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STATE OF MINNESOTA  
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DISTRICT COURT  
SECOND JUDICIAL DISTRICT  
Case Type: CIVIL OTHER

File No. 62-CV-09-56

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

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

**CONTESTANTS'  
MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

**INTRODUCTION**

Many more citizens voted by absentee ballot in this election than had ever done so before—some 280,000. Perhaps as a result, many more such ballots were rejected by election officials—some 12,000. During the administrative recount, in a process that saw different officials applying standards inconsistently in different localities across the state, local officials identified approximately 1,350 of those ballots as likely having been rejected in error. Despite substantial concerns about equal protection, 933 of those were opened and counted on January 3, 2009. The standards applied to those 933 ballots have never been applied to the remaining 11,000 ballots that are still unopened and uncounted. These ballots, representing potentially disenfranchised voters, are the subject of this Motion.

Contestants now have reviewed and analyzed copies of the remaining ballot envelopes in light of the 933 envelopes that were opened and counted. Although a portion of them appear to have been properly rejected—because the voter was not registered in Minnesota or died before election day—Contestants have also seen that local officials did not apply standards consistently in accepting or rejecting ballots. As a result, similar ballots have not been treated the same throughout the state, raising an equal protection violation.

As a result of this inconsistent treatment, thousands of ballots stand wrongly rejected as a matter of law. Of those thousands, a substantial portion fully complied with the applicable statutory requirements, set forth in Minn. Stat. §§ 203B.12 and 203B.24. The remaining absentee ballots are in substantial compliance with the statutes—either because any mistakes are those of local officials or because those made by the voters were immaterial.

Now that the election has entered the contest phase, this Court must ensure that the standard for rejection is consistently applied for all those voters whose absentee ballots remain uncounted. None of these ballots appears to have been born of fraud. Under longstanding law stating Minnesota's policy favoring enfranchisement and the counting of valid votes, these should be opened and counted.

The failure to count these votes would be a violation not only of Minnesota's election laws but of the equal protection clauses of the Minnesota and U.S. Constitutions as well. The fact is that different counties applied standards inconsistently in determining whether to accept absentee ballots and as a result similarly situated ballots were treated

differently: in one county, for example, unsigned envelopes with stickers obscuring the portion of the form the voter was to sign were accepted and opened, while in other counties such envelopes were rejected. Counties applied standards inconsistently for every category of information requested on the envelopes, resulting in envelopes that look precisely the same being treated differently—some were opened and their ballots counted (on election day or among those counted on January 3, 2009), while others remain in the large pile of rejected ballots.

To count one ballot and not all others similarly situated leads inexorably to disenfranchisement. To disenfranchise thousands of Minnesota voters who labored to cast their votes, and due to no (or immaterial) fault of their own had their votes rejected, would be intolerable. As a matter of law, this Court should not sanction such a result. It should grant summary judgment ruling that their votes be counted.

#### **ISSUES FOR SUMMARY JUDGMENT**

1. Whether in order to satisfy equal protection the Court should order that all rejected absentee ballots cast by registered voters who were living on election day and did not otherwise vote in this election be counted?
2. Whether the Court should order that certain absentee ballots falling into the categories described herein were wrongly excluded and should be counted as a matter of law?

#### **IDENTIFICATION OF THE RECORD**

The record for this motion is comprised of:

- Notice of Contest;
- Contestee's Answer and Counterclaims;
- Affidavit of James Langdon (and attached exhibits); and

- Affidavit of John Rock (and attached exhibits).

## **STATEMENT OF UNDISPUTED MATERIAL FACTS**

### **I. PROCEDURAL BACKGROUND**

The election between Norm Coleman and Al Franken for a seat in the United States Senate took place on Tuesday, November 4, 2008. While Norm Coleman received the greatest number of votes, the close result of this election triggered an automatic statewide administrative recount under Minn. Stat. § 204C.35 (the "Recount"). The Recount was conducted pursuant to Minn. Rules Ch. 8235, the Secretary of State Recount Plan, dated November 18, 2008, and the 2008 Recount Guide. *See* Affidavit of James K. Langdon ("Langdon Aff."), Ex. 1 (Nov. 18, 2008 Recount Plan) and Ex. 2 (2008 Recount Guide).

On January 5, 2009, the Canvassing Board, upon conclusion of the recount, declared that Al Franken had received the highest number of votes by only 225 votes (1,212,431 votes for Al Franken and 1,212,206 votes for Norm Coleman). On January 6, 2009, Contestants Cullen Sheehan and Norm Coleman filed a Notice of Contest appealing from the decision of the Canvassing Board.

### **II. THE RECOUNT AND REJECTED ABSENTEE BALLOTS**

During the Recount, the Franken campaign raised the potential issue of improperly rejected absentee ballots. *See* Langdon Aff., Ex. 3. Rejected absentee ballots were a focus of both the Canvassing Board and the Minnesota Supreme Court.

**A. Minnesota Law on Absentee Voting**

Minnesota law expressly provides for absentee voting. In Minnesota, citizens are allowed to vote absentee for the following reasons: (1) absence from precinct, (2) illness or disability, (3) serving as an election judge in another precinct, or (4) religious discipline or religious holiday or observance. Minn. Stat. § 203B.12. There are two ways to vote by absentee ballot: in person or by mail. If voting absentee, the voter must complete an Absentee Ballot Application. If voting by mail, the county auditor then sends an absentee ballot to the voter. In order to be counted, a completed absentee ballot must be received by the county auditor by Election Day. *See* Minn. Stat. §§ 203B.04, 203B.06-.08.

The election judges in each precinct take possession of all return envelopes delivered to them in accordance with Minn. Stat. § 203B.08. Two or more election judges or the judges of an absentee ballot board are required to examine each return envelope and mark it “accepted” or “rejected.” Minn. Stat. §§ 203B.12, 203B.24 Below are form Absentee Ballot Return Envelopes for registered voters (left) and non-registered voters (right):

RETURN ENVELOPE

Registered

Voters

TO BE COMPLETED BY VOTER	
VOTER'S NAME (PLEASE PRINT)	
VOTER'S MINNESOTA ADDRESS (PLEASE PRINT)	
MN	
I certify that on election day I will meet all the legal requirements to vote by absentee ballot.	
VOTER'S SIGNATURE	DATE
TO BE COMPLETED BY WITNESS	
I certify that the voter	
<ul style="list-style-type: none"> <li>showed me the blank ballots before voting;</li> <li>marked the ballots in private or, if physically unable to mark the ballots, the ballots were marked as directed by the voter; and</li> <li>enclosed and sealed the ballots in the secrecy envelope.</li> </ul>	
NAME OF WITNESS (PLEASE PRINT)	
ADDRESS OF NON-NOTARY WITNESS IN MINNESOTA (PLEASE PRINT)	
MN	
SIGNATURE OF WITNESS	DATE
TITLE OF WITNESS (IF AN OFFICIAL)	
FOR OFFICE USE ONLY	
<input type="checkbox"/> ACCEPTED <input type="checkbox"/> REJECTED _____	

RETURN ENVELOPE

Non-Registered

Voters

TO BE COMPLETED BY VOTER	
VOTER'S NAME (PLEASE PRINT)	
VOTER'S MINNESOTA ADDRESS (PLEASE PRINT)	
MN	
I certify that on election day I will meet all the legal requirements to vote by absentee ballot.	
VOTER'S SIGNATURE	DATE
TO BE COMPLETED BY WITNESS	
I certify that the voter	
<ul style="list-style-type: none"> <li>showed me the blank ballots before voting;</li> <li>marked the ballots in private or, if physically unable to mark the ballots, the ballots were marked as directed by the voter;</li> <li>enclosed and sealed the ballots in the secrecy envelope;</li> <li>registered to vote by filing out and enclosing a voter registration application in the ballot envelope; and</li> <li>provided proof of residence as indicated below.</li> </ul>	
NAME OF WITNESS (PLEASE PRINT)	
ADDRESS OF NON-NOTARY WITNESS IN MINNESOTA (PLEASE PRINT)	
MN	
SIGNATURE OF WITNESS	DATE
TITLE OF WITNESS (IF AN OFFICIAL)	
PROOF OF RESIDENCE USED BY VOTER	
Witness—please check one:	
<input type="checkbox"/> MN Driver's License/Perm/ID Card or receipt with current address Number _____	
<input type="checkbox"/> Tribal ID card with name, current address, signature, and picture	
<input type="checkbox"/> Utility bill or student fee statement plus a MN Driver's License/ID Card, Tribal ID card with picture, U.S. Passport, U.S. military ID card with picture, or student ID card with picture. Number _____	
<input type="checkbox"/> Previous registration in the same precinct.	
<input type="checkbox"/> Notice of late registration from county auditor or municipal clerk.	
<input type="checkbox"/> Registered voter in the precinct who vouched for absentee voter's residence in the precinct. (Please complete the three voucher lines below.)	
<input type="checkbox"/> Employee of a residential facility in the precinct who vouched for absentee voter's residence at the facility. (Please complete the three voucher lines below.)	
VOUCHER'S NAME AND NAME OF RESIDENTIAL FACILITY, IF APPLICABLE (PLEASE PRINT)	
VOUCHER'S ADDRESS OR ADDRESS OF RESIDENTIAL FACILITY, IF APPLICABLE (PLEASE PRINT)	
VOUCHER'S TELEPHONE NUMBER OR TELEPHONE NUMBER OF RESIDENTIAL FACILITY, IF APPLICABLE (PLEASE PRINT)	
VOUCHER'S SIGNATURE	
FOR OFFICE USE ONLY	
<input type="checkbox"/> ACCEPTED <input type="checkbox"/> REJECTED _____	

Generally speaking, there are two types of absentee ballots—“regular” absentee ballots<sup>1</sup> and UOCAVA Absentee Ballots.<sup>2</sup> Pursuant to statute, there are only four specific grounds upon which a regular absentee ballot may be rejected. *See* Minn. Stat. § 203B.12, subd. 2. Specifically, Minn. Stat. § 203B.12, subd. 2 directs election judges to accept regular absentee ballots if the election judges (or a majority of them) are satisfied that:

- (1) the voter’s name and address on the return envelope are the same as the information provided on the absentee ballot application;
- (2) the voter’s signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot,<sup>3</sup> except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;
- (3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and
- (4) the voter has not already voted at that election, either in person or by absentee ballot.

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<sup>1</sup> “Regular absentee ballots” are ballots cast by “[a]ny eligible voter who reasonably expects to be unable to go to the polling place on election day in the precinct where the individual maintains residence because of absence from the precinct; illness; disability; religious discipline; observance of a religious holiday; or service as an election judge in another precinct.” Minn. Stat. § 203B.02, subd. 1.

<sup>2</sup> “UOCAVA Absentee Ballots” are ballots cast by voters who are in the military or who temporarily reside outside of the United States. Minn. Stat. § 203B.02, subd. 2; *see also* Minn. Stat. §§ 203B.16 - 203B.27.

<sup>3</sup> The directions include the requirement that the absentee voter have a witness who is registered to vote in Minnesota and instructions on how to complete and mail the ballot. *See* Minn. R. 8210.0500, Subpart 2.

If all or a majority of the election judges examining return envelopes find that an absent voter has failed to meet one of the requirements above, “they shall mark the return envelope ‘Rejected,’ initial or sign it below the word ‘Rejected,’ and return it to the county auditor.” Minn. Stat. § 203B.12, subd. 2.

As to UOCAVA Absentee Ballots, Minn. Stat. § 203B.24, subd. 1 directs election judges to accept ballots if the election judges are satisfied that:

- (1) the voter’s name on the return envelope appears in substantially the same form as on the application records provided to the election judges by the county auditor;
- (2) the voter has signed the federal oath prescribed pursuant to section 705(b)(2) of the Help America Vote Act, Public Law 107-252;
- (3) the voter has set forth the same voter’s passport number, or Minnesota driver’s license or state identification card number, or the last four digits of the voter’s Social Security number as submitted on the application, if the voter has one of these documents; and
- (4) the voter has not already voted at that election, either in person or by absentee ballot.

Unlike regular absentee ballots, Minnesota law requires the election judge to write the reason for rejecting UOCAVA Absentee Ballots. *See* Minn. Stat. § 203B.24, subd. 1 (for UOCAVA Absentee Ballots, “[e]lection judges must note the reason for rejection on the back of the envelope in the space provided for that purpose”).

Minnesota law does not permit an election judge to reject an absentee ballot for any other reason. *See* Minn. Stat. §§ 203B.12, subd. 2 (“There is no other reason for rejecting an absentee ballot.”), 203B.24, subd. 1 (“An absentee ballot . . . may only be rejected for lack of one of clauses (1) to (4).”).

**B. The Secretary of State's "Detailed Instructions" Relating to Rejected Absentee Ballots**

Over 280,000 Minnesota citizens who exercised their fundamental right to vote in the November 2008 election did so by submitting absentee ballots.<sup>4</sup> Of these, approximately 12,000 absentee ballots were rejected by local election officials. Langdon Aff., Ex. 3 (Secretary of State estimating that 12,000 absentee ballots were rejected). Based on an analysis of data provided by the Secretary of State and individual counties, throughout the state, approximately 4% of absentee ballots submitted were rejected by local election officials. However, local election officials in the various counties rejected absentee ballots at varying rates. For example, Benton, Crow Wing, and Itasca counties had a rejection rate of greater than 9%, while many other counties had a rejection rate of less than 1%.

Joseph Mansky, Ramsey County Elections Manager and former Secretary of State Elections Director,<sup>5</sup> testified that there is "no question" that that election officials make mistakes with respect to evaluating absentee ballot envelopes, and determining whether the absentee ballot envelopes should be accepted or rejected. Mansky Dep. 77:21-78:2

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<sup>4</sup> All arguments contained herein apply to mail ballots and ballots pursuant to the Uniformed Overseas Citizens Absentee Voting Act ("UOCAVA"), as well as absentee ballots.

<sup>5</sup> Mr. Mansky has twenty-four years of experience administering Minnesota's election laws. Since 2002, he has been Ramsey County Elections Manager. Mansky Dep. 8:18-10:12 (Langdon Aff. Ex. 4). Prior to that, he acted as a consultant to various counties and municipalities providing training for election judges and advising city and county officials on election laws. *Id.* at 13:9-23. From 1984 to 1999, Mr. Mansky worked in the Minnesota Secretary of State's office. He was director of the election division for eleven years. *Id.* at 15:5-16:2.

(Langdon Aff., Ex. 4). The higher volume of absentee ballots in this election led to a higher mistake rate amongst election judges. Mansky Dep. 80:21-81:13. Ramsey County, which has about eleven percent of Minnesota's population, had about 1,500 rejected absentee ballots. Mansky Dep. 79:20-80:5.

During the Recount, the Canvassing Board expressed an interest in knowing the number of absentee ballots that may have been mistakenly rejected. On December 2, 2008, Deputy Secretary of State Jim Gelbmann "asked for each county's assistance in reviewing all previously-rejected absentee ballots." *See* Langdon Aff., Ex. 7. Mr. Gelbmann indicated that he was requesting the re-sorting because "the Board members expressed an interest in knowing the number of Absentee Ballots that may have been mistakenly rejected." *Id.* This December 2, 2008 email asked the counties to create a "fifth category"<sup>6</sup> while "reviewing all previously-rejected absentee ballots." *Id.*

On December 4, 2008, with the manual recount largely completed, Mr. Gelbmann emailed a document entitled "Detailed Instructions for Sorting All Currently-Rejected Absentee Ballots Cast in the U.S. Senate Race." *See* Langdon Aff., Ex. 8. These "Detailed Instructions" state:

This task goes beyond a mere listing of the reasons for rejecting an absentee ballot that are listed on the envelope. It requires the election workers to further document that the reasons listed are accurate. The integrity of our election system, and the need to make sure every effort is made to count every vote that is legitimately cast by a qualified, registered voter, is dependent upon your voluntary participation in this process. No voter should be required to

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<sup>6</sup> Minn. Stat. §204B.12, subd. 2 provides four grounds for rejecting absentee ballots. This idea of a fifth category was referred to as the "fifth pile" or "Pile 5."

rely on an election contest to ensure his or her vote is counted by the State Canvassing Board. If the Board lacks the authority to count absentee ballots that were mistakenly rejected, it is critical that the Board be able to document the number of mistakenly-rejected absentee ballots in its final certification of the election results.

*Id.* (Detailed Instructions at 1).

The Detailed Instructions invited local election officials to “conduct preliminary investigations relative to each rejected absentee ballot prior to the actual public sorting process.” *Id.* at 2. The Detailed Instructions for the non-mandatory re-sorting of rejected absentee ballots contain a further “optional” instruction. Under the heading “Optional: Mail Ballots,” the Secretary of State’s office stated: “At the discretion of the local Election Official, previously rejected ballots from mail ballot precincts may also be reviewed to determine whether any were rejected due to an administrative error, through no fault of the voter.” *Id.* at 6.

The Detailed Instructions also requested county officials to move any absentee ballots from the second pile (for ballots rejected because the return envelope does not contain the voter’s genuine signature) to the fifth pile if the application and return envelope signatures “are similar, but not identical.” *Id.* at 3.

On December 7, 2008, the Secretary of State’s office sent an email under the subject line “Updated Information on Sorting of Rejected Absentee Ballots.” *See* Langdon Aff., Ex. 9. Here, Mr. Gelbmann stated that Houston County conducted “a public sort on Friday” and then provided the remaining counties who still planned to conduct the voluntary re-sort with “additional clarifications and instructions.” *Id.* at 2.

This December 7 email directs the counties to, for the first time, consider a rejected absentee ballot as improperly rejected if the signatures do not match or even if there is no signature, but the “transaction was actually handled at your in-person counter and was witnessed by a county or city official.” *Id.* at 3.

### **C. Counties Handled the Rejected Absentee Ballots Differently**

In response to the Secretary of State’s “Detailed Instructions,” when doing the “Pile 5” sorting process counties applied the standards inconsistently and some counties refused to engage in the recommended process at all. For example, Scott County placed no ballots in the fifth pile. *See* Langdon Aff., Ex. 10 (Affidavit of Cullen Sheehan (“Sheehan Aff.”) ¶ 3).<sup>7</sup> At least five ballots were rejected (and were not put in the fifth pile) where the voter and the witness have the same street address and surname, but the witness did not include the city in his or her address. Similarly, some absentee voters used election judges as witnesses. These absentee voters’ ballots were rejected where the election judge/witness did not include his or her complete address information. These were not moved to the fifth pile. *Id.* In contrast, in Minneapolis, officials placed previously rejected absentee ballots in the fifth pile where a city official acted as the voter’s witness and provided only name and title without the witness’s address. Clay County placed at least one ballot in the fifth pile even though it had no witness information, while Lyon County left a similarly situated ballot in a rejected pile. *See* Langdon Aff., Ex. 10 (Sheehan Aff. at Ex. 1).

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<sup>7</sup> The Sheehan Aff. was originally submitted to the Minnesota Supreme Court on December 16, 2008 in support of the Amended Petition for an Order to Show Cause Pursuant to Minn. Stat. § 204B.44.

The City of Minnetrista, in Hennepin County, created its own categories in the re-sorting process, believing that the Secretary of State's instructions were incomplete. In an e-mail dated December 12, 2008, Terri Haarstad, City Clerk for the City of Minnetrista, stated: "the on-line survey requested by the Canvassing Board, Minnetrista left Category 5 blank as Categories 1-4 do not address all legal and valid reasons why an absentee ballot may be properly rejected. As such, Minnetrista created their own categories for ballots rejected under MS§ 203B.08 subd. 4, MS§ 203B.08 subd. 1, MS§ 203B.07 subd. 3, MN Rules 8210.2200 and MN Rules 8210.2500." Langdon Aff., Ex. 12. See *also* Reichert Dep. 245:12-246:2 (noting that there had been inconsistencies even among cities in Hennepin County) (Langdon Aff., Ex. 11).

A number of counties declined (some on the advice of county attorneys) to participate in this process, including St. Louis, Freeborn, Hubbard and Stearns. Langdon Aff., Ex. 13.

**D. The Minnesota Supreme Court Orders**

On December 18, 2008, the Minnesota Supreme Court ordered candidates Norm Coleman and Al Franken and their campaign representatives, the Secretary of State, and all county auditors and canvassing boards to establish and implement a process, as expeditiously as practicable, for the purpose of identifying all absentee ballot envelopes that the local election officials and the candidates agree were rejected in error. The Court further ordered local election officials to identify for the candidates' review those previously rejected absentee ballot envelopes that were not rejected on any of the four bases stated in Minn. Stat. § 203B.12 or § 203B.24. Any absentee ballot return envelopes

that local election officials and both candidates agreed were rejected in error were delivered to the Secretary of State and opened and counted on January 3, 2009. *See* Langdon Aff., Exs. 14-15 (Dec. 18 and Dec. 24 Orders).

Of the approximately 12,000 rejected absentee ballots, local election officials identified approximately 1,350 as likely having been rejected in error. Of those, the candidates agreed on 933 that were opened and counted on January 3, 2009. The standards applied to those 933 ballots have never been applied to the remaining 11,000 absentee ballots still unopened and uncounted.

As noted above, many local election officials refused to participate in the “Pile 5” sorting process and some local election officials refused to agree that any of their absentee ballots were improperly rejected. Additionally, both the Coleman campaign and the Franken campaign requested that absentee ballot envelopes be opened and counted but were rebuffed in the process by one or both of the other parties. Under the Supreme Court Order requiring unanimity, these ballots were not counted. Both parties maintain that these remaining rejected absentee ballots include absentee ballots that were improperly rejected by local election officials but have not yet been opened and counted. *See* Notice of Contest ¶¶ 10-11; Contestee’s 1<sup>st</sup> and 2<sup>nd</sup> Counterclaims.

On January 5, 2009, the Minnesota Canvassing Board certified the election. The certified election totals did not include the remaining 11,000 absentee ballots that have not been opened and counted. These excluded absentee ballots include ballots that were:

- excluded, even though not marked “rejected” by local election officials;
- rejected for no apparent or given reason;

- rejected due to error of government clerk or local election official; and
- rejected despite evidence that voter substantially complied with the requirements of the law.

## ARGUMENT

### **I. SUMMARY JUDGMENT STANDARD**

A court should grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.03. *See also Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). Moreover, Rule 56 imposes the following specific burdens on the party responding to a summary judgment motion:

[A]n adverse party may not rest upon the mere averments or denials of the adverse party’s pleadings but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Minn. R. Civ. P. 56.05.

### **II. TO ENSURE THE EQUAL TREATMENT OF ALL ABSENTEE BALLOTS CAST IN THIS ELECTION, THIS COURT SHOULD ORDER THAT THE ABSENTEE BALLOTS OF ALL REGISTERED VOTERS ALIVE AND NOT OTHERWISE VOTING ON ELECTION DAY BE COUNTED**

#### **A. Election Officials Violated the Equal Protection Clause by Applying the Standards for Rejecting Absentee Ballots Differently in Different Counties**

“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). The U.S. Supreme Court has held that if the state fails

to adopt “specific standards” during a statewide recount that will ensure “equal application” to all votes, the lack of uniform standards violates the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 106. Similarly, this Court has concluded that “treating similarly-situated voters differently with no rational explanation . . . violates equal protection guarantees.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 (Minn. 2003) (ordering mailing of revised absentee ballots to all voters, including those who already voted).<sup>8</sup>

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

Here, the statutory criteria for rejecting absentee ballots under Minn. Stat. §§ 203B.12 and 203B.24 were applied differently in different counties on election night. Then, during the recount, the Secretary of State exacerbated the lack of uniformity by

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<sup>8</sup> The Minnesota Constitution “embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment to the United States Constitution.” *State v. Russell*, 477 N.W.2d 886, 889 n.3 (Minn. 1991). Indeed, the state constitution may require even more “stringent” review and a more robust guarantee of equal protection. *Id.* at 889.

issuing instructions that were internally inconsistent and did not clearly explain all of the proper bases for rejecting an absentee ballot. The implementation of those instructions during the Recount, superimposed on the discretionary decisions of election night, resulted in different standards being applied to ballots exhibiting the same types of characteristics.

Here, applying varying standards, election officials excluded approximately 11,000 absentee ballots, purportedly for failure to comply with the statutory requirements under Minn. Stat. §§ 203B.12, subd. 2 or 203B.24. To remedy these equal protection violations, the contest court must apply uniform standards to all rejected absentee ballots to ensure that all legal votes are counted.

**B. The Court Must Apply Uniform Standards To All Rejected Absentee Ballots and Give Effect to the Votes of Legal Voters**

Minnesota follows a “well-established policy of giving effect to the votes of legal voters regardless of irregularities in the election.” *Johnson v. Trnka*, 154 N.W.2d 185, 187 (Minn. 1967).

Election laws are to be construed so as to secure to every voter reasonable opportunity to vote and to have his vote counted as cast, when his intention can be ascertained from the ballot without violating statutory provisions. No man should be disenfranchised upon a doubtful construction of such statutes.

*Bloedel v. Cromwell*, 116 N.W. 947, 948 (Minn. 1908). Here, given the equal protection violations that have already occurred, the Court must apply equal standards to the remaining rejected absentee ballots consistent with Minnesota’s policy of counting every legal vote. The Court should forego application of the technical standards for rejecting

absentee ballots, preliminarily admit all those ballots, and exclude only those cast by ineligible voters or tainted by fraud.

**1. This Court Should Count Every Absentee Ballot Except Those Cast by Ineligible Voters or Those Tainted by Fraud**

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

Here, on Election Night, election officials rejected approximately 11,000 absentee ballots for purportedly failing to comply with the four technical standards in §§ 203B.12 and 203B.24. Although these technical provisions were “mandatory in all their substantial requirements” as to the absentee voters before they cast their votes, *Bell v. Gannaway*, 227 N.W.2d 797, 803 (Minn. 1975), these provisions were only directory as to the election officials who administered them, *see Fitzgerald*, 120 N.W.2d at 345; *State v. Erickson*, 188 N.W. 736, 737 (Minn. 1922); *Pennington v. Hare*, 62 N.W. 116, 118

(Minn. 1895), and are only directory as to any post-election review, such as this Court is conducting:

It is the general rule that, before an election is held, statutory provisions regulating the conduct of the election will usually be treated as mandatory and their observance may be insisted upon and enforced. After an election has been held, the statutory regulations are generally construed as directory and such rule of construction is in accord with the policy of this state, which from its beginning has been that, in the absence of fraud or bad faith or constitutional violation, an election which has resulted in a fair and free expression of the will of the legal voters upon the merits will not be invalidated because of a departure from the statutory regulations governing the conduct of the election except in those cases where the legislature has clearly and unequivocally expressed an intent that a specific statutory provision is an essential jurisdictional prerequisite and that a departure therefrom shall have the drastic consequence of invalidity.

*Erickson v. Sammons*, 65 N.W.2d 198, 202 (Minn. 1954) (emphasis omitted) (footnote omitted); accord *Johnson*, 154 N.W.2d at 187; *In re Contest of Election of Vetsch*, 71 N.W.2d 652, 658 (Minn. 1955) (“[A]fter an election is over, statutory regulations are usually construed to be directory rather than mandatory unless the departure from the statutes casts uncertainty upon the result”) (footnote omitted).

After an election has been held, its results are presumed to be valid notwithstanding irregularities or election law violations. *Id.*; *Application of Andersen*, 119 N.W.2d 1, 10 (Minn. 1962) (“[O]nce the true vote of the people is ascertained, mere irregularities will be overlooked.”) When reviewing an election retrospectively, the issue for a contest court is not whether violations of the election laws took place or were justified but rather whether any such violations “enabled disqualified voters to vote; has deprived legal electors of their vote; or has deprived voters of the adequate notice and information reasonably necessary to enable them to vote with a deliberate appraisal of the

merits, whereby the results of the election are made uncertain or inaccurate as a free and fair expression of the popular will.” *Sammons*, 65 N.W.2d at 202.

Here, where numerous equal protection violations occurred in the administration of the statutory technical requirements for rejecting absentee ballots, the most equitable and most efficient remedy is to presume that all rejected absentee ballots are legal votes and to exclude only those cast by ineligible voters or tainted by fraud or bad faith.

Absent a showing that a particular absentee ballot was cast by an ineligible voter or was tainted by fraud or bad faith, the Court should open each rejected absentee ballot and give legal effect to each valid vote under Minn. Stat. § 204C.22.

**2. Alternatively, This Court Should Count Every Rejected Absentee Ballot That Substantially Complied with Minn. Stat. § 203B.12 and § 203B.24**

Even if this Court were to apply standards derived from § 203B.12 and § 203B.24 to determine the preliminary legality of each rejected absentee ballot, the Court must be mindful that those technical provisions apply only in their “substantial requirements,” *Bell*, 227 N.W.2d at 803, not in all their literal detail. Minnesota courts have adopted the rule that voters need only “substantially comply” with technical voting requirements in order for their votes to be counted.<sup>9</sup>

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<sup>9</sup> A majority of states have adopted the “substantial compliance” standard in their election laws. *Eubanks v. Hale*, 752 So.2d 1113, 1152 (Ala. 1999) (“The majority of jurisdictions, however, has held that absentee voting laws should be liberally construed in order to effectuate the legislative purpose of protecting and furthering a citizen’s right to vote. ‘Substantial compliance’ with the statutory requirements is required under this interpretation.”) (quoting *Wells v. Ellis*, 551 So.2d 382, 383-84 (Ala. 1989)). *Accord Adkins v. Huckabay*, 755 So. 2d 206, 216 (La. 2000); *Cure v. Bd. of County Comm’rs*, 952 P.2d 920, 923 (Kan. 1998); *Beckstrom v. Volusia County*

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

*Andersen*, 119 N.W.2d at 8; *accord Bloedel v. Cromwell*, 116 N.W. 947, 948 (Minn. 1908) (“The intent of the voter, accordingly, to be effective, must be shown and indicated by markings on the official ballot substantially in the manner provided by such law, and in bona fide attempt at compliance therewith.”); *In re Contest of School District Election*, 431 N.W.2d 911, 915 (Minn. App. 1988) (“As a general rule, as long as there is substantial compliance with the laws, and no showing of fraud or bad faith, the true result of an election should not be defeated by an innocent failure to comply strictly with the statute.”). *See also* Mansky Dep. 144:5-6 (explaining that voters should be given considerable room to comply with the law).

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

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*Canvassing Bd.*, 707 So. 2d 720, 724-25 (Fla. 1998); *Erickson v. Blair*, 670 P.2d 749, 755 (Co. 1983); *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 628 (Mass. 1982) (“An absentee voter should not be disenfranchised if he substantially complies with the election law.”).

qualified voters will exercise the privilege of absentee voting.” *Bell*, 227 N.W.2d at 804. Similarly, the application requirement at issue in *Wichelmann* is to prevent “[f]rauds and corrupt elections.” *Wichelmann*, 273 N.W.2d at 640.

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

Accordingly, absentee ballots falling into the following categories discussed in Section III, *infra*, are in substantial compliance with Minn. Stat. §§ 203B.12 and 203B.24 and, as a matter of law, should be opened and counted.

### **III. ALTERNATIVELY, THE UNDISPUTED EVIDENCE SHOWS THAT CERTAIN CATEGORIES OF ABSENTEE BALLOTS WERE IMPROPERLY EXCLUDED AND MUST BE COUNTED**

Alternatively, if the Court does not order that all absentee ballots of properly registered Minnesota voters who were living on election day and did not otherwise vote in this election be counted, the Court should conclude, at the very least, that certain absentee ballots falling into specific categories were improperly excluded and must be counted as a matter of law, including: (A) absentee ballots that were not marked “rejected” by local election officials, (B) absentee ballots that were rejected for no apparent or given reason (or the given reason was incomprehensible), (C) absentee

ballots that were rejected due to error by a government clerk or local election official, and (D) absentee ballots that were excluded despite evidence that the voter substantially complied with the statutory requirements. As set forth below, the exclusion of such absentee ballots is contrary to Minnesota and federal law and fundamentally unfair. Accordingly, such wrongly excluded absentee ballots should be counted as a matter of law.

**A. Ballots Excluded, Even Though Not Marked “Rejected” By Local Election Officials**

Contestants have identified 321 absentee ballots which were excluded, even though they were actually marked “accepted” by local election officials. Rock Aff., Ex. 1, Category A-1<sup>10</sup> Rejected Absentee Ballots. *See also* Langdon Aff., Ex. 22 (examples of excluded absentee ballot envelopes marked “accepted” by local election officials). For example, the following ballot – marked “accepted” by local election officials has never been opened and counted:

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<sup>10</sup> The categories of rejected absentee ballot envelopes attached as exhibits to the Affidavit of John Rock are referenced by the section in which such rejected absentee ballots are discussed in this Section III (i.e., Category A-1 is discussed in Section III.A.1 herein; Category C-3 is discussed in Section III.C.3. herein).

TO BE COMPLETED BY VOTER	
VOTER'S 276275 8512 11.04/2008 ML PCT NR 8386012	
VOTER'S OR 4810 D16 FREDELY W-3 P-1 DORRAINE ELIZABETH NAUMAN 831 1/2 UNIVERSITY AVE NE 224 EM02 MN	
I certify that on election day I will meet all the legal requirements to vote by absentee ballot.	
VOTER'S SIGNATURE <i>Dorraine E. Nauman</i>	DATE 10-17-08
TO BE COMPLETED BY WITNESS	
I certify that the voter • showed me the blank ballots before voting; • marked the ballots in private or, if physically unable to mark the ballots, the ballots were marked as directed by the voter; and • enclosed and sealed the ballots in the secrecy envelope.	
NAME OF WITNESS (PLEASE PRINT) CONRAD NAUMAN	
ADDRESS OF NON-NOTARY WITNESS IN MINNESOTA (PLEASE PRINT) 127 CARVER CREEK CIR CARVER 55315 MN	
SIGNATURE OF WITNESS <i>Conrad Nauman</i>	DATE 10/17/08
TITLE OF WITNESS (IF AN OFFICIAL)	

RECEIVED ANOKA COUNTY IS  
OCT 20 2008

FOR OFFICE USE ONLY	
<input checked="" type="checkbox"/> ACCEPTED <i>404</i>	
<input type="checkbox"/> REJECTED	

Ballot of Dorraine Nauman, Anoka County. Similarly, Contestants have identified 168 absentee ballots which have not been opened and counted, even though they were never marked “rejected” by local election officials. Rock Aff., Ex. 2, Category A-2 Rejected Absentee Ballots. *See also* Langdon Aff., Ex. 23 (examples of excluded absentee ballot envelopes not marked “rejected” by local election officials).

The law requires that all absentee ballots not properly rejected by local election officials be counted. *See* Minn. Stat. § 203B.12, subd. 4 (providing that absentee ballot envelopes marked “accepted” shall be opened on election day and counted in the same

manner as ballots cast in person at the polls); Minn. Stat. § 203B.12, subd. 2 (only ballots identified by local election officials as meeting one of the enumerated reasons for rejection may be excluded); Minn. Stat. § 203B.24, subd. 1 (same). Because the absentee ballots identified in Category A-1 and Category A-2 were not designated as rejected by local election officials, and in many cases were actually accepted, these absentee ballots must be counted by this Court.

Moreover, approximately 97 of the initially rejected absentee ballots in Categories A-1 and A-2 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3, 2009). *See also, e.g.,* Langdon Aff., Ex. 40-41 (examples of absentee ballots initially excluded even though marked "accepted" by local election officials, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, the similarly situated absentee ballots in Categories A-1 and A-2 should be opened and counted as well.

**B. Ballots Rejected For No Apparent Or Given Reason**

Contestants have identified 163 absentee ballots which were rejected by local election officials, even though there is no apparent reason for their rejection and local election officials failed to provide any comprehensible reason for their rejection. *Rock Aff., Ex. 3, Category B Rejected Absentee Ballots. See also* Langdon Aff., Ex. 24

(examples of excluded absentee ballot envelopes marked “rejected” for no apparent or given reason) and Ex. 24 (absentee ballot envelope of John Murphy, Benton County, marked rejected and noted “overlooked” by local election official).

As discussed above, Minnesota law provides that absentee ballots can only be rejected for one of the enumerated reasons. If no such reason exists, the ballot must be accepted. Because there is no ascertainable reason for the rejection of the absentee ballots in Category B, they should be counted by this Court.

Moreover, 26 of the initially rejected absentee ballots in Category B were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3 , 2009). *See also* Langdon Aff., Ex. 43 (examples of absentee ballots initially rejected by local election officials for no given or apparent reason, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, the similarly situated absentee ballots in Category B-1 should be opened and counted as well.

**C. Absentee Ballots Rejected Due To Error Of Government Clerk Or Local Election Official**

Contestants have identified a multitude of absentee ballots that were rejected solely as the result of an error of a government official or local election official. It would be fundamentally unfair—and contrary to Minnesota law—to disenfranchise voters

whose ballots were rejected through no fault of their own. Because these voters substantially complied with the voting requirements, their votes should be counted.

**1. Absentee ballots rejected for lack of signature, where sticker affixed to the envelope by a government official improperly obstructed the portion of the ballot instructing the voter to sign the envelope.**

Contestants have identified 857 absentee ballots which were rejected by local election officials for lack of signature, where the pre-printed voter identification sticker was affixed to the envelope by a government official over the portion of the return envelope instructing the voter to sign the envelope.<sup>11</sup> Rock Aff., Ex. 4, Category C-1A Rejected Absentee Ballots; Rock Aff., Ex. 5, Category C-1B Rejected Absentee Ballots. *See also* Langdon Aff., Ex. 26 (examples of excluded absentee ballot envelopes where pre-printed sticker obstructed “To Be Completed By Voter” instruction on the absentee ballot envelope) and Ex. 27 (examples of rejected absentee ballot envelopes where pre-printed sticker obstructed “printed sticker obstructed voter certification or signature portions of the envelope). For example, the following absentee ballot envelopes were rejected for lack of voter signature:

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<sup>11</sup> According to Mr. Mansky, government officials should place such stickers on the very top of the envelope. Mansky Dep. 86:22-87:1.

LAWRENCE G ANDERSON  
2940 REGENT AVE N  
GOLDEN VALLEY, MN 55422



I certify that on election day I will meet all the legal requirements to vote by absentee ballot.  
VOTER'S SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

TO BE COMPLETED BY WITNESS

I certify that the voter:  
showed me the blank ballot before voting;  
marked the ballot in private or, if physically unable to mark the ballot, the ballot was marked as directed by the voter; and  
enclosed and sealed the ballot in the secrecy envelope.

NAME OF WITNESS (PLEASE PRINT)  
ESPERANZA GUERRERI-ANDERSON

ADDRESS OF NON-NOTARY WITNESS IN MINNESOTA  
(PLEASE PRINT) 2940 REGENT AVE N.

MINNEAPOLIS 55422 MN

SIGNATURE OF WITNESS \_\_\_\_\_ DATE 10/25/08

TITLE OF WITNESS (IF AN OFFICIAL)

FOR OFFICE USE ONLY

ACCEPTED  
 REJECTED no voter signature  
STV-88

RECEIVED BY THE STATE ELECTION OFFICE

Absentee Ballot Envelope of Lawrence Anderson, Hennepin County. Because the pre-printed voter identification sticker obstructed the "To Be Completed By Voter," the voter did not understand that he was required to fill in any information in the section governed by that instruction. See Langdon Aff., Ex. 18, Affidavit of Lawrence G. Anderson, ¶ 6.

**ABSENTEE BALLOT RETURN ENVELOPE**

ENVELOPE **B** Ward 4 Precinct \_\_\_\_\_  
 Election Day NOV 04 2008 20\_\_

FOR OFFICIAL USE ONLY

ACCEPTED  REJECTED *WLS*

TO BE COMPLETED BY VOTER

VOTER: \_\_\_\_\_  
 VOTER: \_\_\_\_\_  
 I certify to vote: \_\_\_\_\_

VOTER'S SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

TO BE COMPLETED BY WITNESS

I certify that the voter:

- showed me the blank ballots before voting;
- marked the ballots in private or, if physically unable to mark the ballots, the ballots were marked as directed by the voter; and
- enclosed and sealed the ballots in the secrecy envelope.

NAME OF WITNESS (PLEASE PRINT) James P. Larson  
 ADDRESS OF NON-ROTARY WITNESS IN MINNESOTA (PLEASE PRINT) 3407 EMERALD DR WBL  
 SIGNATURE OF WITNESS \_\_\_\_\_ DATE 10/9/08  
 TITLE OF WITNESS (IF AN OFFICIAL) \_\_\_\_\_

FORM 203 REV VOTER RETURN ENV 6/08

**RECEIVED**  
 OCT 10 2008

Absentee Ballot Envelope of Darlene Larson, Ramsey County. Because the pre-printed voter identification sticker was placed over the section governed by the instruction "To Be Completed By Voter" and covered up most of that section, the voter did not understand that she was required to fill in any information in that section. See Langdon Aff., Ex. 18, Affidavit of Darlene Larson, ¶ 6, Affidavit of Elissa Jackson (attached absentee ballot envelope rejected for lack of voter signature; voter did not realize that

he/she was required to complete the certification section, because the instruction “To Be Completed By Voter” was obstructed by the pre-printed sticker), Affidavit of Ross Jorgensen (same), Affidavit of Phyliss A. Norrbohm (same), Affidavit of Joan R. Russell (same), Affidavit of Grover Junior Simms (same). Mr. Mansky testified that if the sticker affixed by a government official obstructed the instructions to the voter, and the voter failed to sign the ballot, then it is arguable that the person did not know they needed to sign it. Mansky Dep. 86:22-87:5.

It would be unfair to reject these ballots for lack of voter signature, as any technical defect is directly the result of an error by government officials. *Id.* at 157:5-15 and Dep. Ex. 41(experienced elections official stating that he would accept an absentee ballot without a voter signature where the pre-printed sticker obstructed the “To Be Completed By Voter” section and certification). Accordingly, the absentee ballots in Category C-1 should be counted.

**2. Absentee ballots rejected because government official sent the voter the wrong ballot.**

Contestants have identified 18 absentee ballots which were rejected by local election officials because the voter was sent the wrong ballot by election officials. Rock Aff., Ex. 6, Category C-2 Rejected Absentee Ballots. *See also* Langdon Aff., Ex. 27 (examples of absentee ballot envelopes rejected because the voter was sent the wrong ballot).

It would be unfair to exclude legally cast votes—where the voter completed and returned the ballot as instructed—solely on the basis that the voter was sent the wrong

absentee ballot by government officials. As Mr. Mansky testified, if a voter receives and returns a ballot for the wrong precinct, the votes cast for most of the offices—including all statewide offices—can and should still be counted. *See Mansky Dep. 101:10-102:7* (if voter returned an absentee ballot for the wrong precinct, he would have instructed Ramsey County election judges to make a duplicate of the ballot so that “as many valid votes as were possible could have been counted for this voter” in his or her correct precinct). Because a voter’s intent on the U.S. Senate Race can be determined whether or not the voter received the correct ballot, these votes should be counted. Accordingly, the absentee ballots in Category C-2 should be counted.

Moreover, at least 1 of the previously excluded absentee ballots in Category C-2 was opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See Langdon Aff., Ex. 16* (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3 , 2009). *See also, e.g., Langdon Aff., Ex. 45* (absentee ballots initially rejected because the voter was issued the wrong ballot, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, the similarly situated absentee ballots in Category C-2 should be opened and counted as well.

**D. Ballots Rejected Despite Evidence That Voter Substantially Complied With The Requirements Of The Law**

The following categories of rejected absentee ballots are in substantial compliance with the statutory requirements for absentee ballots and, accordingly, must be counted as legally cast votes.

**Absentee Ballots Purportedly Rejected For Inability to Compare Information on Envelope and Application**

**1. Absentee ballots rejected because no application for absentee ballot could be found.**

Contestants have identified 199 absentee ballots which were rejected by local election officials, because the officials were unable to locate the voter's application for an absentee ballot. Rock Aff., Ex. 7, Category D-1 Rejected Absentee Ballots. *See also* Langdon Aff., Ex. 17 (Affidavit of Kenneth Flom and attached Absentee Ballot Envelope (absentee ballot rejected for lack of an application; Flom testifies that he signed and submitted an application for an absentee ballot and completed his absentee ballot as prescribed by law)) and Ex. 28 (examples of absentee ballots rejected for lack of an application).

The exclusion of these lawfully obtained and completed absentee ballots is improper. It is clear that these voters did, indeed, complete an application. In order to obtain an absentee ballot, voters must submit an application for an absentee to the county auditor or municipal clerk where the voter resides. Minn. Stat. § 203B.04; *see also* Minn. Stat. § 203B.06, subd. 3 (if the voter's application is accepted, the county auditor or

municipal clerk shall file the application and mail the absentee ballot to the voter).<sup>12</sup>

Accordingly, it would be unfair to reject these ballots solely as the result of government officials' misplacement of their applications.

Furthermore, even though local election officials are unable—through no fault of the voter—to compare the information on the voter's application and absentee ballot, the absentee ballots in Category D-1 contain the genuine information and signatures of registered Minnesota voters. Because there is no evidence that these absentee ballots are not in substantial compliance with the requirements of the law, the absentee ballots in Category D-1 must be counted.

Moreover, approximately 69 of the initially rejected absentee ballots in Category D-1 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3, 2009). *See also, e.g.,* Langdon Aff., Ex. 46 (examples of absentee ballots initially rejected by local election officials for lack of application, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, the similarly situated absentee ballots in Category D-1 should be opened and counted as well.

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<sup>12</sup> Because of this statutory requirements, this situation is unlike that in *Wichelmann*, where the evidence was that none of the absentee voters filed verified applications for the ballots with the city clerk, prior to the election. *Wichelmann*, 273 N.W. at 638.

**Absentee Ballots Purportedly Rejected For Lack of Genuine Signature**

**2. Absentee ballots rejected for no voter signature on envelope, even though voter signed the envelope.**

Contestants have identified 80 absentee ballots which were rejected by local election officials for lack of voter signature, even though the voter signed the absentee ballot envelope. Rock Aff., Ex. 8, Category D-2 Rejected Absentee Ballots. *See also* Langdon Aff., Ex. 29 (examples of absentee ballots which were rejected for lack of voter signature even though the voter's signature is found on the absentee ballot application). For example, the following ballots were rejected for lack of voter signature, even though the voter signed the absentee ballot envelope:

TO BE COMPLETED BY VOTER	
VOTER'S NAME (PLEASE PRINT)	
<b>[REDACTED]</b>	
27423 819 11/40000 ML ACT R 830604 71 0111 628-07 ZIMMERMAN P-2 KEVIN MARSH HENDERICKSON 13606 POND VIEW RD MINN EMWZ	
I certify that on election day I will meet all the legal requirements to vote by absentee ballot.	
VOTER'S SIGNATURE	DATE
<i>Kevin Marsh Hendrickson</i>	10/26/2008
TO BE COMPLETED BY WITNESS	
I certify that the voter: • showed me the blank ballots before voting; • marked the ballots in private or, if physically unable to mark the ballots, the ballots were marked as directed by the voter; and • enclosed and sealed the ballots in the secrecy envelope.	
NAME OF WITNESS (PLEASE PRINT)	
Katriina Hendrickson	
ADDRESS OF NON-NOTARY WITNESS IN MINNESOTA (PLEASE PRINT)	
13606 POND VIEW RD ZIMMERMAN, MN 55398 MN	
SIGNATURE OF WITNESS	DATE
<i>Katriina Hendrickson</i>	10-26-08
TITLE OF WITNESS (IF AN OFFICIAL)	
FOR OFFICIAL USE ONLY	
ACCEPTED	REJECTED
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<i>NO Signature</i> Reason	
Registered	

Absentee Ballot Envelope of Kevin Mathew Hendrickson, Sherburne County.

**ABSENTEE BALLOT RETURN ENVELOPE**

**ENVELOPE B** Ward 370563 670 11042008 ML PCT R 0452247  
 Election Gerald W. Anderson  
 1384 Franklin Ave  
 St. Paul, MN 55108

FOR OFFICIAL USE ONLY

ACCEPTED  REJECTED *5/2*

TO BE COMPLETED BY VOTER

VOTER'S NAME (PLEASE PRINT)  
*Gerald W. Anderson*

VOTER'S MINNESOTA ADDRESS (PLEASE PRINT)  
*1384 Franklin Ave  
 St. Paul, MN 55108*

I certify that on election day I will meet all the legal requirements to vote by absentee ballot.

VOTER'S SIGNATURE \_\_\_\_\_ DATE *10/2/08*

TO BE COMPLETED BY WITNESS

I certify that the voter

- showed me the blank ballots before voting;
- marked the ballots in private or, if physically unable to mark the ballots, the ballots were marked as directed by the voter; and
- enclosed and sealed the ballots in the secrecy envelope.

NAME OF WITNESS (PLEASE PRINT)  
*Shirley R. Anderson*

ADDRESS OF NON-NOTARY WITNESS IN MINNESOTA (PLEASE PRINT)  
*1784 Franklin Ave  
 St. Paul, MN 55108*

SIGNATURE OF WITNESS \_\_\_\_\_ DATE *10/2/08*

TITLE OF WITNESS (IF AN OFFICIAL)  
*Gerald W. Anderson*

FORM 201 REG VOTER RETURN ENV 5/08

**RECEIVED**  
 OCT 3 2008  
 RAMSEY COUNTY  
 ELECTIONS

Ballot of Gerald Anderson, Ramsey County. Moreover, voters have confirmed that such signatures are, indeed, genuine. See, e.g., Langdon Aff, Ex. 20, Affidavit of Kevin Mathew Hendrickson (verifying that the attached absentee ballot envelope bears his genuine signature), Affidavit of Gerald Anderson (verifying that the attached absentee ballot envelope bears his genuine signature) and Affidavit of Brandon Michael Haugen (absentee ballot rejected for lack of signature; Haugen verified that the envelope bears his genuine signature).

Minnesota law provides that the absentee ballot envelope should contain the genuine signature of the voter. Minn. Stat. § 203B.12, subd. 2(2). The law does not, however, require that the signature be placed in a specific location on the ballot envelope. *See Mansky Dep. 95:2-16*. Furthermore, even if the voter's signature was not in the location designated on the ballot envelope, such mere technicality or irregularity should not be used to exclude the absentee ballot. Because the absentee ballot envelopes in Category D-2 contain the genuine signatures of the voters, they must be counted.

Moreover, at least 3 of the previously excluded absentee ballots in Category D-2 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See Langdon Aff., Ex. 16* (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3, 2009). *See also Langdon Aff., Ex. 47* (examples absentee ballots initially rejected for lack of voter signature, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, the similarly situated absentee ballots in Category D-2 should be opened and counted as well.

- 3. Absentee ballots rejected because local election officials could not match the signature on the envelope to the signature on application, even where the signature on the envelope was the genuine signature of the voter.**

Contestants have identified 830 absentee ballots which were rejected by local election officials because they were unable to match the voter's signature on the absentee

ballot envelope to the application, even though the signature on the envelope may be the genuine signature of the voter. Rock Aff., Ex. 9, Category D-3 Rejected Absentee Ballots. In some instances absentee ballots were rejected because the voter did not sign the application and therefore election officials had no basis for comparison. *See, e.g.*, Langdon Aff., Ex. 30 (examples of absentee ballots rejected for failure to match voter signature on envelope and application). In other instances, the absentee ballots were rejected because the local election officials concluded that the voters signatures did not match. *See, e.g.*, Langdon Aff., Ex. 20 (Affidavit of Connie L. Engelking and attached Absentee Ballot Envelope (absentee ballot rejected because signature did not match application)). Several voters have verified that absentee ballots in Category D-3 bore their genuine signature. *Id.* (Affidavit of Karen M. Clark (verifying that signature on absentee return envelope was genuine), Affidavit of Connie L. Engelking (same), Affidavit of Paul Happe (same), Affidavit of Almon G. Hoye (same), Affidavit of Cheryl Johnson (same), Affidavit of Carl Inkala (same), Affidavit of Tyler Joyce (same), Affidavit of Anna Koehler (same), Affidavit of James Kukral (same), Affidavit of Patricia McArdell (same), Affidavit of Geraldine Sadowski, (same), Affidavit of Mijanou Sampers (same), Affidavit of Jonathan Schultz (same), Affidavit of Anatoli Sokhor (same), and Affidavit of Douglas Thompson).

Minnesota law provides that, in most instances, the absentee ballot envelope should contain the genuine signature of the voter who made the application. Minn. Stat. § 203B.12, subd. 2(2) (requiring that the absentee ballot bear the genuine signature of the person who submitted the application for ballots, except where a person other than the

voter applied for the absentee ballot under applicable Minnesota Rules). The law does not, however, require that the signature on the application match the signature on the envelope exactly. *See* Mansky Dep. 91:18-92:7 and 105:25-106:5 (noting that election officials should give the voter considerable latitude in terms of matching the signatures on the application with the envelope). Given that mere irregularities are insufficient reason to reject an absentee ballot, neither the lack of an application signature with which to verify the voter's signature, nor variations in signatures on the voter's application and envelope are sufficient to reject an absentee ballot. Because the absentee ballot in Category D-3 substantially comply with the requirements for voter signatures, they must be counted.

Moreover, approximately 27 of the previously excluded absentee ballots in Category D-3 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3, 2009). *See also, e.g.,* Langdon Aff., Ex. 48 (examples of absentee ballots initially rejected for mismatch of signature on the application and envelope, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, the similarly situated absentee ballots in Category D-3 should be opened and counted as well.

**Absentee Ballots Purportedly Rejected For Failure to Complete  
Certificate as Prescribed**

- 4. Absentee ballots rejected for lack of witness address, where address would be easily ascertainable by election officials.**

Contestants have identified 42 absentee ballots which were rejected by local election officials for lack of witness address information where the address would be easily ascertainable by election officials. Rock Aff., Ex. 10, Category D-4 Rejected Absentee Ballots; *see also*, Langdon Aff., Ex. 31 (examples of absentee ballots which were rejected for lack of witness address where such address was evident). For example, the following ballot was rejected for lack of witness address:

TO BE COMPLETED BY VOTER	
VOTER'S NAME [REDACTED]	
320267 BTG 11042009 ML PTR 8440087 VOTER'S MINN 19 4289 0188 ROSEMOUNT P&S CHRISTINE ROBERTA BOLLAERT 1842 CRESTVIEW CIR FRANK MN	
I certify that on election day I will meet all the legal requirements to vote by absentee ballot.	
VOTER'S SIGNATURE <i>Christine R. Bollaert</i>	DATE 10/20/08
TO BE COMPLETED BY WITNESS	
I certify that the voter • showed me the blank ballots before voting; • marked the ballots in private or, if physically unable to mark the ballots, the ballots were marked as directed by the voter, and • enclosed and sealed the ballots in the secrecy envelope.	
NAME OF WITNESS (PLEASE PRINT) ARTHUR G. BOLLAERT	
ADDRESS OF NON-NOTARY WITNESS IN MINNESOTA (PLEASE PRINT)  MN	
SIGNATURE OF WITNESS <i>Arthur G. Bollaert</i>	DATE 10-20-'08
TITLE OF WITNESS (IF AN OFFICIAL) Husband.	

FOR OFFICE USE ONLY	
<input type="checkbox"/> ACCEPTED	
<input checked="" type="checkbox"/> REJECTED	No Witness Address

REGISTERED 7/1/2008

Absentee Ballot Envelope of Christine Bollaert, Dakota County (also included in Rock Aff., Ex. 20, Category D-4 Rejected Absentee Ballots). See Langdon Aff, Ex. 21, Affidavit of Christine Bollaert (explaining that a relative living at her same address witnessed the attached absentee ballot envelope). See also, e.g., Langdon Aff, Ex. 21, Affidavit of Wesley Briest (absentee ballot rejected for lack of witness address; Briest explained that a relative living at his same address witnessed the attached absentee ballot

envelope) and Affidavit of Stacy Rieder (absentee ballot rejected for lack of witness address; Rieder explained that a relative living at his same address witnessed the attached absentee ballot envelope).

Minnesota law requires that the absentee ballot certification on the envelope be witnessed by either a notary public or a registered Minnesota voter. Minn. Stat. § 203B.07, subd. 3. To confirm the validity of such witness, the witness's name and address are written on the absentee ballot envelope. Given that mere irregularities or technicalities should not invalidate a vote, a valid witness's failure to fully complete the witness address on the absentee ballot envelope should not be reason to reject a ballot. This is especially true where local elections officials could have easily ascertained the witness's address from the face of the envelope. Accordingly, the absentee ballots in Category D-4 contain should be counted.

Moreover, at least one absentee ballot which was initially rejected by local election officials for lack of witness address information even though witness appeared to be a relative was opened by the Secretary of State and counted by the Canvassing Board. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3 , 2009). *See also, e.g.,* Langdon Aff., Ex. 49 (example of absentee ballot initially rejected for lack of witness address even though address was easily ascertainably, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, the similarly situated absentee ballots in Category D-6 should be opened and counted as well.

**5. Absentee ballots rejected for lack of complete witness address.**

Contestants have identified 131 absentee ballots which were rejected by local election officials for lack of complete witness address information. Rock Aff., Ex. 11, Category D-5 Rejected Absentee Ballots (chart listing, and copies of, excluded absentee ballots which were rejected for lack of complete witness address). *See, e.g.,* Langdon Aff., Ex. 32 (examples of absentee ballots rejected for lack of complete witness address).

Minnesota law requires that the absentee ballot certification on the envelope be witnessed by either a notary public or a registered Minnesota voter. Minn. Stat. § 203B.07, subd. 3. To confirm the validity of such witness, the witness's name and address are written on the absentee ballot envelope. Given that mere irregularities or technicalities should not invalidate a vote, a valid witness's failure to fully complete the witness address on the absentee ballot envelope should not be reason to reject a ballot. Accordingly, the absentee ballots in Category D-5 contain should be counted.

Moreover, approximately 14 of the previously excluded absentee ballots in Category D-5 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3 , 2009). *See also, e.g.,* Langdon Aff., Ex. 50 (examples of absentee ballots initially rejected for lack of witness address, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied

to each voter. Accordingly, the similarly situated absentee ballots in Category D-5 should be opened and counted as well.

**6. Absentee ballots rejected for lack of proof of residence, even though the witness indicated that the voter presented such proof.**

Contestants have identified 213 absentee ballots which were rejected by local election officials for lack of proof of residence, even though the witness indicated that such proof was presented by the voter. Rock Aff., Ex. 12, Category D-6 Rejected Absentee Ballots (chart listing, and copies of, absentee ballots which were rejected for lack of proof of residence even though witness checked that such proof was provided). *See, e.g.*, Langdon Aff., Ex. 33 (examples of absentee ballots rejected for lack of proof of residence even though witness checked that such proof was provided). For example, the following ballot was incorrectly rejected for lack of proof of residence:

384632 BTG 11/04/2008 M. PCT NR 040000  
 10 0026 112 CHAUNASSON P-7  
 LUCAS DONALD WAYNE TOFTELAND  
 6326 STONE CREEK DR. CARVER MN

Locality that you checked the local level of the legal requirements for this absentee ballot.  
*Carver* *11-3-08*

*Donna Johnson*

*517 B. Howard St. Eau Claire, Wis. 54601*

*Donna Johnson*  
 Notary Public  
 North Dakota

Add Voter's Name/Postal ID Card to receipt with correct address  
 Voter ID correctly reads, correct address, signature, complete  
 Utility bill or other document placed inside the envelope, correct, valid ID card, signature, U.S. Postmark, U.S. mailing ID card, photo, or valid ID card with photo  
 Foreign registration in the same period  
 Home-state registration has correctly been removed/updated  
 Registered voter in the project who worked for election unit's residence in the project. (Please complete for first-voter households)  
 Employee of a household in the project who worked for election unit's residence in the locality. (Please complete for first-voter households)

VOUCHER'S NAME AND ADDRESS OF RESIDENTIAL FACILITY, IF APPLICABLE (PLEASE PRINT)

VOUCHER'S ADDRESS OR ADDRESS OF RESIDENTIAL FACILITY, IF APPLICABLE (PLEASE PRINT)

VOUCHER'S TELEPHONE NUMBER OR RETURN NUMBER OF RESIDENTIAL FACILITY, IF APPLICABLE (PLEASE PRINT)

VOUCHER'S SIGNATURE

MAILED 11/04/08 11:04 AM  
 PREPAID MAIL PERMIT NO. 10000 CARVER, MN  
 POST OFFICE BOX 10000 CARVER, MN 56220  
 Non-Registered Return Envelope

Ballot of Lucas Donald Wayne Tofteland, Carver County (also included in Rock Aff., Ex. 12, Category D-6 Rejected Absentee Ballots).

Minnesota law requires that the absentee ballot certification on the envelope be witnessed, and in the case of voters that were not previously registered, that such witness verify that the voter has provided proof of residence. Minn. Stat. § 203B.07, subd. 3 (3)

(the witness should verify that the voter provided proof of residence); Minn. Rule 8210.0500, Subp. 3 (the witness should mark the proof shown on the envelope).

Minnesota law does not, however, require that the witness actually provide a description of such proof (i.e., the driver's license number) on the absentee ballot envelope; it only requires that the witness acknowledge receiving appropriate proof of residence. *Id.* See also Mansky Dep. 100:5-11 (experienced elections official stating that absentee ballots should be counted even if the witness does not provide the identification number).<sup>13</sup>

Furthermore, given that mere irregularities or technicalities should not invalidate a vote, a valid witness's failure to include the specific proof of residence information provided by the voter should not be reason to reject a ballot. Because the absentee ballots in Category D-6 comply with the requirements of the law, these ballots must be counted.

Moreover, approximately 10 of the previously excluded absentee ballots in Category D-6 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. See Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3, 2009). See also, e.g., Langdon Aff., Ex. 51 (examples of absentee ballots initially rejected for lack of proof of

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<sup>13</sup> Mr. Mansky further testified that because the law does not require the witness to provide the specific proof of residence information (i.e. identification number) at all, absentee ballots on which there is an invalid identification number provided also should be counted. Mansky Dep. 145:1-5 (stating that he is not aware of any statutory requirement or any legal requirement for the witness to include an identification card number for proof of residency); Langdon Aff., Ex. 5 (Mansky testified that ballot should be accepted despite the fact that the witness noted an invalid identification number).

residence where a box was checked by the witness but no specific information provided, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, the similarly situated absentee ballots in Category D-6 should be opened and counted as well.

### **Absentee Ballots Purportedly Rejected For Lack of Registration**

**7. Absentee ballots rejected for lack of registration, even though the voter was sent a “Registered Voter” envelope and was actually registered.**

Contestants have identified 637 absentee ballots which were rejected by local election officials for lack of voter registration. Rock Aff., 51, Category D-7 Rejected Absentee Ballots (chart listing, and copies of, “Registered Voter” absentee ballots which were rejected for lack of voter registration). *See, e.g.*, Langdon Aff., Ex. 34 (examples of “Registered Voter” absentee ballots which were rejected for lack of voter registration). Notably, the fact that a voter was sent a “Registered Voter” ballot indicates that at some point a government official determined that the voter was, in fact, registered. *See* Minn. Stat. § 203B.06 (requiring county official, upon receipt of an application for an absentee ballot, to determine whether the applicant is a registered voter, and if not, to include a voter registration application among the election materials provided to the applicant).

Contestants have already identified at least two of these “Registered Voter” absentee ballots which were initially rejected for lack of registration, but were, in fact, cast by a registered voter. *Compare* Langdon Aff., Ex. 58, (Absentee Ballot Envelopes of Walter V. Just, Anoka County and Lyle Allen Wright, Carver County) to Langdon

Aff., Ex. 60 (report of names designated as registered voters on the Minnesota Secretary of State's website). Because this absentee ballots was cast in accordance with the law by a registered voter, it must be counted. Likewise, any Category D-7 ballots which are found to have been cast by registered voters must be counted as well. There are numerous others. *See* Langdon Aff., ¶ 61 and Ex. 60 (report of individuals designated as registered voters on Secretary of State's whose absentee ballots were rejected for lack of registration).

Moreover, approximately 133 of the previously excluded absentee ballots in Category D-7 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3 , 2009). *See also, e.g.,* Langdon Aff., Ex. 52 (examples of absentee ballots initially rejected for lack of voter registration, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, all of the similarly situated absentee ballots in Category D-7 should be opened and counted as well.

**8. Absentee ballots rejected for lack of registration, where voter was sent a "Non-Registered Voter" envelope but was actually registered.**

Contestants have identified 1,280 absentee ballots which were rejected by local election officials for lack of voter registration, where the voter received a "Non-Registered Voter" envelope. Rock Aff., Ex. 14, Category D-8 Rejected Absentee Ballots

(chart listing, and copies of, rejected “Non-Registered Voter” absentee ballots which were rejected for lack of voter registration). *See, e.g.*, Langdon Aff., Ex. 35 (examples of “Non-Registered Voter” absentee ballots which were rejected for lack of voter registration).

Contestants have already identified at least two of these “Non-Registered Voter” absentee ballots which was initially rejected for lack of registration, but was, in fact, cast by a registered voter. *Compare* Langdon Aff., Ex. 58, (Absentee Ballot Envelopes of Mary E. Helling, Carlton County and Dane P. Andersen, Dakota County) to Langdon Aff., Ex. 60 (report of names designated as registered voters on the Minnesota Secretary of State’s website). Because these absentee ballots were cast in accordance with the law by a registered voter, it must be counted. Likewise, any Category D-8 ballots which are found to have been cast by registered voters must be counted as well. There are numerous others. *See* Langdon Aff., ¶ 61 and Ex. 60 (report of individuals designated as registered voters on Secretary of State’s whose absentee ballots were rejected for lack of registration). Notably, to be certain that such voters had not, in fact, returned properly completed voter registration cards along with their absentee ballots, officials would have to open the sealed ballot envelope.

Moreover, approximately 76 of the previously excluded absentee ballots in Category D-8 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3 , 2009). *See also, e.g.*,

Langdon Aff., Ex. 53 (examples of absentee ballots initially rejected for lack of voter registration, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, all of the similarly situated absentee ballots in Category D-8 should be opened and counted as well.

**9. Absentee ballots rejected for lack of valid witness, even though the witness was actually a registered Minnesota voter.**

Contestants have identified 318 absentee ballots which were rejected by local election officials for lack of a valid witness. Rock Aff., Ex. 15, Category D-9 Rejected Absentee Ballots. *See, e.g.*, Langdon Aff., Ex. 36 (examples of absentee ballots which were rejected for lack of valid witness). Minnesota law requires that the absentee ballot certification on the envelope be witnessed by either a notary public or a registered Minnesota voter. Minn. Stat. § 203B.07, subd. 3.

Contestants have identified at least one of these absentee ballots which was initially rejected for lack of a valid witness, but was, in fact, witnessed by a registered voter. *See* Langdon Aff., Ex. 59, Absentee Ballot Envelope of Bryan Mathew Wachter (rejected for lack of witness registration) and Voter Registration verification on witness Lynn Frances Wachter. Because this absentee ballot was cast in accordance with the law by registered voters, it must be counted. Likewise, any Category D-9 ballots which are found to have been witnessed by registered voters must be counted as well.

Moreover, approximately 8 of the previously excluded absentee ballots in Category D-9 were opened by the Secretary of State and counted by the Canvassing

Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3, 2009). *See also, e.g.,* Langdon Aff., Ex. 54 (examples of absentee ballots initially rejected for lack of a valid witness, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be applied to each voter. Accordingly, all of the similarly situated absentee ballots in Category D-9 should be opened and counted as well.

#### **Absentee Ballots Purportedly Rejected As Untimely**

##### **10. Absentee ballots rejected as late, even though there is no clear evidence the ballot was received late.**

Contestants have identified 174 absentee ballots which were rejected by local election officials as late, even though there was no clear evidence that such ballots were received after the applicable deadline. Rock Aff., Ex. 16, Category D-10A Rejected Absentee Ballots; Rock Aff., Ex. 17, Category D-10B Rejected Absentee Ballots.<sup>14</sup> *See, e.g.,* Langdon Aff., Ex. 37 (example of ballots rejected as late even though they did not have a date/time stamp or notation) and Ex. 38 (example of ballots rejected as late even though they had date stamps indicating that the ballot was received by election officials on/or before the deadline). For example, the following ballot was rejected as late, even though marked with a November 1, 2008 date stamp:

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<sup>14</sup> Many of the rejected absentee ballots in Category D-10B had multiple date stamps reflecting receipt dates before and after election day. There is no reason to presume that the ballot was not received on the first date indicated.

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Received by Hennepin County  
Elections Division

NOV 01 2008

TO BE COMPLETED BY VOTER

VOTER'S NAME (PLEASE PRINT)  
 [Barcode]  
 (V) 65011 5TP 0502/2008 UOC PC7 8328036 (PLEASE PRINT)  
 27 9615 001 MINNEAPOLIS W 6 P 00  
 (C) JAMILA J HAKAM  
 141 RIDGEWOOD AVE APT 3J ENW12

COUNTY (PLEASE PRINT)  
 HENNEPIN

TELEPHONE AREA # (OPTIONAL)

CURRENT EMAIL ADDRESS (OPTIONAL)  
 jhakam85@yahoo.com

I swear or affirm, under penalty of perjury, that I am  
 a member of the uniformed services or merchant marines on active duty or an eligible spouse or dependent of such a member;  
 a United States citizen temporarily residing outside the United States;  
 a United States citizen residing outside the United States

and I am a United States citizen, at least 18 years of age (or will be by the date of the election), and I am eligible to vote in the respective jurisdiction; I have not been convicted of a felony, or other disqualifying offense, or been adjudicated mentally incompetent, or, if so, my voting rights have been reinstated; and I am not registering, requesting a ballot, or voting in any other jurisdiction in the United States except the jurisdiction cited in this voting form.

In voting, I have marked and sealed my ballot in private and have not allowed any person to observe the marking of the ballot, except for those authorized to assist voters under state or federal law. I have not been influenced.

My signature and date below validate when I complete this document.  
 The information on this form is true, accurate and complete to the best of my knowledge. I understand that a material misstatement of fact in completion of this document may constitute grounds for a conviction of perjury.

ID NUMBER (Passport number, MN Driver's License or State Identification Card number, or the last four digits of the voter's Social Security Number as provided on the absentee ballot application)  
 [Redacted]

VOTER'S SIGNATURE DATE  
 Jamila Hakam 10/21/2008

FOR OFFICE USE ONLY

ACCEPTED  
 REJECTED LATE

Ballot of Jamila Hakam, Hennepin County. *See also, e.g., Langdon Aff., Ex. 37*

(Absentee ballot envelope of Emma Harness, Hennepin County, rejected as late even though marked with a November 3, 2008 date stamp); Langdon Aff., Ex. 38 (Unopened absentee ballot of Susan Emard, Anoka County, rejected as late even though marked with a October 30, 2008 date stamp).

Minnesota law provides that legally cast absentee ballots returned prior to the deadline for receipt of ballots must be counted. *See Minn. Stat. § 203B.08, subd. 3*

(requiring officials to deliver to the appropriate election judges all absentee ballots returned by mail before or with the last mail delivery on election day); Minn. Stat. § 203B.08, subd. 1 (requiring that absentee ballots delivered in person by an agent of the voter to the county auditor or municipal clerk be submitted by 3:00 p.m. on election day); Minn. Rule. 8210.220, subp. 1 (requiring that absentee ballots delivered in person by the voter to the county auditor or municipal clerk be submitted by 5:00 p.m. on the day before election day). Minn. Stat. § 203B.08, subd. 3 further provides that “when absentee ballots are returned to a county auditor or municipal clerk, the official shall stamp or initial and date the return envelope.”

Absentee ballots are presumed timely, and should only be rejected as late where it is clear that the ballot was returned after the appropriate deadline. The absentee ballots in Category D-10 lack such evidence and, thus, should not be excluded. Accordingly, the absentee ballots in Category D-10 should be counted by this Court.

Moreover, approximately 2 of the initially rejected excluded absentee ballots in Category D-10 were opened by the Secretary of State and counted by the Canvassing Board after local election officials and both parties agreed that such absentee ballots were wrongly rejected. *See* Langdon Aff., Ex. 16 (chart identifying initially rejected absentee ballots opened by Secretary of State's Office on January 3 , 2009). *See also, e.g.,* Langdon Aff., Exs. 55 and 56 (examples of absentee ballots initially rejected for lack of a valid witness, but subsequently counted by the Canvassing Board). The mandates of equal protection require that all ballots cast be evaluated equally and the same rules be

applied to each voter. Accordingly, all of the similarly situated absentee ballots in Category D-10 should be opened and counted as well.

**11. Absentee ballots of members of the military received late.**

Contestants have identified 36 absentee ballots of military personnel serving overseas which were rejected by local election officials as late. Rock Aff., Ex. 18, Category D-11 Rejected Absentee Ballots (chart listing, and copies of, excluded absentee ballots of military personnel rejected as late). Absentee ballots of military personnel serving this country overseas should be presumed valid. Accordingly, the absentee ballots in Category D-11 should be counted by this Court.

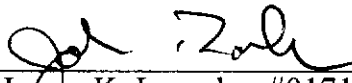
**CONCLUSION**

For the reasons set forth above and in the accompanying affidavits, Contestants respectfully request that the Court grant their motion for summary judgment and order that all rejected absentee ballots cast by registered voters who were living on election day and did not otherwise vote in this election were legally cast under Minnesota law and should be counted. Alternatively, Contestants respectfully request that the Court order that absentee ballots that were (1) excluded, even though not marked “rejected” by local election officials; (2) rejected for no apparent or given reason; (3) rejected due to error of government clerk or local election official; or (4) rejected despite evidence that the voter substantially complied with the requirements of the law were improperly rejected as a matter of law and should be counted.

Dated: January 21, 2009

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