability to watch them
 5 24 hours a day if they so choose. Why do we do that?
 6 There's only one reason, to protect their integrity so
 7 that they can be, according to the statute, manually
 8 recounted. Why else would we care about the chain of
 9 custody of ballots? They're not going to destroy each
 10 other. They're not going to devour each other. The
 11 only reason the chain of custody matters is so that
 12 they can be preserved for a recount.

13 And if they're missing for some time and
 14 then they reappear somehow, you would hear all kinds
 15 of objections to counting them. Minneapolis 3-1 and
 16 the unknown number of ballots in that envelope, by
 17 Ms. Reichert's own testimony, the envelope
 18 disappeared. There were some ballots in there. This
 19 is the ultimate chain of custody problem. The chain
 20 of custody was broken for all time. The ballots are
 21 missing. They cannot be found. We don't know their
 22 number. We know there were a group of them. In fact
 23 I carefully examined Ms. Reichert to show how
 24 carefully they were watched and what their procedures
 25 were. That was to demonstrate to this Court how

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1 important the chain of custody is. And if we had a
 2 group of ballots that were gone for two hours
 3 somewhere mystically and then picked up two hours
 4 later by accident, there'd be terrible objections to
 5 counting those ballots. So how can we count ballots
 6 that are gone forever apparently? And I take Ms.
 7 Reichert and Mr. Gelbmann at their word, that
 8 everything that could be done was done to find them.

9 In 1880, in *Newton against Newell*, 6
 10 Northwestern 346 which might be the oldest case I ever
 11 looked at in my life, the Court said if they -- if
 12 they're lost, they can't be counted. And I would also
 13 mention the *Moon* case that's about 40 years later that
 14 Mr. Hamilton mentioned. First of all, there weren't
 15 any machines back then in 1920, so that hasn't got
 16 anything to do with this. And in the *Moon* case two
 17 precincts lost all the ballots, so they went by their
 18 first count which happened to have been manual.

19 In 2008 the legislature inserted the word
 20 "manually." They didn't do it for no reason. We
 21 sometimes criticize why legislatures do things but
 22 they always have reasons. And here you have the
 23 ultimate chain of custody issue, the ballots are lost.
 24 The side wanting the recount is entitled to have them
 25 counted. If they can't be counted, there's only one

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1 thing to do and that's disregard them.

2 Recount comes with some privileges, the
3 interpretation of voter intent which can't be done,
4 the question of ballots that may look suspicious. But
5 just the fact that the Contestant has the right to
6 have them counted, they're gone and they can't be and
7 the law is clear, which raises what I think is a
8 collateral issue that I was asked that I assume was
9 simmering below the surface for a while and, that is,
10 the Canvassing Board has two Supreme Court Justices on
11 it. Can we overrule them? well, there isn't an
12 overrule situation here. The Canvassing Board has
13 ministerial duties only. This issue was left to you.
14 Their decision has no impact here. This is a de novo
15 court and when you can't count them in person, you
16 can't count them at all.

17 Let me go to the duplicate and original
18 issue and here there is a 61 vote swing in favor of
19 Mr. Coleman. And I may have worn this issue out the
20 other day in arguing concerning our position that Rule
21 9 set forth by the Secretary of State is invalid, it
22 violates the law and it can't be enforced. But let me
23 quickly go over the issue again. What was counted on
24 election day in relation to the dup and original issue
25 is here. They're present. They can be counted again

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1 and the count will match the machine or come much
2 closer than it does at the moment because the evidence
3 is, that there were unmarked duplicates run through
4 the tabulators. How do we know that? First of all,
5 when the candidates started talking about, or I
6 suppose the campaigns is more accurate, what to do
7 about original and duplicate issues, all of the people
8 involved professionally were nothing less than
9 horrified. There were e-mails sent to the Secretary
10 of State, are you sure you want to do this? This
11 looks bad. And then nobody will forget the -- the
12 comment with about 15 G's and H's in it from one of
13 the county auditors, saying -- and what is it they
14 were afraid of? They were all afraid of the same
15 thing, that what you're going to end up with here is
16 duplicate counting. You're going to end up with
17 double counting. You're going to end up with more
18 votes than voters, which happened in a number of
19 precincts, although we only present 10 for your
20 consideration.

21 what was the Secretary of State afraid of?
22 Well, you had Mr. Gilbmann -- Gelbmann and you -- you
23 had Mr. Poser here. They opposed this. In fact, Mr.
24 Poser, in essentially apologizing to a county auditor,
25 said, I lost this battle. Well, what happened? As I

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1 referred to the other day is, the campaigns got
2 together and obviated the law which they had no right
3 to do because that law is there for the protection of
4 the voters, not the candidates. Two candidates cannot
5 get together and do away with a statute designed for
6 the protection of the voters, no matter how wrong they
7 may think it is.

8 Not only that, I'm going to make hopefully
9 short shrift of the argument here that there's some
10 kind of estoppel because for estoppel there has to be
11 reliance and for reliance there has to be prejudice.
12 In this situation those duplicates that went through
13 the machine are still available. They're intact. We
14 can go back. We can count them in 10 precincts and
15 you're going to come up with a number that doesn't
16 signify more votes than voters. It's an easy remedy.
17 I believe the estimate was that it will take between
18 one and two hours per precinct to do that. In order
19 to follow the law, that's not a big sacrifice of time.

20 In addition, as I mentioned before, the only
21 thing the campaigns were thinking of when they
22 formulated that rule was, that the originals are the
23 best evidence of voter intent. They weren't thinking
24 of ending up with more votes than voters. Neither
25 side was. And nobody would propound that proposition

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1 to you that I had in mind I wanted to get more votes
2 than voters. What they wanted to do is have clear
3 evidence of voter intent if there were challenges on
4 some ballots. What happened was, the election judges
5 take care of that problem when they make the
6 duplicate. The election judges evaluate voter intent
7 when they copy and they're from competing political
8 parties. They reach a conclusion as to what the
9 voter's intent was and if they have a problem there's
10 a Chief Judge to help them. So the duplicates are the
11 manifestation of voter intent. The originals are kept
12 sequestered in an envelope. The law says you count
13 the ones that went through the tabulator which are the
14 duplicates, marked or unmarked.

15 Now let me go to another issue and that's
16 the issue of how -- to what standard is it required
17 that a litigant in this contest prove the validity of
18 a ballot that's unopened? With all due respect, the
19 standard that you've set requires proving each
20 statutory element to an absolute certainty. That
21 standard doesn't exist anywhere in Anglo-American
22 jurisprudence. Our job was to prove up ballots for
23 counting. We believe and have urged that Minnesota is
24 a substantial compliant state. You've ruled that
25 based on your February 13th order that you demand

1 strict compliance going forward. So be it. We'll
 2 concede that arguendo at this point. And so strict
 3 compliance with the statute under your February 13th
 4 order is required. But where is it written that we
 5 must prove compliance with that statute to a
 6 certainty? That's what you have apparently demanded
 7 of us. With all due respect, that holding was created
 8 out of whole cloth and it just grew like Topsy. In
 9 fact as I recall at one point, and I don't believe
 10 this ever became the standard, Judge Reilly took the
 11 position that in order to prove that a voter didn't
 12 vote elsewhere, we had to prove they didn't vote
 13 anywhere in any other county in the state. That's
 14 virtually incapable of proof. So we take issue with
 15 the standard. This is a civil case. The burden of
 16 proof is by a preponderance of the evidence. And
 17 absent some statutory pronouncement to the contrary,
 18 that's the standard that we are required to fulfill.

19 Contestee has chosen a different path. They
 20 have proved the viability of a number of ballots to an
 21 absolute certainty to where there can be no
 22 conceivable question but that most of the ballots
 23 they've put in issue should be open and counted. We
 24 congratulate them for their dedication to precision
 25 and their meeting the standard of moral certainty.

1 That's a commendable thing but that standard exists
 2 nowhere else in Anglo-American jurisprudence. All we
 3 need to prove under your strict compliance standard is
 4 that it is more likely than not that inside the
 5 envelope dwells the franchise of a proper voter, more
 6 likely than not, one who is more likely to have
 7 conformed his conduct to the ingredients of the
 8 statute than to have done the opposite. That statute,
 9 we accept your ruling for the purposes of this
 10 argument, requires strict compliance.

11 Let me illustrate. Ms. Reichert, I'm sure
 12 not intending to, makes our case for us. It lies in
 13 her answer to a series of questions concerning witness
 14 registration. She, and at her direction, the workers
 15 in the City of Minneapolis checked for witness
 16 registration when the witness gives an out of state
 17 address. Why do they do that? Because it's more
 18 likely than not that people who live outside the state
 19 are not registered Minnesota voters. It's a very,
 20 very sane process. Why would you make an assumption
 21 that somebody that lives in Massachusetts is
 22 registered to vote in Minnesota? You wouldn't make
 23 that assumption. What you would do is find out and
 24 that's what they do in Minneapolis.

25 Now what does she do when there is a

1 Minnesota person who is the witness? She makes the
 2 assumption they are registered and so does the entire
 3 City of Minneapolis and in fact all but four or five
 4 counties in the state make the assumption that the law
 5 was followed and that a person with a good Minnesota
 6 address is a registered Minnesota voter. Why do they
 7 do that? They do it because they presume that our
 8 citizens will follow the law, which for the most part
 9 is correct.

10 Now we know something in this case. We know
 11 that based on the evidence, if you check on witness
 12 registration diligently, prime example Carver County,
 13 you will find about 4 percent of the witnesses are
 14 unregistered. Carver County is very, very careful,
 15 probably the most careful because out of 4800 ballots
 16 they found 180 with unregistered witnesses that they
 17 kicked out. 4 percent unregistered. That means 96
 18 percent of the people with Minnesota addresses who
 19 signed as witnesses are registered Minnesota voters,
 20 96 percent, which means that when you look at a ballot
 21 envelope with a Minnesota address person on it, the
 22 chances are 96 percent that they are registered.
 23 That's more than more likely than not. It's more than
 24 probable cause. It's more than clear and convincing
 25 and based on experience it's also more than proof

1 beyond a reasonable doubt. It's proof beyond a moral
 2 certainty.

3 You make presumptions as you go through life
 4 and you make presumptions based on experience. If 96
 5 percent of the witnesses on the front of the ballot
 6 are registered Minnesota voters, and we know they are
 7 based on the Carver County experience, then it is
 8 presumptive beyond peradventure that you're going to
 9 be right 96 percent of the time. So when Ms. Reichert
 10 tells her workers, don't bother to check registrations
 11 on Minnesota witnesses, she's correct at least 96
 12 percent of the time. But here, when we look at any
 13 specific ballot with a Minnesota witness when we come
 14 in here, we know, based on the experience in this
 15 state, based on the diligence of Carver County, that
 16 96 times out of a hundred that person will be a
 17 registered Minnesota voter.

18 Again, I make the assumption that people's
 19 intelligence and conduct is pretty much the same from
 20 county to county. I made that assumption in my
 21 opening statement. I have not heard anybody that has
 22 the audacity to disagree with me and say there are
 23 smart counties and dumb counties. I suggest the first
 24 person to do that will probably not run for office.

25 So the witness satisfies the standard by

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1 having a Minnesota residence. That satisfies whatever
 2 test without checking. And if somebody alleges to the
 3 contrary, as was done in a number of cases and proves
 4 to the contrary based on some suspicion or based on
 5 some diligent checking and can prove that that person
 6 is not a registered Minnesota voter, then under this
 7 court's strict compliance standard, out they go. But
 8 there being proof neither way, the mere fact of the
 9 Minnesota address with the witness stands for the
 10 proposition that we have proved it's more likely than
 11 not that they are registered.

12 What about missing applications? That got
 13 to be quite a bugaboo and I suppose maybe even in a
 14 trial like this a little humor is occasionally called
 15 for, as I asked Ms. Engdahl whether or not she was
 16 aware of anybody in black clothes sneaking about the
 17 Plymouth City Hall looking to steal ballots that they
 18 could for some reason sell to somebody? There's a
 19 presumption here. You can't get, for the most part,
 20 an application -- you can't get a ballot without
 21 sending in an application. There are one or two
 22 instances apparently where husbands gave them to wives
 23 where it happened. But you can't extrapolate from the
 24 exception and make it to the -- and make it the rule.
 25 99.58, whatever percent, of people that send in

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1 absentee ballots got them by sending in an
 2 application. There's no evidence to the contrary. So
 3 when the application can't be found, and we do have
 4 evidence in this case that counties and precincts lose
 5 applications, it is more likely than not, whether it's
 6 there or not, that there was an application and the
 7 person did conform their conduct to the law. To ask
 8 us to prove that which is presumed statistically is to
 9 ask us to prove things to a certainty. But were one
 10 to take 10,000 absentee ballots, in over apparently
 11 9,995 of them the people sent an application in. It's
 12 proved by virtue of the fact itself by virtue of the
 13 ownership of the ballot and sending it in. Again, if
 14 you don't do that, the exception will have gobbled the
 15 rule.

16 Let's look at another issue, and if somebody
 17 says you didn't -- you didn't send in an application,
 18 the naysayer should have to prove it because virtually
 19 all the time they did. Why would we kick people out
 20 who almost to a moral certainty or an absolute
 21 certainty have to have sent an application in or they
 22 wouldn't have a ballot.

23 Let me go to the signature mismatch issue.
 24 The testimony of voter after voter has been that they
 25 signed both the application and the envelope. Mr.

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1 Amara is the poster child for this. There is not a
 2 semblance of similarity between his two signatures,
 3 yet somebody looked at it and said, that's not their
 4 genuine signature. You can't do that. If it's
 5 anything, that the testimony of the voters that the
 6 Contestees brought in, there's anything to be gleaned
 7 from that, it's that you can't look at that and make
 8 that determination. If you haven't got a reason to
 9 believe that that's not the genuine signature on the
 10 vote -- of the voter on the envelope, then no one has
 11 a right to kick that ballot out because Ms. Engdahl in
 12 Plymouth kicked out 75 of them in Plymouth. With all
 13 due respect, that's like reading tea leaves. There is
 14 no scientific basis for doing it and it should never
 15 be done. There's an assumption of correctness in
 16 Minnesota citizenry. There's a presumption, absent
 17 evidence to the contrary, that people do what they're
 18 supposed to do. And there's a presumption of validity
 19 that runs throughout the law that is applicable to
 20 those ballot envelopes, that they were in fact signed
 21 with a genuine signature of the voter whose ballot is
 22 within.

23 Let me raise another issue about these
 24 applications. We briefed this issue some time ago
 25 and, that is, that as long as it's the valid, genuine

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1 signature of the voter on the envelope, it really
 2 doesn't matter that they gave authority to their
 3 mother to request the ballot. This is a fraud
 4 protection device. People don't get ballots for other
 5 people without the voter being involved. There's no
 6 fraudulent desire on anybody's part here. Maybe in a
 7 town like Chicago people do vote other people's
 8 ballots, I don't know. But there is no reason to
 9 believe when a college student says, mom, would you
 10 get me an absentee ballot? It's okay, sign my name.
 11 Is this the only place in the law that authority to
 12 sign your name doesn't work? I can ask a person to
 13 sign a check for me. I can tell them write my name on
 14 a check. They have all the authority in the world to
 15 do it as long as they don't abuse it. But, again,
 16 there's a presumption of regularity. There's a
 17 presumption, absent evidence to the contrary, that the
 18 signature on the ballot envelope is the genuine
 19 signature of the voter.

20 There are 1360 ballots that are sufficiently
 21 proved up, if we make common-sense assumptions about
 22 what's in front of us that should be opened and
 23 counted, and if we apply the standard of a
 24 preponderance of the evidence, which is the legal
 25 standard that applies to this case.

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1 Now we need to talk about some serious
2 constitutional problems that this Court has looked at
3 and appears to find inapposite. I never fail to
4 believe that when I'm talking to a jury, even if they
5 have their minds made up, I might get them to step
6 back, clear their minds and open their minds and let
7 me try to convince them to the contrary. It's more
8 difficult with Judges to do that because basically you
9 know more about the law than I do. But I need to take
10 this opportunity to go back and discuss some of the
11 issues that I discussed in my opening statement that
12 you have allowed us to make offers of proof on. But I
13 believe there is substantial and sufficient evidence
14 in the record as it exists without the offers of proof
15 for you to deal with these issues in a way that you
16 have not wanted to.

17 Yesterday Mr. Lillehaug called me a name. I
18 thought he called me disingenuous but -- and trial
19 lawyers call each other that all the time. It's no
20 longer an insult. However, upon further review I
21 found out he called me ingenuous. Well, he's from
22 Harvard and I'm from North Carolina and I don't know
23 what that means so I have some help from their side.
24 Apparently it means candid, frank, guileless. They
25 grew to love him because of his sincere and ingenuous

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1 nature. I take it as a compliment and I'll try to be
2 that way when I discuss the issues that I want to
3 raise to you con -- concerning basic systemic problems
4 and constitutional issues. I'll do it without guile
5 or sophistication and I'll tell you frankly, I submit
6 that you're wrong. First of all, we have a violation
7 of due process. Why? All you have to do is read *Roe*
8 *against Alabama*. You can't change the rules after the
9 game is played. Under *Roe against Alabama*, the 11th
10 Circuit, when Alabama decided during a post-vote
11 litigation that they were going to start recognizing
12 at that time unwitnessed ballots, the federal court
13 looked at the doctrine of abstention, looked at the
14 Anti-Injunction Act, and says, this is a Constitution
15 that we're talking about. We will not abstain. We
16 will not be restricted by the Anti-Injunction Act. We
17 need to stop this because when you change the rules
18 after the game is played, you violate due process of
19 law by putting a state in a situation where they apply
20 two different standards at two different times and
21 that's not an equal protection issue. It's a due
22 process issue.

23 The game was played and was over on election
24 day. The polls were closed and the ballots began to
25 be open. There were rules enforced that day and

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1 absentee ballots were counted around this state
2 pursuant to those rules. 90 percent or 95 percent of
3 the counties allowed ballots to be open and counted
4 where there were unregistered witnesses. Many
5 counties and Minneapolis did not signature match. You
6 can tell because in Minneapolis, when Ms. Reichert's
7 testimony was done, there were five signature matches
8 left in Minneapolis. Plymouth had 75. The logical
9 conclusion to be drawn is Minneapolis, the biggest
10 city in the state, didn't match signatures while
11 Plymouth did and for the most part in -- with
12 different degrees of scrutiny, so did the rest of the
13 state.

14 You also heard Mr. Mansky's standard, do
15 everything you can to enfranchise voters. Plymouth is
16 the poster example of doing it the other way. You saw
17 Mr. Mansky on the stand yesterday and the day before
18 look at those signatures and look for any conceivable
19 similarity in them so he could let them in, not kick
20 them out. Minneapolis didn't match signatures but we
21 are now. Your February 13th order requires signature
22 matching. Your February 13th order requires that
23 witnesses be registered.

24 We found some other problems that seem to
25 change with people moving apartments where Hennepin

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1 County applies one rule and then other counties apply
2 another. But the important thing is, there were rules
3 on election day and they are desperately different
4 from the rules you're applying because you are looking
5 at the statute and on election day many counties
6 didn't.

7 When you cast this whole new set of rules
8 and determine that ballots within certain categories
9 were illegal and couldn't be counted, that's a pro
10 tanto finding that there are thousands of illegal
11 ballots already in the count. So if that's true, the
12 rules were changed after the game was played.

13 There's another problem with that issue. If
14 in fact, and I will deal with the *Bell against*
15 *Gannaway* issue in a minute, but if your February 13th
16 order remains extant, there are several thousands
17 votes you've called illegal by your standards that are
18 already in the count. That being true, there's no way
19 to determine who got the most legally cast votes
20 because those are illegally cast votes. What's the
21 math? If 4 percent of the ballots in Carver have
22 unregistered witnesses and we know that to be true, it
23 must be close in Minneapolis. Carver had 48 -- let's
24 say 5,000 ballots. Minneapolis has 17,000. Three
25 times 5 is 15. That means that there must be

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1 somewhere between 6 and 700 ballots in Minneapolis
2 with unregistered witnesses that have already been
3 counted.

4 Ramsey County has about the same number of
5 ballots as the City of Minneapolis. That's another 6
6 or 700.

7 St. Louis County brings it up to about
8 2,000. And I haven't discussed the rest of the state
9 because virtually nobody but Carver, Lyon, and a
10 couple of other counties checked for witness
11 registrations. Those are, according to your February
12 13th order, illegal ballots. They are in the count
13 already and they can't be removed.

14 This changing standard from one time to
15 another is a substantive due process problem that
16 cannot be corrected unless the standards are made the
17 same going forward as they were in the past. *Roe*
18 *against Alabama* tells us that. The remedy, as we've
19 propounded from day one is to apply a uniform standard
20 on opening ballots now that's consistent with the
21 rules that were in place when the game started. We've
22 made that proposal by offering about 4800 ballots
23 originally.

24 The changing standards from time to time is
25 a due process violation. Equal protection is another

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1 issue. The problem here is that whether you got your
2 vote counted on election day varies depending upon
3 where you live. I can give you the Plymouth against
4 Minneapolis example again on signature matching. I
5 can give you the voter registration issue again from
6 Carver to virtually every other county. This isn't
7 just a problem of subjectivity. It's a completely
8 different standard from county to county.

9 Only Hennepin County and apparently every
10 subdivision takes your franchise away if you move to
11 the apartment next door without re-registering. Only
12 Hennepin County apparently plays the hyphen game. If
13 you pick one up or drop one off, you lose your
14 registration. They don't do that in the rest of the
15 state as far as we know. Some counties don't reject
16 any absentee ballots as we showed you as this case
17 began. Some reject as high as 12.8 percent but we had
18 to get to the specific reasons in order to make our
19 case and we have.

20 Let me get to the data base issue. First of
21 all, I got called to task for something I said in
22 chambers which isn't really cricket and I was
23 meticulous not to use the terms that Mr. Hamilton
24 accurately quoted me saying in public, so I'm not
25 going to repeat them here. That's out of deference to

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1 the Secretary of State and how hard they work to do
2 the best job they can. But one week ago, now nine
3 days ago, the Secretary of State's data base on
4 registrations had not had input of data from 600
5 precincts out of the 4,000 in the state. And I'm not
6 talking about the DVS new licenses, I'm talking,
7 according to the testimony, about the input from the
8 November election. They didn't have it from 600
9 precincts a week ago. Suggest to you that they didn't
10 have it from almost anybody on January 26 when we
11 started this trial. We went first and now it's down
12 to where there's 36 precincts missing. This, I want
13 to call it organic, is a dynamic data base that
14 changes on a day-to-day basis and will come to rest
15 sometime in the next week. Then the data will be
16 input and the data base will presumptively be correct.

17 With a two-day lapse, Mr. Mansky found
18 apparently five changes in the data base that changed
19 the status of voters. There can't be any more
20 compelling evidence that we were dealing with a
21 constantly changing data base and we went first, so it
22 was certainly a more mature and more complete data
23 base when the Contestee finished their case.

24 Mr. Lillehaug, during his examination of a
25 number of people, would say this is your status,

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1 active, registered here, and then would say and let's
2 cross-check it to be sure we're right with the
3 election history, if you remember that testimony?
4 Well, that shows 11-4, you voted absentee. That's a
5 cross-check. Well, we found out yesterday from the
6 technology department at the Secretary of State's
7 office that it isn't a cross-check. That the one data
8 stroke enters both the voter Lookup and the election
9 history. So it's not a cross-check. If there's an
10 error in one, it is highly likely there will be an
11 error in the other because they're not entered
12 independent. They don't check each other.

13 You can't really check the registration
14 status of people until you use the most up to date and
15 I suspect within the next week the final data access.
16 But, remember, it's our position that there's a
17 presumption of regularity and that when you assume
18 people are registered, they are.

19 Let me talk about *Bell against Gannaway*
20 because that's been visited upon us by the Court as a
21 substantial problem. First of all, it has been argued
22 that *Bell against Gannaway* stands for the proposition
23 that somebody challenging an absentee ballot is
24 estopped to do it after the ballot has been tabulated
25 because they gave up their opportunity to challenge

1 it. That's the square holding of *Bell against*
 2 *Gannaway*. We produced irrefutable evidence in this
 3 case, really not even subject to cross-examination,
 4 from Ms. Reichert, from Mr. Poser, from Mr. Gelbmann,
 5 and from Mr. Mansky. You can't challenge absentee
 6 ballots in this day and age. There's no opportunity
 7 to do it. Challengers stand in a segregated place and
 8 the only thing they can challenge is the voter's
 9 eligibility. Like that busload of people that just
 10 came in, they're not from here. Or I know that guy
 11 doesn't live there 'cause there's no such address.
 12 That's what a challenger is.

13 Now realize *Bell against Gannaway* was 33
 14 years ago and really doesn't get cited anyplace. And
 15 also realize the query that's essentially inherent in
 16 the case of how could you do this on a statewide
 17 basis? But even more important, look at the Justices
 18 that dissented based on carrying this type of holding
 19 forward, Mr. -- Chief Justice Sheran, Justice
 20 MacLaughlin and Justice Otis. But it doesn't matter
 21 because the evidence from the Secretary of State's
 22 training manual, from each one of the auditor's
 23 training manuals that's in evidence, from Mr. Mansky,
 24 from Ms. Reichert, and anybody else I might have asked
 25 is, challengers have nothing to do in this day and age

1 with absentee ballots. And so to argue the estoppel
 2 issue that arises in *Bell against Gannaway* as
 3 estopping us from attacking the legality or illegality
 4 of the ballots that were counted on election day or,
 5 as I've said before, to use them as a control, is the
 6 misuse of the case. That isn't -- it isn't very good
 7 law to begin with based on the dissent. It hangs on a
 8 very slim reed and it's completely inapplicable to the
 9 case before you. All the Justices, including the
 10 majority, knew that try to apply this thing to a
 11 statewide election and you've got trouble. And now we
 12 know it's physically impossible. You can't be
 13 estopped by conduct that's physically impossible to go
 14 through with.

15 There are 1630 ballots in evidence. If the
 16 proper presumptions are applied to them, they will be
 17 open and counted. I'm not nearly as confident as Mr.
 18 Hamilton who apparently, when he says you open their
 19 250, and Mr. Franken's going to win. I don't know who
 20 are inside ours but there's 1600 and -- about 1650.
 21 They ought to be opened. They ought to be counted
 22 because we presume here that Minnesota people followed
 23 the law and the presumptions all work in our favor.
 24 They're more likely than not, upon further
 25 examination, to conform to the statute. Rule 9 is

1 invalid, we pick up 61 votes, 133, and the others
 2 can't be counted 'cause they don't exist.
 3 And then there's the issue of the 413
 4 ballots, now reduced to about 275 that are out there,
 5 that even the county officials thought were improperly
 6 rejected and the Supreme Court order over two dissents
 7 brought the political game to bear on those ballots.
 8 They should be open and counted and I don't know who
 9 those people voted for either.

10 I have a list of presumptions that are
 11 reasonable, legal, and correct. If a voter got a
 12 registered voter envelope, you should presume he was
 13 registered unless you have evidence to the contrary.
 14 If a witness has a Minnesota address, presume they're
 15 registered in Minnesota because 96 percent of them
 16 are. If a voter received an absentee ballot, presume
 17 he or she applied for it. How else would they get it.
 18 If a person signed the application or ballot, presume
 19 it's their genuine signature, absent evidence to the
 20 contrary.

21 And, by the way, Ms. Kecker didn't try to
 22 vote twice. Ms. Kecker thought that her absentee
 23 ballot might not have been counted or about to be
 24 counted. She went down, spoke to the election judge,
 25 and found out through the system that there weren't

1 going to be two votes and there weren't two votes.
 2 That's another presumption. It would -- to make us
 3 prove that people didn't vote twice, there isn't any
 4 evidence that people voted twice. The system catches
 5 it. It's designed to do that and the only way people
 6 do it is by accident and we don't have any evidence of
 7 it happening in this case. If there's one thing you
 8 can rest assure of is that nobody in this election
 9 voted twice. All of these presumptions are logical,
 10 they're common sense, and they result in compliance
 11 with even your 2-13 order.

12 Let me kind of show you an example of what
 13 happens and where common sense goes out the window
 14 when you don't presume what's logical. Yesterday Mr.
 15 Mansky's on the stand and we got into this business of
 16 the definitive way to prove that somebody voted or
 17 didn't vote is with a roster and so I said, Mr.
 18 Mansky, did you check the rosters? No, actually I
 19 didn't. Okay. I guess you can't make a definitive
 20 answer to that question but, wait a minute, you had
 21 two trained workers and you said go get me the rosters
 22 if they're there and they never came back. We presume
 23 that those well-trained people working for the best
 24 expert in the state went out, couldn't find them, so
 25 they didn't bring them. You can't presume that they

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1 went to lunch or went out and started drinking
2 martinis and didn't do their job or that they found
3 them and decided to hide them from Mr. Mansky.
4 Those are absurd assumptions to make. You make the
5 same assumptions in law that you make as you go
6 through life. You -- you assume the logical. You
7 draw common-sense conclusions. The common-sense
8 conclusion was, that they didn't sign rosters. There
9 wasn't any evidence of it.

10 I thank you very much for the tolerance.
11 There is no question that I stumbled and stammered a
12 lot in the course of this case. I now know a lot more
13 about election law than when I started which was zero.
14 You have been generous with your time and I thank you
15 very much. It was a pleasure.

16 JUDGE HAYDEN: Thank you.

17 Thank you very much. That'll be all for
18 today.

19 MR. LILLEHAUG: Your Honor, one thing, if I
20 might? The Court has given us the deadline with
21 respect to certifications and that deadline passed
22 during Mr. Friedberg's argument. I've consulted with
23 Mr. Friedberg and -- and with the clerk and I
24 understand we may make that submission. How would the
25 court like us to do that?

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1 JUDGE HAYDEN: We have some other matters
2 that need to be addressed in regard to scheduling with
3 your proposed findings, so we will see the trial
4 counsel in chambers in just a few minutes.

5 MR. LILLEHAUG: Thank you, Your Honor.

6 JUDGE HAYDEN: Thank you.

7 (Whereupon, a brief recess was taken.)

8 JUDGE HAYDEN: We are back on the record now
9 with another matter of business. Mr. Lillehaug?

10 MR. LILLEHAUG: Thank you, Your Honor.
11 Contestee, pursuant to Court order, offers its last
12 evidence in this case. First, we offer Exhibits
13 F3547, 3-5-4-7, through 3-5-7-1, 3571. These consist
14 of certifications from the various counties and they
15 are offered in the form of two notebooks and one
16 redwall and if I might, I'd like to recite for the
17 record the exhibits in each of the notebooks?

18 JUDGE HAYDEN: You may.

19 MR. LILLEHAUG: The first notebook is
20 Franken Exhibits 3547 through 3552, that's 3547
21 through 3552. The redwall is Exhibit F3553. And then
22 the remaining notebook is Franken Exhibit 3554 through
23 3571. So a redwall bracketed by two notebooks in the
24 numerical sequence.

25 MR. FRIEDBERG: No objection.

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1 JUDGE HAYDEN: Thank you. The exhibits are
2 received.

3 MR. LILLEHAUG: Then, Your Honor, we offer
4 Franken Exhibits 4243 through 4318, that's 4243
5 through 4318. That consists of two notebooks. The
6 first notebook is 4243 through 4266, 4243 through
7 4266. And the second notebook completing the sequence
8 is 4267 through 4318, so 67 to 18.

9 MR. FRIEDBERG: No objection.

10 JUDGE HAYDEN: Thank you. F4243 through
11 4318 is received.

12 MR. LILLEHAUG: Thank you. Then one final
13 matter of cleanup, Your Honor. Apparently one SOS
14 voter Lookup was inadvertently omitted from a previous
15 exhibit and we've caught that. It is Exhibit F4119A;
16 4119A, and it is a lookup for voter Askelson,
17 A-s-k-e-l-s-o-n.

18 MR. FRIEDBERG: I'll make my last objection
19 to the Secretary of State's data base.

20 JUDGE HAYDEN: Thank you. And that will be
21 overruled. 4119A is received.

22 MR. LILLEHAUG: Thank you, Your Honor.
23 That's all I have.

24 JUDGE HAYDEN: Thank you.

25 Mr. Elias, did you --

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1 MR. ELIAS: No, no, I was just standing.

2 JUDGE HAYDEN: Any other matters? Mr.
3 Hamilton?

4 MR. HAMILTON: I think we rest.

5 JUDGE HAYDEN: Anything further, Mr.
6 Friedberg?

7 MR. FRIEDBERG: I'm sure we do. We have
8 some additional certifications coming Monday I
9 believe, Your Honor.

10 JUDGE HAYDEN: Monday noon, was that the
11 deadline?

12 MR. LANGDON: It was.

13 JUDGE HAYDEN: Thank you very much.

14 (Whereupon, the trial concluded at
15 approximately 12:50 p.m.)

16 * * * * *

