No. A09-697

STATE OF MINNESOTA
IN SUPREME COURT

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,

Norm Coleman and Cullen Sheehan,

Appellants,

v.

Al Franken,

Respondent.

APPELLANTS' BRIEF

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Trial Court's Ruling: Such evidence was irrelevant to whether the ballots before it were legally cast.

Apposite Authorities: Minn. Stat. § 209.12; U.S. Const. amend. XIV.

2) Whether the trial court violated the constitutional protections of equal protection and due process when it declared Respondent received the highest number of "legally cast votes" where the record demonstrated the number of "illegally cast" ballots, under the court's own definition, that were counted on election day and during the recount greatly exceeded the margin between the candidates?

Trial Court's Ruling: Already-counted absentee ballots, even if illegal under the court's own definition, were properly included in the tally because Minnesota law does not provide any remedy for retracting such ballots from vote totals and the Fourteenth Amendment does not require that similar ballots in the same election be treated the same.

Apposite Authorities: Minn. Stat. § 209.12; *Hanson v. Emanuel*, 297 N.W. 749 (Minn. 1941); *Berg v. Veit*, 162 N.W. 522 (Minn. 1917); *Roe v. State of Alabama*, 43 F.3d 574, 581 (11th Cir. 1995); *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978); U.S. Const. amend. XIV.

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Apposite Authorities: *Fitzgerald v. Morlock*, 120 N.W.2d 339, 345-47 (Minn. 1963); *Andersen v. Rolvaag*, 119 N.W.2d 1, 10 (Minn. 1962); *In re Contest of School District Election*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988); Minn. Stat. § 203B.12; *Erlandson v. Kiffmeyer,* 659 N.W.2d 724,

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4) Whether the trial court erred in declining to order inspections of precincts in which double-counting may have occurred during the recount?

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Apposite Authorities: Minn. Stat. § 209.06.

5) Whether the trial court erred in ruling missing ballots from a Minneapolis precinct were properly included in the final recount tally?

Trial Court's Ruling: The court gave deference to the canvassing board's determination that election night totals from that precinct be included in the tally.

Apposite Authorities: *Newton v. Newell*, 6 N.W. 346 (Minn. 1880).

STATEMENT OF THE CASE

On November 4, 2008, the vote tally for the office of United States Senator showed 1,211,590 votes cast for Norm Coleman and 1,211,375 votes cast for Al Franken, an advantage of 215 votes for Coleman. On November 18, 2008, the Minnesota State Canvassing Board ("MSCB") directed the Secretary of State to oversee an administrative manual recount pursuant to Minn. Stat. § 204C.35, subd. 1. On January 5, 2009, the MSCB certified the recount results: Coleman received 1,212,206 votes and Franken 1,212,431, a difference of 225 in favor of Franken. There remain approximately 11,000 unopened absentee ballots.

Coleman brought this action on January 6, 2009 pursuant to Minn. Stat. § 209.12. The Notice of Contest sought a declaration that he received the highest number of legally cast votes. A.32-40. Franken moved to dismiss the Notice but also filed an answer and counterclaims. The trial court denied the motion and ruled the Notice complied with Minn. Stat. § 209.021 and stated a claim. A.134-143. Coleman moved for summary judgment, asking the court to count thousands of rejected absentee ballots with the same characteristics as ballots counted on election day. The court denied the motion but allowed Coleman to present evidence at trial regarding those ballots. A.186-196; A.159-163.

Trial commenced on January 26, 2009 and lasted seven weeks. Coleman presented evidence that thousands of rejected absentee ballots had sufficient indicia of trustworthiness to substantially comply with the statutory standard (Minn. Stat.

§ 203B.12, subd. 2) and, consistent with Minnesota's policy to enfranchise voters, should be counted.

Beginning with his opening statement, Coleman pursued an equal protection claim based on the disparate application of the standard set forth in Minn. Stat. § 203B.12, subd. 2 to absentee ballots. He contended constitutional violations must be addressed before the court decided under Minn. Stat. § 209.12 which candidate received the highest number of legally cast votes. Simply put, the court first would be required to apply a consistent standard to similar ballots to decide what votes, both uncounted and counted, were legally cast.

Consistent with this claim, Coleman presented evidence of substantial disparities among election officials in how they applied the statutory standard. Some counties, for example, assiduously researched whether a voter or his witness was registered; others never inquired. Some officials accepted ballots when they could not locate an application; others refused to do so. The result is that whether an absentee ballot was accepted depended on where the voter lived.

After several days of such testimony, the court ruled that any disparate treatment of ballots on election day was irrelevant. It thereafter refused to permit evidence regarding how local officials judged absentee ballots on election day. A.439-441; A.443; A.445-446; A.448-450; A.454-460; A.465; A.492; A.495; A.499-500; A.503; A.510; A.521. It also refused to admit evidence of absentee ballots counted on election day that failed to meet a strict compliance standard. A.543-544; A.551-552; A.556-557; A.566. The court granted Franken's motion in limine to exclude Coleman's expert statistician

(who would have testified the disparity in rejection rates among counties was not random). Add.40-42. Coleman ultimately compiled that evidence in written offers of proof, which included further testimony from election officials, expert testimony, and, from just a small sampling of counties, more than 425 illegally cast absentee ballots counted on election day. *See, e.g.*, A.570-591; A.709-919.

Mid-way through trial, the court adopted a strict compliance application of the statutory standard more exacting than that used by local officials for determining whether an absentee ballot was legally cast. Add.23-39. The court's rulings also required proof not only that election officials erred in rejecting each ballot for a particular reason but also that each ballot met every other statutory requirement as well. Moreover, the trial court declined to apply reasonable presumptions routinely applied by local officials.

The court ultimately ruled only 351 rejected absentee ballots were legally cast. It also denied Coleman's petition for an inspection under Minn. Stat. § 209.06, ruled Coleman failed to establish double-counting occurred, and endorsed the MSCB's decision to accept the election night tally from Minneapolis precinct 3-1. Add.62-64 (¶¶113-125).

The court also denied Coleman's motions seeking, as a matter of Minnesota and constitutional law, to have the court apply one, uniform standard to all absentee ballots. Add. 68-69 (¶¶151-156). It held it had no jurisdiction to resolve constitutional claims arising from deliberate, serious and material violations of election law and, as to disparities arising from mere errors, held they did not rise to the level of a constitutional violation.

SUMMARY OF ARGUMENT

The trial court took a narrow view of its role under Minn. Stat. § 209.12. It wrongly presumed the MSCB's certification was entitled to deference and that the court's role was merely to interpret the governing statute and apply its interpretation to rejected absentee ballots presented to it. The court accordingly excluded most evidence offered regarding how local officials applied that statutory standard and whether similar ballots had been accepted. Having excluded such evidence, the court pronounced any election day disparities minor and immaterial.

In fact, as the evidence showed and Coleman set forth in written offers of proof, there were widespread disparities in how officials applied the standard and, as a result, if the court's strict compliance standard were uniformly applied, thousands of absentee votes should not be included in the tally of legally cast votes. These disparities are at the heart of determining, pursuant to Minn. Stat. § 209.12, which candidate won. And the constitutional guarantees of equal protection and due process require the uniform application of the statutory standard to all absentee ballots. Had the court not excluded such evidence, Coleman would have proven the disparities changed the outcome of the election.

The record conclusively establishes that local officials applied the statutory requirements differently and inconsistently—not just by minor, isolated, "garden variety" errors to be expected in every election, but by extensive, wholesale and intentional decisions. Different counties and municipalities made their own deliberate decisions on the meaning of the statute and, as a result, reviewed similar absentee ballots differently,

accepting ballots that were not in strict compliance with the statute but had sufficient indicia of trustworthiness. As a result, some ballots were counted while other identical ballots were not. Given the closeness of the election, this combination rendered the result of Minnesota's 2008 Senate election, as certified by the trial court, inaccurate.

By applying a standard different—and in most cases far more exacting—than that used on election day, the trial court exacerbated the disparity in whether similarly situated absentee ballots were counted. It created two classes of similarly situated voters: those who had their ballots accepted under a substantial compliance standard, and those who had their ballots rejected by jurisdictions applying a more exacting standard and then not enfranchised by the court using its strict compliance standard.

The trial court took the narrow approach it did, and eschewed jurisdiction to consider constitutional claims, because it undoubtedly felt constrained by this Court's decisions in *Wichelmann v. City of Glencoe*, 273 N.W. 638 (Minn. 1937), and *Bell v. Gannaway*, 227 N.W.2d 797 (Minn. 1975). This Court, however, should not accept such a narrow approach. Instead, it must consider the constitutional impact of the materially different standards intentionally applied to absentee ballots as well as whether *Bell* and *Wichelmann* really apply here.

Equal protection and due process mandate that similarly situated voters be treated the same: whether a ballot is accepted cannot be determined by where the voter lives. Those claims are not outside the Court's jurisdiction—indeed, they are at the heart of determining which candidate received the highest number of legally cast votes. This Court should ensure one standard is applied consistently to all absentee ballots in this

election and that all legally cast votes—but only legally cast votes—are included in determining, under Minn. Stat. § 209.12, the vote totals for each candidate. This means the Court should look back to election day and cannot ignore a record showing intentional material disparities and illegal votes counted.

Simply put, the trial court's rulings, though made in good faith, have created a dilemma this Court must resolve:

(a) on the one hand, if the trial court was correct in ruling absentee ballots must be judged by a strict compliance standard conforming precisely to its reading of the statute, then this Court, in fulfilling its statutory charge, would be required to disenfranchise thousands of voters. The constitutional guarantees of equal protection and due process mandate that all absentee ballots cast in the election be reviewed by the same standard. To the extent ballots counted on election day did not comply with the trial court's strict standard, and the record demonstrates thousands did not, those ballots were illegal and cannot be included in the tally. If the trial court's standard is the correct one, the Court would have to remand for a proportionate reduction of the vote tally on a precinct-by-precinct basis or, more likely, a determination by the trial court that on this record it cannot certify a winner.

(b) on the other hand, if the trial court was not free to impose its strict compliance standard because of the overwhelming evidence that local officials applied a substantial compliance standard designed to enfranchise voters—an approach consistent with this Court's previous rulings embracing substantial compliance as a means to enfranchise voters—then common law and the same constitutional guarantees dictate the remaining uncounted absentee ballots be judged by the same substantial compliance standard, meaning that on remand thousands more absentee ballots would be counted.

The option of having different counting rules, as the trial court chose, is not permissible. To maintain the required consistency in the context of this election, Coleman urges the

Court to choose the latter approach and enfranchise all Minnesota voters, regardless of where they live.

Finally, the trial court also erred in (1) declining to order precinct inspections under Minn. Stat. § 209.06, and (2) failing to subtract from the tally those purported votes in Minneapolis precinct 3-1 for which no ballots could be located during the recount.

STATEMENT OF FACTS

Coleman initiated this contest proceeding under Minn. Stat. § 209.12 seeking a determination that he received the highest number of legally cast votes. The trial focused primarily on absentee ballots, but also addressed alleged double-counting of ballots during the recount and whether ballots that cannot be found should be included in the final tally.

I. ABSENTEE BALLOTS

On election day approximately 292,000 Minnesotans voted by absentee ballot. Under Minn. Stat. § 203B.12, subd. 2 (and § 203B.24 for overseas ballots), certain requirements must be met before an absentee ballot can be counted. Despite training efforts by the Secretary of State's Office and local officials, the evidence showed local election officials did not uniformly apply the statute.

Some 12,000 absentee ballots were rejected, but there was no consistency among the counties and municipalities in what ballots were rejected and what ballots were accepted: Minneapolis, for example, accepted many ballots that would have been rejected in Carver County, and Ramsey County accepted ballots that would have been rejected in Wright County. Local officials made deliberate decisions to apply the statutory

requirements as they understood them, resulting in a substantial compliance standard different from the trial court's standard—and one that was not uniform.

The testimony of election officials from around the state showed just how differently their jurisdictions applied the statutory standards for determining whether to accept an absentee ballot. As detailed below, many confirmed they operated under a substantial compliance regime. Others admitted they purposely disregarded requirements the trial court later ruled must be met. None appear to have applied the trial court's standard. Examples of testimony regarding the deliberate decisions officials made, and the impact those decisions had on the vote tally, follow.

The requirement that the vote be witnessed by a registered voter

The statutory requirement that an absentee voter's witness be a registered Minnesota voter—which the trial court inconsistently applied (Add.66 at ¶ 136g & h)—provides perhaps the starkest illustration. Among the officials testifying, there was wide disparity in the practices employed. Some, like Carver County, assiduously checked witness registration in the Statewide Voter Registration System ("SVRS") to determine if the witness was registered at the same address listed on the absentee ballot envelope. A.437 (at 78). Over half of Carver County's rejections came because the witness was not a registered voter (or was registered at a different address). *Id.* Others, like Goodhue County, Beltrami County, Lyon County, and the Cities of Plymouth and St. Cloud, similarly checked witness registration—even though the process was "excruciating" and "time-consuming." A.515 (at 93-94); *see also* A.454 (at 71); A.476 (at 139); A.503 (at 165); A.1090-1097.

Many more officials, however, did not check. For example, in Ramsey County, Washington County, and the City of Minneapolis, if the witness provided a Minnesota address, officials simply presumed, without checking, the witness was registered. A.368 (at 71); A.389 (at 45); A.521 (at 116-117). Other officials testified they did not know they were required to check the registration status of witnesses. A.443 (at 171); A.464 (at 164); A.469 (at 63). Some officials did not check witness registration because they did not have adequate access to the SVRS database. A.471 (at 92-93); A.479 (at 152-153); A. 482 (at 176); A.486 (at 216). Most, including Stearns County (that part of it not in St. Cloud), testified they simply did not check —even if they did have access to the database. A.433 (at 26); A.454 (at 71); A.487 (at 221); A.490 (at 35); A.507 (at 49); A.509 (at 64). Finally, in some counties there was no consistent practice, meaning similarly situated ballots within the same county were treated differently. A.454 (at 71); A.483-484 (at 203-204).

The application of these differing standards caused staggering differences in rejection rates across the state. Among the 17,127 submitted in Minneapolis and the 7,800 absentee ballots submitted in St. Louis County, none was rejected for lack of witness registration. Ramsey County rejected only seven for lack of witness registration out of more than 31,000 submitted. At the same time, Carver County rejected 181 of its 5,251 absentee ballots because the witness was not registered. All told, less than half of the jurisdictions rejected any ballots on this basis, and the majority of those that did rejected but a very few. A.575-578.

Coleman offered to prove that nearly 300 absentee ballots rejected for lack of witness registration would have been accepted had the voter resided in any of the many jurisdictions that did not reject ballots on this basis. A.570-591; A.642-648. Coleman also offered to prove that had all jurisdictions applied the standard strictly, thousands of ballots would have been rejected. A.570-591. Indeed, had St. Louis and Ramsey Counties and Minneapolis rejected the same percentage of ballots for this reason as Carver County did, nearly two thousand votes would not have been counted.

The requirement that the witness provide his or her address

Whether an election official accepted an absentee ballot if the address of the witness was missing or incomplete also depended on the jurisdiction applying the standard. Although the trial court required a complete (or, in a few cases, nearly complete) address, Add.66 (¶ 136h), A.306, some election officials, including those in Ramsey County, Stearns County, and the City of Minneapolis, accepted ballot envelopes with incomplete—or even missing—addresses. A.368 (at 71-72); A.461 (at 129); A.521 (at 114-115). Other jurisdictions, such as Dakota County and Carver County, insisted on strict compliance. A.407 (at 56); A.436 (at 69-70). A few jurisdictions simply did not have an established process. A.510 (at 94).

Coleman offered to prove that more than 300 ballots were rejected for missing or incomplete witness address. A.570-591; A.635-641. Coleman also offered to prove that had all jurisdictions applied the standard strictly, thousands of ballots would have been rejected. A.570-591.

The requirement that the voter be registered

The trial court insisted that the voter be registered—with no exceptions. Add.27-29; Add.65 (¶135). Election officials in some locations, however, accepted absentee ballot envelopes from non-registered voters who received registered voter materials due to official error, while other jurisdictions insisted on strict compliance. Many counties, like Ramsey and Washington, presumed a voter who had received and completed a registered envelope was in fact a registered voter, and therefore did not re-check the registration status of the voter upon receipt of the envelope.[1] A.367 (at 63); A.368 (at 70); A.376 (at 38). Other counties that did check voter registration, like Scott, accepted absentee ballots from non-registered voters who received registered voter materials because they believed it inequitable to punish a voter for the officials' mistake. A.438 (at 117-118); A.445 (at 181-182).

Meanwhile, other jurisdictions, like Dakota, Olmsted and Stearns Counties, decided, as did the trial court, that even if a non-registered voter received registered voter materials due to official error, the ballot would be rejected. Add.65 (¶ 135); A.406 (at 50); A.410 (at 85); A.460 (at 103); A.465 (at 180).

The requirement that a non-registered voter provide proof of residence

Whether an election official accepted an absentee ballot envelope if an identification (such as drivers license number) was not provided also depended on where

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[1] In determining whether to send an absentee ballot applicant a registered or non-registered voter package, most officials checked the SVRS to determine whether the applicant was indeed registered. Many jurisdictions then generated a pre-printed envelope label from the SVRS which identified the voter as registered ("R") or non-registered ("NR"). A.367 (at 62-63); A.377 (at 39).

the voter lived. Some jurisdictions, such as Ramsey County and Crow Wing County, did not require this information. A.366 (at 61); A.497 (at 129). Other jurisdictions, such as Anoka and Washington Counties, insisted on strict compliance. A.379-380 (at 166-167); A.394 (at 32); A.401 (at 62-63); A.484 (at 207); A.490-491 (at 38-40); A.506 (at 36); A.529 (at 37). Still other jurisdictions did not have an established policy, instead preferring to make the determination on a case-by-case basis. A.465 (at 181-182).

The requirement that the voter submit, and sign, an absentee ballot application

Election officials in some locations accepted absentee ballot envelopes even though the application for an absentee ballot envelope was not signed, while other jurisdictions, and the trial court, Add.66 (¶136d), insisted on strict compliance. For example, Carver County accepted absentee ballots even if the voter did not sign the application because the office "had a conversation [with the Secretary of State's Office]...that to reject them would be inappropriate...." A.440 (at 124-125); *see also* A.814-861. Several jurisdictions, like Pine and Scott Counties, rejected such ballots, even if the application had been completed in front of a government official. A.391 (at 119-120); A.444 (at 178); A.464 (at 166).

Election officials in some locations also accepted absentee ballots even though an application was never submitted or, if submitted, could not be found, while other jurisdictions insisted on having the application and, if it could not be located, rejected the ballot. For example, Ramsey County did not reject absentee ballots if the application could not be found: "Obviously we wouldn't have issued a ballot without the application. But I think where there's an error made on our part that we ought to count

the ballots." A.372 (at 164). Other officials, like those in Plymouth and Dakota County, rejected ballots if the application could not be found. A.402 (at 88); A.418 (at 44-45); A.464 (at 165). In some counties, even if an election official failed to have the voter complete an application, the ballot was later rejected for lack of the application. A.474; A.502 (at 161-162).

The requirement that the voter sign the certification

Election officials in some locations accepted absentee ballot envelopes even though the certification on the absentee ballot envelope was not signed while other jurisdictions, and the trial court (with the exception of those voters who had a government official witness their votes), Add.66 (¶136e & f), insisted on strict compliance. For example, Ramsey County would accept absentee ballots that did not have a signature on them if the mailing sticker obstructed information because government error may have confused the voter. A.372 (at 182). Other jurisdictions, such as St. Louis County and the City of Minneapolis, also accepted some absentee ballots without signatures on them. *See* A.862-894. However, Coleman offered to prove that over 800 ballots were rejected because the voter failed to sign the envelope. *See* A.570-591; A.678-696.

The requirement that the voter's signatures on the ballot and the application match

Another example of disparate treatment was the presumed statutory requirement—strictly applied by the trial court (Add.66 at ¶136f)—that the registered voter must sign both the ballot envelope and the absentee ballot application with his or her genuine

signature. The testimony of various election officials illustrates the difficulty in having any confidence that similarly situated absentee voters were treated the same.

Washington County, for example, instructed election judges that the voter's signatures "did not have to match exactly, but that they should inquire or review as to whether or not they believed the same person signed both the application form and the returned absentee ballot form." A.378 (at 60). Carver County told its election workers to "not be concerned...[with] inconsistencies, but to look more at the general characteristics of the signature and look for any obvious differences between the application and the return envelope." A.440 (at 125-126). Stearns County officials accept absentee ballots if the signatures on the application and ballot envelope are a "relatively close match." A.453 (at 69). Needless to say, the match was in the eye of the beholder.

Some counties, such as Ramsey, Washington, and Scott, described their test as lenient and said they erred on the side of accepting the vote in order to enfranchise voters. A.364 (at 40); A.378 (at 62); A.444 (at 177). Other election officials, including those from Dakota County and the City of Plymouth, rejected substantial numbers of ballots on this basis. A.578-582; A.1091-1097. Some counties did not reject any absentee ballots on this basis because those jurisdictions had voters come in and correct the error. A.477 (at 141-142); A.484 (at 204-205).

The differing philosophies on signature mismatches meant that the percentage of ballots rejected for this reason varied wildly throughout the state.[2] Indeed, twenty-three counties did not reject any ballots for signature mismatches and another fifty or so rejected but a handful. Minneapolis, for example, rejected "very few" of 17,127 absentee ballots submitted for signature mismatch. A.522 (at 118); A.570-591. Meanwhile, nearby Plymouth, which handled only 2,024 absentee ballots, rejected more than sixty on that basis. A.1091-1097. (Had Minneapolis rejected the same percentage of ballots on this basis as Plymouth did, its rejections would have numbered more than 500.) Additional examples abound. A.570-591; A.618-629.

Coleman offered to prove that approximately 500 purported signature mismatches among the rejected absentee ballots would likely have been accepted had the voter resided in the many counties and municipalities that did not reject ballots on this basis. *Id.* Coleman also offered to prove that had all jurisdictions applied the standard strictly, many ballots would have been rejected. A.570-591.

The requirement that the voter submit a ballot from the precinct in which he or she was registered

Election officials in some locations accepted absentee ballots cast in the wrong precinct when the voter was given the wrong ballot as a result of official error, while other jurisdictions insisted on strict compliance. For example, Anoka County, Ramsey County, and Washington County would accept such ballots. A.369 (at 84); A.378 (at 59);

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[2] Voter witnesses called by Franken to verify their signatures showed just how difficult it could be to determine whether signatures matched. A.546-547 & A.116-119; A.540-541 & A.1107-1111; A.559-560 & A.1120-1123; A.549 & A.1112-1115.

A.397 (at 127). In those counties, election judges were directed to cure the error by preparing a duplicate ballot and marking it for all the offices for which the voter was eligible to vote. *Id.* Other jurisdictions, like Cass and Douglas Counties, rejected such ballots, even though the voter was not at fault. A.475-476 (at 135-136); A.500-501 (at 150-151).

The requirement that a notary witness provide a stamp or seal

Election officials in some locations accepted ballots even though the witness certification was signed by a person purporting to be a notary public who did not provide a notarial seal, while other jurisdictions—and the trial court (Add.66 at ¶136h)—insisted on strict compliance. For example, Minneapolis and St. Louis County accepted many such ballots. A.713-714; A.740-772; A.895-919. Other counties, like Washington, initially rejected ballots without a notarial stamp but recommended they be counted during the recount. A.381 (at 225-226); A.396 (at 96).

Additional absentee ballots counted in the recount would not have been accepted under a strict compliance standard

These disparities continued during the recount when, pursuant to this Court's directive, local election officials identified 1,346 ballots improperly rejected. Cognizant of this Court's invocation of Rule 11, the candidates agreed 933 of those ballots should be counted, leaving uncounted 413 ballots election officials believed to be legally cast votes. A.343 (at 78-79). Included among the previously rejected ballots counted during the recount were numerous ballots that, like the ballots discussed above, would not satisfy a strict compliance standard (or, indeed, the standard applied by many counties on

election day).[3] A.1063-1089. Election officials in those jurisdictions nevertheless concluded those ballots were mistakenly rejected, and Coleman–in reliance on this Court's December 18 and 24 orders and the appropriateness of a substantial compliance standard–agreed.

* * *

In sum, the evidence in the record, together with that Coleman offered to prove, means: either many rejected absentee ballots the trial court declined should be accepted, or many absentee ballots counted on election day cannot now be included as "legally cast" votes.[4] In fact, despite the trial court's indication to the contrary, the record reflects that were the trial court's strict compliance standard applied to all absentee ballots cast on election day, the number of illegal votes would far exceed the margin between the two candidates. In a small sampling of jurisdictions, including Minneapolis and St. Louis County (both of which Franken won overwhelmingly), Coleman identified at least 425

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[3] Before the trial court made its February 13, 2009 ruling adopting a strict compliance standard, the parties stipulated, and the court ordered, that those ballots were correctly counted. The court denied Coleman's motion following the February 13, 2009 ruling to reconcile the disparity between the counties' standards and the court's strict compliance standard. *See* A.215-223.

[4] The trial court itself sometimes had difficulty applying the strict compliance standard. It was required, for example, to vacate judgment it had granted in favor of several individual petitioner voters when it realized those voters had not in fact met its strict compliance standard. A.265-267. It also reversed course on the acceptability of substantial compliance when a voter cast his ballot in front of a government official. A.328. Finally, it appears to have counted some ballots that did not meet its standard, *see* Add.111, A.1104-1106 (counting Janelle Schmidt's ballot despite evidence she was not registered at current address, witness was not registered, and absence of application), while refusing to count others that did. *See* A.1101-1103; Add.108 (not counting Ray Hermanson's ballot despite evidence introduced by both parties showing he was registered, submitted an application and had his vote witnessed by an election official).

ballots that clearly did not meet the statutory standard strictly construed. *See, e.g.,* A.570-591; A.709-919.

II. DOUBLE-COUNTING OF BALLOTS

In accordance with Minn. Stat. § 206.86, subd. 5, and Minn. R. 8230.3850(E), duplicate ballots are made if a ballot cannot be processed by a voting machine. A.384-385 (at 189-190). Due to the large number of absentee ballots in the election, certain precinct election judges failed to mark the duplicates as such. A.356 (at 137); A.519 (at 69); A.523 (at 155).

The record demonstrates that in ten Minneapolis precincts the number of marked duplicates and original ballots did not match and that both were counted during the recount. An inspection, together with available evidence, would establish conclusively whether double-counting occurred. Despite the right granted by Minn. Stat. § 209.06, the trial court denied Coleman's motion for an inspection. A.144-147.

III. MISSING BALLOTS

An envelope that local election officials testified contained ballots went missing from Minneapolis precinct 3-1 between election night and the recount. A.358-361. There is no evidence the missing ballots ever reached the Minneapolis warehouse for storage following the election. A.525-526.

The missing ballots were not available to be examined or recounted during the recount, so the voters' intent cannot be determined. A.360-361. Since the ballots are still missing, there is no chain of custody for these ballots. *Id.* Nor is there any way to count

them, to challenge them for voter intent or to verify them in any way.[5] Despite these deficiencies, the trial court deferred to the MSCB's decision to include those votes.

ARGUMENT

I. STANDARD OF REVIEW

When an election contest is appealed to the Supreme Court, the trial court's findings of fact and conclusions of law "are entitled to the same weight as in any civil action." *In re Election of Ryan*, 303 N.W.2d 462, 465 (Minn. 1981). Although factual findings should not be set aside unless clearly erroneous, the Court is not bound by the trial court's interpretation of the evidence if it believes an error has been made. *Id.* Unlike factual findings, the Court need not give legal conclusions any deference. *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 354 (Minn. 1977).

The key issues before the Court—uniform application of the appropriate standard for accepting absentee ballots, the mandatory nature of a statutory inspection in connection with likely double-counting of ballots during the recount, and whether missing ballots can be included in the recount tally—involve questions of law. *See A. J. Chromy Constr. Co. v. Commercial Mechanical Servs., Inc.*, 260 N.W.2d 579, 582 (Minn. 1977) (holding that the application of a statute to undisputed facts is a conclusion of law fully reviewable). Like other legal issues, they should be considered de novo. *See Fitzgerald v. Morlock*, 120 N.W.2d 339, 348-54 (Minn. 1963) (reversing trial court's

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[5] The recount totals for Minneapolis Ward 3, Precinct 1 were as follows: Coleman – 561 votes; Franken – 1,010 votes. A.1098-1100. The machine vote totals from election night were as follows: Coleman – 595 votes; Franken – 1,090 votes. *Id.* Hence, by applying election night totals, an additional net 46 votes were improperly attributed to Franken.

rejection of ballots); *Johnson v. Tanka*, 154 N.W.2d 185, 188 (Minn. 1967) (reversing trial court's determination on illegal votes).

II. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE DIRECTLY RELEVANT TO THE ISSUE OF WHICH CANDIDATE RECEIVED THE MOST LEGALLY CAST VOTES.

The trial court erred in refusing to admit evidence of: (i) local officials' widely differing practices for accepting absentee ballots; and (ii) thousands of absentee ballots counted on election day—enough votes to change the outcome of the election—that did not satisfy the strict compliance standard imposed by the court and, accordingly, cannot now be "legally cast" if the court's standard is allowed to stand. This evidence was directly relevant to the question of what constituted a legally cast vote and the potential existence of constitutional violations, both of which affect the final certified vote totals for the candidates.

In order to fulfill its statutory role under Minn. Stat. § 209.12, the court was required to determine what constituted a legally cast vote. In doing so, it was not free to focus only on the rejected absentee ballots before it. As a matter of law, its February 13, 2009 interpretation of the governing statute, Minn. Stat. § 203B.12, subd. 2, was an authoritative statement of what that statute had always meant—then and at the time of the November 4, 2008 election. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). The statute cannot mean something different for different ballots cast in the same election.

If an absentee ballot that fails to comply with a particular element of the statute is an illegal vote, then all ballots cast in the November 4 election which fail to comply with

that element of the statute are illegal votes—regardless of whether they have already been counted. Once it determined what constituted a legally cast vote, the trial court's obligation under Minn. Stat. § 209.12 required it to determine not only whether any of the rejected absentee ballots it reviewed were legally cast votes but also, if the parties presented appropriate evidence, whether absentee ballots counted on election day were illegally cast. *See, e.g.*, *Erickson v. Sammons*, 65 N.W.2d 198, 202 (Minn. 1954) (contest court must determine whether violations of election law "enabled disqualified voters to vote," or "deprived legal electors of their vote"). The court denied Coleman's attempts to present such evidence.

The applicability of the guarantees of equal protection and due process in the Fourteenth Amendment to the Constitution also made such evidence relevant. Those guarantees mandate that all similarly situated absentee ballots be reviewed under a uniform standard uniformly applied. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter...underlies many of our decisions."); *Erlandson*, 659 N.W.2d at 732, 734; *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. Ct. App. 2007) (applying a facially neutral statute in way that makes distinctions between similarly situated persons without legitimate government interest can be a violation of equal protection); *infra* at 40-45. The Court's ruling that it lacked jurisdiction to decide such claims arising from "deliberate, serious or material" violations of election law, was misguided—deliberate, serious and material

disparities in the application of the statutory standard go directly to the determination of which votes are legally cast.[6]

That being so, the disparate manner in which officials applied the standard was central to the determination of what standard should be applied to the remaining rejected absentee ballots and how it should be applied.[7] In refusing to admit the evidence Coleman offered (and the further evidence he would have offered), the trial court erred. *See Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 387 (Minn. Ct. App. 2001); *Poppenhagen v. Sornsin Constr. Co.*, 220 N.W.2d 281, 285 (Minn. 1974).

III. THE COURT SHOULD APPLY A SINGLE, UNIFORM STANDARD TO ALL ABSENTEE BALLOTS.

The trial court focused solely on the rejected absentee ballots before it[8] and concluded that because absentee voting was a privilege rather than a right, *Erlandson v. Kiffmeyer*, 659 N.W.2d 724 (Minn. 2003), this Court's decisions in *Wichelmann v. City of Glencoe*, 273 N.W. 638 (Minn. 1937), and *Bell v. Gannaway*, 227 N.W.2d 797 (Minn. 1975), dictated a strict application of the governing statute. The trial court was mistaken.

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6 If the trial court was correct in this regard, it failed in its duty under Minn. Stat. § 209.12 to take evidence and preserve a record for the Senate—it *excluded* most such evidence.

7 To the extent the trial court believed it lacked jurisdiction to address any constitutional violations, it was mistaken—those violations go directly to the determination of whether an absentee ballot is a legally cast vote.

8 The trial court's decision to limit its review to only 4,800 of the 11,000 rejected absentee ballots was erroneous. A.159-163. The Notice was sufficiently pled to put all rejected absentee ballots in issue—as well as, indeed, all absentee ballots. An appropriate remedy for the constitutional violations should include all remaining rejected absentee ballots.

This Court has repeatedly held that enfranchisement is the goal of Minnesota's election laws. Indeed, as set forth below, absent evidence of fraud or bad faith, this Court has never favored a strict compliance standard precisely because it would lead to the disenfranchisement of Minnesota voters.

Moreover, despite the trial court's comments otherwise, the record reflects not merely minor errors or isolated inconsistencies, but the wholesale disregard by some counties of standards held inviolate by other counties, as well as the bending of other standards, such that a voter's ability to have his absentee ballot counted depended on where he lived and cast his ballot. The disparity was not the result of mere "garden variety" human errors in failing to apply the statutory standard. Nor was it a factor solely of available resources. It resulted from intentional and systemic differences that impacted thousands of votes—well in excess of the narrow margin separating the candidates.

In such circumstances, the constitutional guarantees of equal protection and due process mandate that a uniform standard be applied to all absentee ballots cast in the election—regardless of when the final determination whether each constitutes a legally cast vote is made.

A. The Imposition Of A Strict Compliance Standard Would Create Thousands Of Illegal Votes.

While Appellants do not support a remedy that would disenfranchise Minnesota voters whose ballots already have been counted, we respectfully believe the Court is statutorily precluded from including votes meeting its definition of "illegal" in

calculating who won the election. If the trial court's application of a strict statutory compliance standard was correct, its judgment that Franken received the most "legally cast" votes cannot stand because that tally includes more illegal votes than the narrow margin between the candidates.

As set forth below, statutory construction and constitutional mandates require that all votes cast in the November 4, 2008 election must be subject to the same rules—there cannot be a different rule for those ballots considered by the trial court and those counted by some election officials. Put another way, to satisfy due process and to be "legally cast," a vote must comply with the appropriate standard regardless of when it is reviewed. *See Roe v. State of Alabama*, 43 F.3d 574 (11th Cir. 1995).

1. As a matter of common law, the Court cannot include illegal votes in the tally.

Minn. Stat. § 209.12 charges the trial court, and this Court on review, with the responsibility to determine "which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election." The trial court indisputably had the power to determine that previously cast votes in fact were not legally cast. *Fitzgerald*, 120 N.W.2d at 348-54 (conducting a manual review of specific ballots to determine if the ballots were "legally cast"); *see also Taylor v. Taylor,* 10 Minn. 107, 1865 WL 940, at *3 (Minn. 1865) (holding that the court has authority to determine which votes were legally cast). It also had the duty to do so. Indeed, Minnesota election law clearly states that "[a]n [i]llegal vote cannot be counted at all." *Hanson v. Emanuel*, 297 N.W. 749, 755 (Minn. 1941); *Johnson*, 154 N.W.2d at 187

("The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes."); *Berg v. Veit*, 162 N.W. 522 (Minn. 1917) (same).

This Court should ensure that only legally cast votes are included in the final count to preserve the integrity of the election. As the U.S. Supreme Court has noted, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.... Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). In other words, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Here, notwithstanding the trial court's suggestion to the contrary, Add.57 (¶87), the presence of enough illegal votes to change the outcome of the election is clear: even looking in just a handful of counties, Coleman found more than 425 such ballots. *See, e.g.*, A.570-591; A.709-919.

2. Coleman did not waive a uniform application of the standard.

Although the trial court appears to have felt constrained by the waiver analysis in *Bell,* Add.67 (¶141-143), this Court can clarify that such an analysis has no place in the

present circumstances.[9] The evidence below established that, unlike *Bell*, Coleman did not have the ability to challenge the determination by local boards or election judges whether to accept any absentee ballot. Coleman cannot be said to have waived a right he did not have.

The majority in *Bell* held a contestant's failure to challenge an illegal absentee ballot before it was accepted waived his right later to argue that the vote could not be counted. The majority used broad language in dicta, but reached a very narrow holding limited to the circumstances: a one-precinct nonpartisan election in which either candidate could have had a challenger present during the review of absentee ballots.

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

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[9] The trial court also ruled that Coleman had waived his right to pursue claims related to ballots already cast by failing to supplement an interrogatory response. Add.67 (¶¶141-143). In so ruling, the court erred: Coleman raised the issue of illegal ballots in a motion as soon as the court decided the standard for "legally cast" ballots. *See* A.215-223. He also identified specific ballots in his offers of proof. A.570-591; A.709-919. There was no discovery violation. *See* Minn. R. Civ. P. 26.05 (stating that there is no duty to supplement if the additional information has been made known to the other party in writing). In any event, the sanction of waiver was unwarranted. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977) (holding that "courts should consider alternative methods short of exclusion for preventing prejudice").

The evidence established conclusively that although major political parties can designate a challenger in the polling place on election day and a challenger can challenge the eligibility of a voter attempting to vote in person at the polling place, A.537 (at 42-44), there was no opportunity in this election for a challenge to any absentee ballot envelope. A.565 (at 224); A.569 (at 103-104). Only an absentee ballot board or election judges in the precinct made the decision whether to accept an absentee ballot. A.537 (at 44).[10]

That being so, Coleman did not waive the right to have the trial court's standard applied to all absentee ballots, including those cast on election day. In any event, as set forth below, the rules cannot be changed after the game has been played: if strict statutory compliance is the standard, it must be applied to all absentee ballots cast in the election; if substantial compliance is the correct standard, then thousands more ballots should be counted.

3. The constitutional guarantee of due process requires that all absentee ballots cast in the election be subject to the same rules.

Courts throughout the country have refused to countenance the application, after an election, of entirely different standards for accepting ballots than those in place on

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[10] The Secretary of State's own rules and publications reflect that it does not believe an opportunity to challenge, like that in *Bell*, exists. *Compare* Rule 8210.3000, subp.11 (challengers may be present while election judges review envelopes in mail ballot jurisdictions, with challenges to be made in accordance with § 204C.13, subd. 6), *with* the 2008 Election Judge Guide itself, *available at* http://www.sos.state.mn.us/docs/2008electionjudgeguide.pdf (sole role of challenger in physical precinct is with respect to the eligibility of a voter to vote in the particular precinct).

election day. *See, e.g.*, *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981); *Briscoe v. Kusper*, 435 F.2d 1046, 1052-56 (7th Cir. 1970) (canvassing board's application of new, more restrictive rules with respect to nominating petitions to nullify previously acceptable signatures without prior notice violated due process); *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978) (disqualification of absentee ballots previously offered by election officials represented "broad-gauged unfairness"); *Roe*, 43 F.3d at 581 (court's post-election order, which departed from past practice, "implicate[d] fundamental fairness").

In *Roe*, for instance, the Eleventh Circuit concluded the State of Alabama violated absentee voters' constitutional rights when it departed from Alabama's previous policy concerning "un-witnessed" absentee ballots. Such a "change in the rules *after the election* would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [requirements]." 43 F.3d at 581 (emphasis added). The court accordingly upheld the lower court's determination that adopting a practice materially different from that used up to and during the election violated the Fourteenth Amendment. *Roe v. State of Alabama*, 68 F.3d 404, 407 (11th Cir. 1995).

Just as in *Roe*, the appropriate analysis here begins with an examination of Minnesota's past practice in tallying its election results. Just as in *Roe*, ballots here that would or would not have been counted on election day, depending on the practices in the county in which the voter lived, have had their legal status altered by the trial court's strict compliance standard. The court's standard has led to the untenable situation of ballots now being rejected by the trial court, strictly construing the statute, while

thousands of similarly situated ballots were counted on election night and, pursuant to this Court's directive, during the recount. As a result, those voters whose ballots were rejected under the trial court's strict compliance standard have been unfairly disenfranchised and have had their due process rights violated by the court's changing of the rules more than three months after the election.[11]

Such shifting standards are not appropriate: as the District of Columbia Circuit aptly explained, "there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Brown v. O'Brien*, 469 F.2d 563, 569-70 (D.C. Cir. 1972) (vacated on other grounds). Similarly, in *Griffin*, the court agreed that the application of a Rhode Island statute regarding the treatment of absentee ballots amounted to a retroactive change in election practices that violated due process. 570 F.2d at 1077-79 (state's failure to follow well-established and published guidelines warranted relief). The same is true here.

In short, the application of a strict compliance standard after election day, when the vast majority of absentee ballots were reviewed under a substantial compliance

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[11] Moreover, election officials gave notice to some absentee voters that their ballots had been rejected and informed them of the opportunity to file an election contest to have their votes counted, while most rejected absentee voters were not afforded that opportunity. In mid-January, the Secretary of State's office, based on the substantial compliance standard used up until then, notified 413 voters that their absentee ballots had been rejected. A.512 (at 228). None of the other 11,000 voters whose absentee ballots were rejected, however, was given any such notice. *Id.*; A.434 (at 27); A.445 (at 179); A.498 (at 133-134). Notifying only certain voters plainly violates the due process and equal protection clauses as well as the spirit of Minnesota's election law. *See Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678-79 (1930).

standard, is a due process violation.[12] The same is true as to the giving of notice and an opportunity to file a contest to only a small group of voters. *See Erlandson*, 659 N.W.2d at 734 (holding that there is no rational basis for favoring some absentee voters with a new ballot). This Court should remedy both.

4. There is a remedy for the presence of illegal votes in the tally.

If the Court chooses to affirm the trial court's strict compliance standard, to maintain the required consistency it must also direct the trial court, on remand, to apply that standard to all absentee ballots cast in the election. Although the trial court found no remedy for such a circumstance, in fact there is.

It cannot be determined at this point for which candidate those now illegal votes were cast. Under these circumstances, there are two potential remedies:

(i) the proportionate reduction, on a precinct-by-precinct basis, of the tally, or

(ii) a declaration that it is impossible to determine which candidate received the highest number of legally cast votes.

The first, while considered but never implemented in Minnesota, *see Hanson v. Emmanuel*, 297 N.W. at 755, and *Berg v. Veit*, 162 N.W. at 525, finds support in case law from other states. S*ee, e.g.*, *Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978); *Huggins v. Superior Court,* 788 P.2d 81 (Ariz. 1990); *Singletary v. Kelley*, 242 Cal. App. 2d 611 (Cal. Dist. Ct. App. 1966); *Hileman v. McGinness*, 739 N.E.2d 81 (Ill. App. Ct. 2000);

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[12] The trial court's suggestion that because these rejected absentee ballots have each been reviewed twice, and in some cases thrice, it was justified in not counting them misses the point. The reviews were by the same officials, applying their same versions of the standard, who initially rejected the ballots. Those ballots have yet to be reviewed under a uniform standard.

Briggs v. Ghrist, 134 N.W. 321 (S.D. 1912). The problem with this approach is that it necessarily disenfranchises voters and does not remove the illegal votes (which as a matter of practicality and voter privacy cannot be identified specifically).

The second potential remedy, declining to certify either candidate the winner, finds support in rulings from other jurisdictions requiring a new election. *See, e.g.*, *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Hardeman v. Thomas*, 208 Cal. App. 3d 153 (Cal. Dist. Ct. App. 1989); *Mead v. Sheffield*, 601 S.E.2d 99 (Ga. 2004); *Akizaki v. Fong*, 461 P.2d 221 (Ha. 1969); *Adkins v. Huckabay*, 755 So.2d 206 (La. 2000); *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620 (Mass. 1982); and *Ippolito v. Power*, 241 N.E.2d 232 (N.Y. 1968). Minnesota law may not authorize the Court to require a new election, but neither does it require the Court to certify a winner if the record does not admit of one.

If this Court confirms the trial court's strict compliance standard, it must decide which remedy to apply. It may avoid that Hobson's choice by instead directing the application of a substantial compliance standard, built by an amalgam of the practices on election night, to all absentee ballots. As set forth below, Minnesota law and the federal guarantees of equal protection and due process favor such a ruling and remedy.

B. A Substantial Compliance Standard Comports With This Court's Longstanding Policy Favoring Enfranchisement, With What Occurred On Election Day And During The Recount, And With The Equal Protection and Due Process Clauses.

1. This Court has a long history of favoring substantial compliance.

To advance the policy of enfranchising voters, Minnesota courts have long held that voters need only "substantially comply" with technical voting requirements in order for their votes to be counted.[13] *Andersen v. Rolvaag*, 119 N.W.2d 1, 8 (Minn. 1962); *In re Contest of School District Election*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988). In *Anderson*, the Court recognized:

> 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.

119 N.W.2d at 8; *cf. Bloedel v. Cromwell*, 116 N.W. 947, 948 (Minn. 1908).

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[13] Most states have adopted the "substantial compliance" standard in their election laws. *Eubanks v. Hale*, 752 So.2d 1113, 1150-52 (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 Canvassing Bd.*, 707 So.2d 720, 724-25 (Fla. 1998); *Erickson v. Blair*, 670 P.2d 749, 755 (Colo. 1983); *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 628 (Mass. 1982); *Mittelstadt v. Bender*, 210 N.W.2d 89, 95 (N.D. 1973); *Application of Moore*, 154 A.2d 631, 638-39 (N.J. Super. Ct. App. Div. 1959); *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 69 N.W.2d 235, 237-38 (Wis. 1955); *Gregory v. Sanders*, 15 So.2d 432, 435 (Miss. 1943); *Sheils v. Flynn*, 299 N.Y.S. 64, 83-84 (N.Y. Sup. Ct. 1937); *McIntyre v. Wick*, 558 N.W.2d 347 (S.D. 1996); *Colten v. City of Haverhill*, 564 N.E.2d 987, 990-91 (Mass. 1991); *Pena v. Nelson*, 400 F. Supp. 493, 496 (D. Ariz. 1975).

Time and again, Minnesota courts have stopped short of a literal application of election laws in order to enfranchise voters. *See, e.g.*, *Allen v. Holm*, 66 N.W.2d 610, 614 (Minn. 1954) (holding that the statutory regulation of the election franchise "must be so construed as to insure, rather than defeat, full exercise thereof when and wherever possible"); *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 v. Prince*, 147 N.W. 275, 276-77 (Minn. 1914) (counting votes of voters whose affidavits of registration were defective for lack of official signatures, for lack of voter signatures, and for factual errors). Moreover, in the context of non-absentee ballots, 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, subd. 1; *see generally Fitzgerald*, 120 N.W.2d at 345-47.

This longstanding policy of avoiding a technical application of the law that would disenfranchise voters should be applied in the context of absentee voting. Indeed, under this Court's aegis, a substantial compliance standard was applied when local officials identified ballots they considered wrongly rejected. Scores of the ballots counted during that process would not have satisfied the trial court's later-imposed strict compliance standard. A.1063-1089.

2. Neither *Bell* nor *Wichelmann* precludes application of a substantial compliance standard to absentee voting.

This Court has made clear that absentee voters are entitled to the protections of the law. This Court noted in *Erlandson*, 659 N.W.2d at 734, that "[t]he purpose of the absentee ballot is to enfranchise those voters who cannot vote in person." The statute may be stringent, but that does not mean this Court should sanction unfair burdens on the fundamental right to vote of those casting by absentee ballot—that is, to avoid disenfranchising "the very people the absentee voter laws are intended to benefit." *Id.*

Indeed, the right to vote, and to have one's vote counted equally, extends to absentee ballots. Even if the Court agrees that absentee voting is a privilege rather than a right, *Erlandson*, 659 N.W.2d at 733 n.8, this distinction does not mean that the "privilege" to vote by absentee ballot may be afforded any lesser protection than if it were a "right." *See* Minn. Const., art. I, § 2 (confirming that privileges are afforded the same protections as rights, and that neither rights nor privileges may be deprived without due process of law). Because Minnesota has extended to its citizens the privilege to vote absentee, it "may not, by later arbitrary and disparate treatment," value non-absentee ballots over validly cast absentee ballots. *Bush*, 531 U.S. at 104-05. "[E]qual weight" must be "accorded to each vote," for "equal dignity [is] owed to each voter." *Id.* at 104.

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

> We have said that in order to protect this precious right election laws should be liberally construed. ...[W]e said that "[t]he statute must be

> liberally construed so as to effectuate legislative intention and to fully secure to the people their right to express their choice." "A technical construction of the language used would be objectionable on general principles, and tend to subvert the purposes sought to be attained."

December 18, 2008 Order, dissenting at C/D-2 (A.14) (citations omitted). Justice Page did as well:

> We are to liberally construe Minnesota's election laws, guided by the principle that "[s]tatutory regulations of the election franchise must be so construed as to insure, rather than defeat, full exercise thereof when and wherever possible." ...voters should not be disenfranchised "[b]ecause some officer having to do with the election has not fully carried out what the statutes direct him to do ...if it can be avoided by any reasonable interpretation."

Coleman v. Ritchie, 762 N.W.2d 218, 246-47 (Minn. 2009) (Page, J. dissenting) (citations omitted).

In determining that the vast majority of the rejected absentee ballots must remain uncounted, the trial court relied on the anti-fraud provisions of the statutes governing absentee voting and this Court's decisions in *Wichelmann* and *Bell* addressing fact situations arising from fraudulent activity in elections held many years ago. It essentially elevated form over substance, demanding adherence to the statute despite a record devoid of evidence of fraudulent activity on the part of any of these voters. Neither the statute nor the case law supports the disenfranchisement of so many voters in this election.

Against this background, the Court's decisions in *Wichelmann* and *Bell* are best understood as being limited to their specific facts. In, *Wichelmann*, the court faced a fraud involving the wholesale procurement of absentee ballots without filing the requisite application. The court was legitimately concerned that ballots were distributed to a large

group of potentially ineligible voters. 273 N.W. at 641. The record does not support such a concern here. In *Bell*, the court faced a one-precinct, non-partisan local election involving what the court characterized as an obviously illegal absentee ballot cast by a voter who nonetheless was eligible to vote in person. It discussed the need to construe the statute strictly, in all its mandatory requirements, 227 N.W.2d at 803, but went on to hold that the fraudulent vote in question would be counted. That situation is not presented by the evidence regarding this statewide election. Each decision used broad language in dicta, but the holdings were narrow. As a result, neither case stands for the proposition that the mere potential for fraud requires applying the statute in such a fashion as to disenfranchise thousands of voters.

Minn. Stat. § 203B.12, subd. 2,[14] 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, 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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[14] Minn. Stat. § 203B.24, subd. 1, governs UOCAVA and imposes similar requirements.

The statute, which is designed to require sufficient indicia of trustworthiness, does not permit an election judge to reject an absentee ballot for any other reason.

If a ballot envelope contains sufficient information to verify it does indeed contain the voter's vote, then, construed in the context of existing case law, the statute has been satisfied. In most cases, substantial compliance will include having applied for an absentee ballot and, on the return envelope, the name and address of the voter, his or her signature and an indication that his or her vote was properly witnessed. *See Bell*, 227 N.W.2d at 804 (holding that an absentee voter must attest to his residence and eligibility to vote); *Wichelmann*, 273 N.W. at 640 (absentee voter must file verified application for an absentee ballot).

That is precisely what most officials looked for on election day and in response to this Court's orders during the MSCB recount. In so doing, the local officials presumed voters followed the law. That presumption, followed in Minnesota in virtually all past elections, was reasonable.[15] After all, a voter signs the absentee ballot envelope under

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[15] The trial court mistakenly imposed a burden of proof well beyond that followed on election day and, indeed, heavier than the burden applicable in this civil action. The overwhelming majority of Minnesota's counties and cities applied various presumptions when determining whether to accept absentee ballots on election day, and the MSCB accepted the same presumptions in January 2009, including:

a. If a voter received a registered voter's envelope, the presumption is officials originally determined he was registered;
b. If a witness has a Minnesota address, the presumption is she is registered;
c. If a voter received an absentee ballot, the presumption is he applied for it;
d. If a person signed the application or ballot, the presumption is the signature is genuine; and
e. If a rejected ballot notes a reason for rejection, the presumption is all other legal requirements have been met.

(Footnote continues on next page)

penalty of a felony if he misrepresents himself. Minn. Stat. § 203B.03. The witness, who must also be a registered voter or an official empowered to administer oaths, and is subject to the same statutory penalty, affirms that the voter is indeed who she says she is.

As a matter of Minnesota law, then, the trial court's failure to apply Minnesota's substantial compliance policy to enfranchise voters, and to require an appropriate burden of proof to establish substantial compliance as to any particular absentee ballot, disenfranchised thousands of Minnesota voters. Those absentee voters who substantially complied with the statute should have their ballots counted.

3. The constitutional guarantee of equal protection mandates a substantial compliance standard.

The federal constitution dictates that because most, but not all, election officials adopted a substantial compliance standard on election night in their review of absentee ballots, leading to disparate treatment of similarly situated voters, the Court should apply a similar standard to all absentee ballots in order to ensure the uniform (and fair) treatment of all absentee voters. Regardless of how clear the statutory language for accepting absentee ballots might appear, the evidence showed that standard was applied inconsistently—deliberately and not by mistake—by county officials on election night. This undeniable circumstance, together with the trial court's imposition of a strict compliance standard on what in large areas of the state was a substantial compliance regime, constitutes a violation of the constitutional guarantee of equal protection.

The trial court erred in not allowing these presumptions when determining whether the preponderance of the evidence demonstrates that any particular absentee ballot is a legally cast vote.

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds*, 377 U.S. at 554. But the Constitution protects "more than the initial allocation of the franchise." *Bush v. Gore*, 531 U.S. at 104. It also protects the right of all qualified voters to have their votes counted equally. *Id.* ("[T]he right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Reynolds*, 377 U.S. at 567-68.

If the state fails to apply "specific standards" during a statewide recount that will ensure "equal application" to all votes, the lack of uniform standards is a constitutional violation. *Bush,* 531 U.S. at 106; *Erlandson* at 732 ("treating similarly-situated voters differently with no rational explanation...violates equal protection guarantees").[16] Here, although there was a single statutory standard for accepting absentee ballots, that standard was applied differently and inconsistently in the different counties and cities on election night—and as the result of deliberate decisions made by local election officials.

The differences in application were not merely the exercise of discretion about how best to ensure compliance with the statute but instead decisions by some local

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[16] 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.

officials not to apply specific elements the trial court later found to be required. For this reason, cases like *State of New Mexico v. Herrera*, 203 P.3d 94 (N.M. 2009), which declined to hold the exercise of discretion by local officials in determining voter intent under a specific statutory framework to be a violation of equal protection, are inapplicable. Instead, the differences in application were about not complying with what the trial court ruled to be statutory requirements. The record is replete with examples of local officials choosing not to enforce such elements. *See supra* pp. 9-19. One of the trial court's own analogies illustrates the distinction: while differences in the counting accuracy rate of various types of machines may not violate equal protection, Add.86, it is wholly another thing for machines in one county to decline to count specific types of ballots, that is, to filter out ballots that would have been counted by the non-filtering machines in another county. The latter would constitute a clear equal protection violation. It is analogous to what occurred in this election.

The trial court's attempt to distinguish *Bush v. Gore,* which makes clear that different areas of the state applying different interpretations of an applicable standard is unacceptable under the Constitution, is not persuasive. There is no logical distinction between the unequal treatment of equivalent chads caused by the Florida Supreme Court's imprecision (different counties interpreting the court's holding differently) and the unequal local treatment of absentee ballots caused by imprecision in officials' understanding and intentional application of the statutory standard set forth in Minn. Stat. § 203B.12, subd.2. Just because Minnesota's standard was set by statute rather than court decision does not excuse the constitutional requirement that the standard be applied

uniformly. In both cases a standard has been inconsistently applied as the result of official imprecision. Indeed, because it leaves standing—and, therefore, ratifies—local decisions made in accordance with their own interpretative gloss on the statute, without insisting on strict compliance for all absentee ballots, the trial court's decision itself confirms the same constitutional violation at issue in *Bush v. Gore*. Deliberate unequal treatment of similarly situated voters simply is unacceptable under federal equal protection law.

In these circumstances, it is not sufficient to say, as the trial court did, Add.85-87, that not all counties and municipalities had sufficient resources to apply the standard strictly and therefore their inconsistencies are excused. Even the modest evidence the court admitted shows the disparate application of the standard was not the result solely of variances in the resources available to local officials. Many officials whose jurisdictions had access to the SVRS and other resources simply chose not to check but instead deliberately chose to employ presumptions, reasonable in the circumstances, that voters would follow the law: for example, those voters who received registered voter packages in fact were registered; those witnesses who provided a Minnesota address were in fact registered; where an application could not be found, it had existed but was lost. Other officials clearly did not employ such presumptions, despite the demand on resources of strict compliance, and did not accept similar absentee ballots.

In any event, the lack of resources does not, in these circumstances, constitute a rational basis to justify the disparate treatment of similarly situated voters.[17] *See Erlandson*, 659 N.W.2d at 736 (Page, J., dissenting in part). There is no legitimate state interest in promoting local control over the allocation of resources when the Legislature has already spoken (in § 203B.12, subd. 2)—and demanded uniformity. As the Legislature has recognized, and this Court has affirmed, the franchise is simply too fundamental.

The equal protection cases cited by the trial court requiring a showing of malicious or intentional discrimination for claims such as unequal assessment of taxes, *Programmed Land, Inc. v. O'Connor*, 633 N.W.2d 517 (Minn. 2001); different treatment of doctors graduating from different schools when seeking licenses, *Draganosky v. Minn. Bd. of Psychology*, 367 N.W.2d 521 (Minn. 1985); and the inability of charitable hospital employees to strike, *Fairview Hosp. Ass'n v. Pub. Bldg. Serv.*, 64 N.W.2d 16 (Minn. 1954), are also inapposite. The law does not require that election officials have acted maliciously or with intent to discriminate against specific voters. *See, e.g., Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) (lack of intent to violate constitutional rights not a defense if clear that conduct by election official would have that effect); *State v. Richmond*, 730 N.W.2d at 71 (application of facially neutral statute in way that makes distinctions between similarly situated persons without legitimate government interest

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[17] To recognize that the existence of these widespread disparities implicates equal protection is not to say that election officials acted in bad faith or, indeed, in anything other than good faith. It means merely that the officials understood the standard differently so that there was an unacceptable impact on an individual's right to have his vote counted, especially in an election so close.

can be violation of equal protection). A deliberate decision not to require an element of the statutory standard, a decision that necessarily will discriminate between classes of similarly situated voters, is sufficient. That, of course, is precisely what the record here reflects.

That errors and inconsistencies occur in all elections because they are all run by human beings cannot, as the trial court would have it, gainsay the extensive and deliberate decisions by local officials to apply a statutory standard differently.[18] Violations of the Fourteenth Amendment are not minor, "garden variety" imperfections. Moreover, despite the trial court's statement to the contrary, Add.57 (¶87), the record established that the number of ballots subjected to disparate, and unconstitutional, treatment was large enough to change the outcome of this election. *See, e.g.*, A.709-919.[19]

In sum, as a matter of constitutional law, the overwhelming evidence of disparate treatment cannot be ignored—no matter how expedient it may be to do precisely that. The deliberate and disparate treatment of large numbers of similarly situated voters—who had their votes counted only if they lived in certain jurisdictions—is unacceptable in any election. It is especially so in one so close.

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[18] For this reason alone, the various federal decisions on which the trial court relied, Add.81-82, Add.93-96, are inapposite. Each involved sporadic, good faith errors in administering state election laws; none addressed deliberate decisions by different local officials to interpret a standard differently. *See, e.g.*, *Snowden v. Hughes*, 321 U.S. 1 (1944). Nothing cited by the trial court should inhibit this Court from robustly embracing its obligation under Minn. Stat. § 209.12.

[19] The trial court's statement is especially puzzling given that it excluded most such evidence as irrelevant.

4. The appropriate remedy is to count more absentee ballots.

The standard for determining whether an absentee ballot is legally cast must be applied so that identical ballots from the November 4, 2008 election are treated the same. Because identical ballots have been treated differently in numerous instances at every stage of this election, the most equitable and most efficient remedy is to presume, as a significant number of Minnesota jurisdictions did on election day, that an absentee ballot which substantially complies with the statutory requirements is a legal vote. Absent a showing that a particular absentee ballot was cast by an ineligible voter or was tainted by fraud or bad faith, many thousands of the remaining rejected absentee ballots should be opened and counted.

Certainly all of the 1,359 rejected absentee ballots identified by Coleman at the conclusion of his case should be counted, subject only to confirmation by the Secretary of State's Office that the voter is registered and did not otherwise vote. The record establishes that each had sufficient indicia of trustworthiness. A.1024-1062. Moreover, there are thousands more such ballots to be found among the 4,800 on which Coleman sought summary judgment. A.922-1022. Those should be counted as well.

Similarly, approximately 270 of the absentee ballot envelopes identified by local election officials in response to this Court's December 24, 2008 Order as having been improperly rejected remain uncounted and should be counted now. Those absentee ballots identified by election officials during their trial testimony as ones that should be counted should also be counted, as should those of the voters who testified to their ballots but, because of the trial court's elevation of form over substance, had their votes rejected.

Accordingly, this Court should remand this matter to the trial court and order that all absentee ballots in substantial compliance with Minn. Stat. §§ 203B.12, subd. 2, and 203B.24, as established by a preponderance of the evidence (applying all reasonable presumptions, as set forth in footnote 15) be opened and counted.

IV. THE TRIAL COURT'S FAILURE TO ORDER AN INSPECTION PURSUANT TO MINN. STAT. § 209.06 RESULTED IN DOUBLE-COUNTING OF BALLOTS.

The principle of "one person, one vote" is a hallmark of the United States Constitution; no person is entitled to two votes. *Reynolds*, 377 U.S. at 558. Coleman contended below that double-counting of some ballots occurred during the recount in certain precincts where the number of original ballots exceeded that of corresponding marked duplicates because election judges had failed to mark all the duplicates.

By its very name, a duplicate ballot means there are two ballots for a voter, making the risk of double-counting a real one. The evidence showed that the number of votes counted during the recount exceeded the number of persons actually casting ballots at those precincts on election night, often by precisely the number of challenged original ballots counted. If there were more ballots counted in the recount than voters who cast ballots on election day, the excess ballots would be illegal and should not be part of the tally. *See Johnson*, 154 N.W.2d at 187.

Minn. Stat. § 209.06 provides either party with the right to an inspection. Despite the non-discretionary language of this statute, the court denied Coleman's verified petition for an inspection. The denial of an inspection effectively foreclosed Coleman's ability to gather the information needed to fully present his case as to double-counting of

unmarked duplicate ballots during the recount.[20] The Court accordingly should reverse the trial court on this issue and remand for an inspection pursuant to Minn. Stat. § 209.06.

V. THE TRIAL COURT ERRED IN INCLUDING THE MISSING BALLOTS FROM MINNEAPOLIS W3 – P1 IN THE TALLY OF LEGALLY CAST VOTES.

Certification of "results" including ballots not located during the recount is improper, as a matter of law, even if such ballots may have existed earlier. *See* Minn. Stat. § 204C.35 (requiring a manual hand-recount). If a ballot is missing, or its chain of custody is suspect, that ballot cannot serve as the "best evidence" of the voter's intent. *See, e.g., Newton v. Newell*, 26 Minn. 529, 6 N.W. 346 (1880) (ballots not carefully preserved cannot be relied upon in a subsequent recount); *see also Purcell v. Sparks,* Mower County District Court File No. C5-02-1938, at 8-9 (Jan. 6. 2003) (A.1131-32); *DeBroux v. Bd. of Canvassers for the City of Appleton*, 557 N.W.2d 423 (Wis. Ct. App. 1996) (unsecured ballots lacked proper foundational basis to be tallied).

In cases where all ballots from a precinct are missing, the courts have defaulted to election night tallies as *prima facie* evidence of numbers. However, where only *some* ballots are missing, there should be no "default" to election night numbers because the ballots themselves are the best evidence—the sole evidence—of the voter's intent, and

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[20] The court also erroneously applied the doctrine of laches in dismissing Coleman's double-counting claims. In reaching this conclusion, the court ignored unrebutted evidence that the parties challenged several hundred ballots during the recount, which challenges were made for the specific purpose of enabling the MSCB to rule on the double-counting claims. *See, e.g.,* A.532 (at 87-88). As this Court recognized, these challenges occurred as soon as Coleman was aware that double-counting was likely occurring. A.28. Rather than reach a decision on the merits (including considering any evidentiary testimony), the MSCB and this Court deferred the decision to an election contest. A.29-30.

they are gone. This means Coleman did not have the opportunity to challenge these ballots in the recount.

The unreviewed ballots from Minneapolis—whatever number of them there were—cannot be manually counted. Accordingly, the totals from the administrative recount of that precinct should be substituted for those accepted by the MSCB.

CONCLUSION

In order to satisfy Minn. Stat. § 209.12, the Court must ensure that when the trial court on remand determines which candidate received the highest number of legally cast votes, it applies a uniform standard to all absentee ballots. Accordingly, to enfranchise the greatest number of Minnesota voters possible, Coleman respectfully requests the Court remand with instructions to apply a substantial compliance standard, including reasonable presumptions, to the remaining uncounted absentee ballots.

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CERTIFICATE OF COMPLIANCE
WITH MINNESOTA RULE OF CIVIL APPELLATE
PROCEDURE 132.01, SUBD. 3

The undersigned hereby certifies, pursuant to Minnesota Rule of Civil Appellate Procedure 132.01, Subd. 3(a)(1), that this brief (exclusive of the table of contents, the table of authorities, any addendum, and any certificates of counsel), contains 13,751 words, as ascertained by using the word count feature of the Microsoft® Word 2003 word-processing software used to prepare the brief, and conforms to the typeface and type style requirements of the Rules by being in 13-point Times New Roman format.

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