STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

This action came on for a court trial before the Honorable Elizabeth A. Hayden, the Honorable Kurt J. Marben, and the Honorable Denise D. Reilly, District Court Judges, beginning on January 26, 2009 and ending on March 13, 2009.

Having considered the testimony and evidence adduced at trial, the exhibits admitted into evidence, the pleadings, briefs and memoranda submitted by all the parties, and the arguments of counsel, the Court now makes the following Findings of Fact and Conclusions of Law:

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FINDINGS OF FACT

Procedural History of this Election Contest

1. On November 4, 2008, Minnesota held a general election, including the election for United States Senator. Norm Coleman ("Coleman") and Al Franken ("Franken") were two of the candidates for Senator. Cullen Sheehan served as Coleman's campaign manager.

2. On November 18, 2008, the consolidated statewide canvassing report showed that Coleman received 1,211,565 votes and Franken received 1,211,359 votes. (Ex. F14 at 3.) The margin of votes separating the two candidates was 206 votes, less than one-half of one percent, triggering an automatic hand recount of the votes. (Test'y of Gelbmann, Jan. 29, 2009 at 54-55.)

3. On November 18, 2008, the Minnesota State Canvassing Board ("Board") signed the Certificate of General Election Canvassing Report and directed the Office of the Minnesota Secretary of State to oversee an administrative manual recount of votes cast for the office of United States Senator as provided by Minn. Stat. § 204C.35, subd. 1(b).

4. On behalf of the Secretary of State, Deputy Secretary James Gelbmann and Director of Elections, Gary Poser, drafted proposed Administrative Recount Procedures and provided them to both campaigns for their review. (Gelbmann Test'y, Jan. 28, 2009 at 93, 94, 135-37; Ex. F10.) The Board approved the Administrative Recount Procedures as proposed without objection from the parties. (Ex. F14.)

5. The mandatory recount began on November 19, 2008 and concluded on January 5, 2009. Nearly 3 million ballots were reviewed and counted. The report compiled from the hand recount showed that Franken received 1,212,431 votes and that Coleman received 1,212,206 votes. (Ex. F140.)

6. On January 5, 2009, the Board certified the results of the election and declared that Franken received 225 more votes than Coleman in the race for United States Senator. (Ex. F138.)

7. On January 6, 2009, Contestants filed a Notice of Contest in Ramsey County District Court contesting the certificate of election results issued by the Board and seeking an order declaring that Coleman was entitled to the certificate of election as United States Senator.

8. The trial in this election contest commenced on January 26, 2009, within 20 days of the date of Contestants filing their Notice of Contest as required by Minnesota Statute § 209.065.

9. On the first day of trial, Contestee filed witness and exhibit lists identifying 773 potential witnesses. The following day Contestants filed their witness and exhibit lists, identifying 150 potential witnesses and requesting leave to amend those lists during the trial. At no point during trial did Contestants seek to amend their list to add additional witnesses.

10. On January 30, 2009, pursuant to stipulation, the Court ordered dismissal of Contestants' claims relating to Maplewood Precinct 6 and Saint Paul, Ward 3, Precinct 9. (Stipulated Order of Dismissal of Contestants' Claims Regarding Maplewood Precinct 6 and Saint Paul, Ward 3, Precinct 9.)

11. On February 3, 2009, the Court entered a stipulated order, wherein both parties stipulated that the 933 ballots that were opened and counted by the Secretary of State on January 3, 2009, as part of the Supreme Court's absentee-ballot review process "were properly and lawfully opened and counted" and that "the results [of the opening and counting] . . . were properly and lawfully included in the results of the 2008 United States Senate election as certified by the Minnesota State Canvassing Board." (Stipulation and Order, Feb. 3, 2009 at ¶ 2.)

12. On February 3, 2009, the Court issued a separate Order limiting the scope of Contestants' absentee-ballot claims to the 4,797 absentee ballots that Contestants specifically identified prior to January 23, 2009 as having been wrongfully rejected. (Order on Contestee's Mot. in Limine to Limit Absentee-Ballot Evidence to the Ballots Pleaded in the Notice of Contest, Feb. 3, 2009 at ¶ 1(b).)

13. On February 13, 2009, the Court issued an order that identified the standards for determining whether an absentee ballot was a legally cast vote and identified those absentee ballots that did not comply with these standards as a matter of law. (Order Following Hearing, Feb. 13, 2009.)

14. On February 20, 2009, Contestants sought a temporary injunction asking this Court to interrupt the Secretary of State from eliminating identifying information from the ballots previously opened and counted on January 3, 2009. Contestants requested in the alternative that this Court re-examine those ballots and reject those that did not meet the standards applied by the Court in its February 13, 2009 Order. At the time Contestants filed their motion more than half of the absentee ballots and their envelopes had their identifying information redacted. The Court denied both motions. (Order Denying Contestants' Mot. for Temp. Injunction, Feb. 24, 2009.)

15. Prior to the close of their case, Contestants sought leave from this Court to introduce into the record certifications from certain counties and precincts to prove that citizens whose absentee ballots were offered during trial had not otherwise voted. Following Contestee's objection to this request, the Court ruled on February 26, 2009 that certifications in compliance with the Rules of Evidence would be received, but must be received no later than March 4, 2009 by 12:00 p.m. (Order Granting Contestee's Mot. in Limine, Feb. 26, 2009.)

16. During trial the Court heard testimony that some voters placed their voter-registration materials in the secrecy envelope inside their absentee ballot return envelope and that their absentee ballots were rejected for lack of registration materials. Accordingly, on February 26, 2009, the Court issued an Order directing local election officials to open their rejected absentee ballots to determine whether voters inadvertently placed completed voter-

registration materials in the secrecy envelopes when they returned their absentee ballots. (Order for Opening Secrecy Envelopes, Feb. 26, 2009.)

17. As a result, counties found 90 properly completed voter registration applications.

18. On March 2, 2009, Contestants filed a motion seeking to have Rule 9 of the Administrative Recount Procedures declared invalid as a matter of law. Rule 9 provided for the counting of original ballots in lieu of duplicates during the recount.

19. Contestants conditionally rested their case on March 2, 2009 after 26 days of trial, reserving the right to introduce certifications from local election officials.

20. After they conditionally rested, Contestants sought to introduce into evidence affidavits from individual voters who had not been called to testify. The request was denied as untimely.

21. On March 12, 2009, Contestee rested his case after 8 days of trial.

22. Contestants concluded their rebuttal case on March 13, 2009.

23. Over the course of the seven weeks of trial, the Court heard testimony from 142 witnesses, including 38 election officials from various counties and precincts, 69 voters and 3 state officials.

24. The Court received 1,717 individual exhibits. In addition, it received offers of proof from Contestants purporting to include evidence wrongfully excluded by the Court's evidentiary rulings. (*See* C1013-27.)

25. Over 19,181 pages of pleadings, motions and briefs were filed and reviewed.

26. Contrary to claims made by Contestants, at no point did the Court preclude Contestants from presenting evidence to show that ballots were cast in compliance with statutory requirements and wrongfully rejected.

27. On March 31, 2009, the Court issued an order directing counties and municipalities to deliver 400 rejected absentee ballots to the Office of the Secretary of State for review by this Court. Following this review, the Court on April 7, 2009 ordered the opening and counting of 351 of these ballots.

28. All of the Orders entered by this Court throughout these proceedings have been unanimous.

Absentee Voting Requirements.

29. A person cannot vote in person or by absentee ballot unless he or she is properly registered to vote. (*See, e.g.,* Ex. F2044 at § 8.1.) A person, who has never voted in Minnesota, must complete a voter registration application. (*Id.*)

30. Minnesota has a precinct based voter registration system. (Test'y of Boyle, Feb. 11, 2009 at 41-42.) A voter's precinct is determined by his or her address. (Ex. F2044 at § 8.2.)

31. Voters who previously registered to vote must update their registration information if they change their residence, change their name, or fail to vote for four consecutive years. (*See, e.g.*, Test'y of Poser, Mar. 4, 2009 at 23 (explaining that a voter's registration status may become challenged if mail sent to the registered address is returned as non-deliverable); Test'y of Mansky, Mar. 9, 2009 at 163 (same); Test'y of Ferber, Feb. 19, 2009 at 166 (explaining the need to re-register upon change of residence); Test'y of Mansky Jan. 30, 2009 at 7 (explaining the need to re-register if a voter fails to vote within a four-year period); Test'y of Corbid, Feb. 3, 2009 at 37 (same); Test'y of Knutson, Mar. 10, 2009 at 57 (same).) A voter's residence changes even if he or she simply moves within an apartment complex. (*See* Test'y of Gibbs, Mar. 10, 2009 at 27-28; Test'y of O'Donnell, Mar. 10, 2009 at 71; Test'y of Reichert, Mar. 10, 2009 at 116-17, 126, 136-37.) These re-registration requirements ensure that the information on election rosters is accurate and complete. (*See* Ex. F2044 at §§ 3.0, 8.1.1.)

32. Minnesota voters are permitted to vote by absentee ballot if they submit an absentee ballot application certifying that they are unable to vote in person at their precinct on Election Day. Minn. Stat. § 203B.02, subd. 1 (Test'y of Mansky, Feb. 2, 2009 at 60-62, 162-63.) Voters completing absentee ballot applications are specifically instructed to sign their application. (Test'y of Boyle, Feb. 11, 2009 at 26-27; Test'y of Engdahl, Feb. 13, 2009 at 52; Ex. F1745.) Requiring voters to submit a signed absentee ballot application serves to prevent fraud in the election as it allows election officials to compare the signature of the person applying for the ballot with the person voting the ballot. (*See, e.g.*, Test'y of Gelbmann, Jan. 29 at 11, 149; Test'y of Mansky, Feb. 2, 2009 at 117-18, 180; Test'y of Smith, Feb. 6, 2009 at 159-60, 178-79; Ex. F1677 at § 12.3.)

33. The absentee voter materials sent to a voter include written instructions for completing the absentee ballot return envelope. (Test'y of Corbid, Feb. 4, 2009 at 139; Ex. F1744.) Voters are instructed that the ballot must be witnessed by a registered Minnesota voter, or by a notary-public or some other person authorized to administer oaths. (*See* Exs. 1744; *see also* Test'y of Boyle, Feb. 11, 2009 at 38-39; Test'y of Olson, Mar. 5, 2009 at 63.) Voters are also directed to place their name and address on the back of the absentee ballot return envelope and sign their name. (Ex. F1744.) Finally, voters are instructed to have witnesses provide their name, address and signature on the envelope as well. (*Id.*)

34. During the trial, when asked, voters testified that they read the absentee voting instructions and knew that their witness had to be a registered Minnesota voter. (Test'y of Olson, Mar. 5, 2009 at 63.) The voters testified that they tried their best to comply with these instructions . (*See, e.g.*, Test'y of Vogelgesang, Mar. 5, 2009 at 56; Test'y of Olson, Mar. 5, 2009 at 63; Test'y of Schmit, Mar. 5, 2009 at 149; Test'y of Hoff, Mar. 9, 2009 at 56, 60; Test'y of Farr, Mar. 9, 2009 at 69; Test'y of Densinger, Mar. 9, 2009 at 69; Test'y of Narveson, Mar. 10, 2009 at 15-16; Test'y of Bowman, Mar. 10, 2009 at 145; Test'y of Lewis, Mar. 10, 2009 at 154; Test'y of Blake, Mar. 10, 2009 at 207; Test'y of Boss, Mar. 12, 2009 at 114.)

35. Voters seeking to vote by absentee ballot are sent materials for either a registered voter or non-registered voter. For non-registered voters or voters needing to re-register, the absentee ballot materials include voter registration materials. The instructions direct the voter to insert their completed voter registration application into the absentee ballot return envelope. (Ex. F1744.) Despite these instructions, some voters put their applications in the secrecy envelope. (*See, e.g.* Test'y of Mansky, Jan. 30, 2009 at 20; Exs. F4314-16 (relating to voters Haefner, Mursal and Upton).)

36. Occasionally, election officials mistakenly sent registered voters the materials for non-registered voters and vice-versa. For example, registered voters Paulu and Janus from Ramsey County were sent the absentee-ballot materials for non-registered voters. (*See, e.g.* Test'y of Mansky, Mar. 9, 2009 at 25 & Ex. F2213 (discussing voter Janus), at 121 & Ex. 2243 (discussing voter Paulu); *see also* Test'y of Poser, Mar. 4, 2009 at 14 (noting that election officials may fail to find a registration record in the statewide voter registration system when determining which type of absentee-balloting material to send to individual voters); Test'y of Boyle, Feb. 11, 2009 at 135.) Similarly, non-registered voters may be sent the absentee-ballot materials for registered voters. (*See, e.g.*, Test'y of Boyle, Feb. 9, 2009 at 108 (referencing voter Eisenbeiz).)

37. The face of the absentee ballot return envelope for a non-registered voter requires the voter's witness to check the proof of residence provided by the voter seeking to register. A voter may use one of several types of proof of residence for the purpose of registering by absentee ballot. (Ex. F1744.)

38. In 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (hereinafter "UOCAVA"). 18 U.S.C. §§ 608-609; 39 U.S.C. § 3406; 42 U.S.C. §§ 1973FF-1973ff-1973ff-6. The purpose of the UOCAVA was to provide a mechanism for overseas voters to vote if they were unable to obtain a state absentee ballot due to the unreliability of the overseas mail system. *Bush v. Hillsborough County Canvassing Bd.*, 123 F.Supp.2d 1305, 1316 (N.D. Fla. 2000). Any state requirement that conflicts with the mandatory provisions of the UOCAVA is preempted and invalid. *Id.* at 1317 (citing U.S. Const. art. VI, cl.2).

39. The UOCAVA directs states to allow overseas voters "who make timely application for, and do not receive, State absentee ballots" to use the federal write-in ballot. 42 U.S.C. § 1973 ff-2(a). "Thus, the federal statute merely requires that the overseas citizen submit an application, not that the state election official receive it." *Bush*, 123 F.Supp.2d at 1316. The federal write-in ballot contains an oath signed by the voter stating "I swear or affirm, under the penalty for perjury, that [m]y application for a regular state absentee ballot was mailed in time to be received 30 days prior to the election.

40. A properly completed federal write-in ballot for which no Federal Post Card Application or absentee ballot application can be located is a legally cast ballot if the voter is registered and the ballot is received within the required time limits. The Court, without evidence to the contrary, assumes that the voter submitted an absentee ballot application and the county's inability to locate it is due to a problem with the overseas mail system or clerical error. *Bush*, 123 F.Supp.2d at 1317.

41. The Minnesota Secretary of State compiles voter information and stores it within the Statewide Voter Registration System ("SVRS"). (Test'y of Mansky, Jan. 29, 2009 at 235.) The SVRS is a database that contains identifying information for every person who has previously voted in Minnesota. (Test'y of Mansky, Jan. 29, 2009 at 235.) This identifying information includes the voter's name, most recently reported address and date of birth. (*See, e.g.* Ex. C363.)

42. The SVRS records the date a voter first registered to vote as the original registration date. (Test'y of Poser Mar. 4, 2009 at 17.) The SVRS also includes an updated registration date, which is the date the counties enter the new application information into the SVRS. (*Id.* at 18.) Finally, the SVRS includes an "application date" which is the date the voter signs his or her most recent voter registration application. (*Id.*)

43. The SVRS database is accurate and reliable. (Test'y of Mansky, Feb. 2, 2009 at 134, Mar. 9, 2009 at 227-28; Lautzenheiser Test'y, Mar. 12, 2009 at 90.).) Minnesota's SVRS serves as a model for other states that adopted electronic statewide voter registration systems as required by the Help America Vote Act of 2004 ("HAVA"). (Test'y of Mansky, Mar. 9, 2009 at 228-29; Test'y of Lautzenheiser, Mar. 12, 2009 at 90.)

44. The SVRS contains trustworthy evidence of a voter's registration and his or her voting history. (Test'y of Lautzenheiser, Mar. 12, 2009 at 90.) Voter records are updated throughout the year. (Test'y of Corbid, Feb. 3, 2009 at 25.) Voter information received during the general election is entered into the SVRS by county employees after each election. As with any information system, county employees occasionally make data entry errors. (Test'y of Mansky, Jan. 29, 2009 at 242.) These occasional errors do not render the system unreliable and election officials throughout the state routinely rely on it. (Test'y of Mansky; Mar. 9, 2009 at 227-28.) This updating process continued during the course of this election contest. (Gelbmann Test'y, Mar. 12, 2009 at 69 (noting that the updating process was delayed by repeated data practices requests filed by the parties to this election contest); Test'y of Mansky, Mar. 9, 2009 at 200-01; Test'y of Poser, Mar. 4, 2009 at 8.) No party, however, has been prejudiced by this delay because the data from the November 4, 2008 election is readily available from other sources, e.g., election-day rosters. (*See, e.g.* Test'y of Mansky, Mar. 9, 2009 at 158.)

45. The SVRS contains information on whether a person voted in person on Election Day or by absentee ballot. If a voter registers to vote in person on Election Day, the SVRS will show election-day registration with the designation "EDR." (Test'y of Poser, Feb. 24, 2009 at 209; Test'y of Mansky Mar. 9, 2009 at 177-78, 181-83, 187-90.). If a voter registers to vote by including registration materials with his or her absentee ballot envelope, the SVRS will show election-day registration with the designation "EDR-Absentee." (Test'y of Poser, March 2, 2009 at 48; Test'y of Mansky Mar. 9, 2009 at 172, 186-87, 191.)

46. Information on whether a person voted on Election Day can also be obtained from precinct roster books. The rosters list the names of those voters who voted in-person or by absentee ballot on Election Day. (*See, e.g.* Test'y of Smith, Feb. 5, 2009 at 170-72.) If there is a discrepancy between the information contained in the SVRS and the election-day rosters,

the roster is more reliable. (*See* Test'y of Mansky, Mar. 12, 2009 at 158 & 223 (identifying the election-day rosters as the definitive evidence of voting history).)

Absentee Ballots Cast in the November 4, 2008 General Election

47. Approximately 300,000 people voted by absentee ballot in the November 4, 2008 General Election. (Ex. F14.) This was significantly more than in previous elections. (*See* Test'y of Gelbmann, Jan. 29, 2009 at 64; Test'y of Schreifels, Feb. 18, 2009 at 105.) Fewer than 13,000 absentee ballots or less than 0.5% of all ballots cast in the election were rejected. (Gelbmann Test'y, Jan. 27, 2009 at 104.)

48. An absentee ballot may not be accepted by election judges for opening and counting unless they confirm: (1) the voter's name and address on the return envelope matches the information provided on the absentee ballot application; (2) the signature on the envelope is the genuine signature of the individual who applied for the absentee ballot and the certificate on the return envelope has been completed in accordance with the instructions; (3) the voter is registered in the precinct or has submitted a completed voter registration application; and (4) the voter has not otherwise voted in the election. Minn. Stat. § 204B.112, subd. 2.

49. These statutory provisions are mandatory and cannot be waived or altered by election officials. Minn. Stat. § 204B.26 ("Any individual who serves as an election judge in violation of any of the provisions of section 204.19 to 204B.25 is guilty of a misdemeanor.") (*See also* Test'y of Smith, Feb. 6, 2009 at 157-58; Test'y of Van Obereke, Feb. 19, 2009 at 148; Test'y of Anderson, Feb. 23, 2009 at 148.)

50. The standards set forth in Minnesota law apply in every county and city throughout Minnesota. (*See, e.g.*, Test'y of Smith, Feb. 6, 2009 at 157.)

51. The Minnesota legislature enacted specific standards governing the training of election officials and election judges throughout the state of Minnesota. Minn. Stat. § 204B.25.

52. The Secretary of State has adopted rules that establish training programs for election officials within the counties and cities responsible for administering elections. Minn. Stat. § 204B.25, subd. 2; (*see also* Test'y of Gelbmann, Jan. 29, 2009 at 8.) These training programs include the procedures and standards for accepting and rejecting absentee ballots. (*See* Test'y of Gelbmann, Jan. 29, 2009 at 66; Test'y of Poser, Feb. 24, 2009 at 231-32.)

53. Written materials and training videos are also provided to county auditors and election administrators. (Test'y of Gelbmann, Jan. 29, 2009 at 66.) Local election officials are not authorized to administer an election without receiving training from the county auditor. Minn. Stat. § 204B.25, subd. 4.

54. All election judges are required to receive at least two hours of training before every election in order to serve as an election judge. Minn. Stat. § 204B.25, subd. 4; (*see also* Test'y of Gelbmann, Jan. 29, 2009 at 8, 62-63; Test'y of Reichert, Feb. 26, 2009 at 31.) The head election judge at each precinct receives at least one additional hour of training. (Test'y of Gelbmann, Jan. 29, 2009 at 8.)

55. During their training, election judges learn the basic elements of how to conduct the election, including opening the polling place, setting up and operating the equipment, as well as the mechanics of processing absentee ballots delivered to the polling place. (Test'y of Mansky, March 4, 2009 at 214-16.)

56. An element of election judge training relates to registration and absentee ballot voting. Minn. R. 8200.5600 ("Election judges who will be registering voters on election day shall receive training on election day voter registration procedures from the county auditor or designated municipal clerk at the same time training is provided pursuant to Minnesota Statutes, section 204B.25."); (Test'y of Mansky, March 4, 2009 at 214-16.)

57. Besides providing training programs, the Secretary of State prepared an Election Judge Guidebook for 2008. (*See* Test'y of Poser, Feb. 24, 2009 at 234; Ex. F1677.) The Election Judge Guidebook was distributed to all county auditors and chief election officials throughout the state and contains a consistent set of standards for use in evaluating absentee ballots. (*See* Test'y of Loch, Feb. 19, 2009 at 218; Test'y of Reichert, Feb. 26, 2009 at 32.) The Election Judge Guidebook was also available to each election judge at the polling place. (*See* Test'y of Reichert, Feb. 26, 2009 at 31-33; Test'y of Mansky, Mar. 4, 2009 at 233.)

58. The extensive training received by election judges ensures that election judges in all 4,128 polling stations throughout Minnesota apply the election laws in a consistent and uniform manner. (Test'y of Poser, Feb. 24, 2009 at 235; Test'y of Mack, Feb. 24, 2009 at 97; Test'y of Gelbmann, Jan. 29, 2009 at 8.)

59. Minnesota law requires election judges from two different political parties to work together in deciding whether to accept or reject an absentee ballot. Minn. Stat. § 203B.12. The decision to accept or reject an absentee ballot may be done at the precinct level by two election judges or by an absentee ballot board before Election Day. (*See, e.g.*, Test'y of Mansky, Jan. 29, 2009 at 202; Test'y of Corbid, Feb. 4, 2009; Test'y of Clemmer, Feb. 5, 2009 at 90-91; Test'y of Cox, Mar. 5, 2009 at 169-70; Test'y of Stroth, Mar. 10, 2009 at 106-07, 111; Test'y of Reichert, Mar. 12, 2009 at 104.) Counties and municipalities can choose whether to convene an absentee ballot board to review absentee ballots in advance of Election Day. (Test'y of Clemmer, Feb. 5, 2009 at 90-91.)

60. Important activities that occur in the polling place require the presence of one judge from two different political parties to ensure that each of the activities is done properly. (Test'y of Mansky, March 4, 2009 at 210.)

61. If deficient absentee ballots were rejected by an absentee ballot board at least five days before the election, the voters were sent replacement ballots and given the opportunity to cure any deficiency. Minn. Stat. § 203B.13, subd. 2; (*see also* Test'y of Mansky, Jan. 29, 2009 at 196.)

62. Election judges act in good faith and exercise their best judgment and discretion when determining whether to accept or reject an absentee ballot. (*See* Test'y of Corbid, Feb. 4, 2009 at 175-76; Test'y of Clemmer, Feb. 5, 2009 at 127-29.) If election judges cannot

agree on whether to accept or reject an absentee ballot, they are instructed to seek the advice of other election officials. (*See* Test'y of Corbid, Feb. 4, 2009 at 176; Test'y of Clemmer, Feb. 5, 2009 at 91; *see generally* Test'y of Mansky, March 4, 2009 at 204, 236-38.)

63. The election judges, or members of the absentee ballot board, review the voter's absentee ballot return envelope and the voter's absentee ballot application. They determine whether the signature on the envelope is the genuine signature of the voter by comparing it to the signature on the absentee ballot application. (Test'y of Gelbmann, Jan. 29 at 11; Test'y of Corbid, Feb. 4, 2009 at 141.) They also confirm that the absentee ballot return envelope was properly witnessed and, if the voter is registering, that the voter gave proper proof of residence to the witness. (*See, e.g.*, Test'y of Smith, Feb. 5, 2009 at 167.)

64. The reason for rejecting an absentee ballot, identified on the face of the absentee ballot return envelope, may not be the only valid reason for rejection. (Test'y of Boyle, Feb. 9, 2009 at 145.) There may be multiple reasons for rejection. (*Id.*) Accordingly, the question of whether an absentee ballot was properly rejected by election officials must be determined on a case-by-case basis through the examination of evidence beyond the face of the envelope. (*See, e.g.*, Test'y of Gelbmann, Jan. 27, 2009 at 103; Test'y of Mansky, Feb. 2, 2009 at 35, 135-36; Test'y of Boyle, Feb. 9, 2009 at 145.)

65. Once the election judges or the absentee ballot board accept an absentee ballot for counting, it will not be counted until the election judges confirm that the voter did not otherwise vote by another absentee ballot or in person on Election Day. (*See, e.g.*, Test'y of Gelbmann, Jan. 29, 2009 at 163-64; Test'y of Mansky, Mar. 12, 2009 at 152.)

66. Not all counties or cities administering absentee balloting have the technology or personnel needed to check the registration status of every voter's witness by using the SVRS. (*Compare* Test'y of Mansky, Jan. 30, 2009 at 71-72 (testifying Ramsey County checks if the address is not readily ascertainable to be in Minnesota), *with* Test'y of Mangen, Feb. 19, 2009 at 17 (testifying that absentee ballot board judges have limited access to SVRS in Edina) and Test'y of Lock, Feb. 19, 2009 at 177 (testifying that election judges at the polling places do not have access to SVRS on Election Day); Test'y of Ferber, Feb. 19, 2009 at 153 (same); Test'y of Clemmer, Feb. 5, 2009 at 90-91 (acknowledging that there are no non-UOCAVA absentee ballot boards in Pine County, so accepting and rejecting of absentee ballots is always done at the precinct on Election Day.) To ensure that absentee voting is available to their residents, those cities and counties accept a witness as a registered Minnesota voter if the witness provides a Minnesota address.

67. Counties and cities adopted policies they deemed necessary to ensure that absentee-balloting procedures would be available to their residents in accordance with statutory requirements given the resources available to them. (*See* Test'y of Mangen, Feb. 19, 2009 at 176 (testifying that Edina's absentee ballot board had access to a single SVRS terminal and that it would be impossible to verify witness registration given the high volume of absentee ballots received); Test'y of Mansky, Jan. 30, 2009 at 23-26 (recognizing that the processes adopted by Ramsey County reflect "the amount of activity that we have and the short time available" to process more than 31,000 absentee ballots); Test'y of Reichert,

Feb. 25, 2009 ("It's logistically impossible to look every one of them up in the time that's allowed for us.").)

68. Election judges at the precincts on Election Day do not have access to the SVRS. Many smaller municipalities and counties do not convene absentee ballot boards. Instead, they conduct their review of all absentee ballots at the precinct on Election Day. (Test'y of Corbid, Feb. 3, 2009 at 46; Test'y of Clemmer, Feb. 5, 2009 at 90-91; Test'y of Boyle, Feb. 9, 2009 at 33.) The differences in resources, personnel, procedures and technology necessarily affected the procedures used by local election officials reviewing absentee ballots.

69. The record is devoid of any evidence that election officials did not perform their duties on Election Day in good faith and to the best of their abilities.

70. The Court has received no evidence or testimony to support a finding of wholesale disenfranchisement of Minnesota's absentee voters in the November 4, 2008 general election.

Rejected Absentee Ballots Reviewed During the Recount

71. During the administrative hand recount, Contestee Franken requested that the Minnesota Board review all rejected absentee ballots to determine if any were wrongfully rejected. (Ex. C280.) Coleman objected to this request and took the position that the Board did not have the authority to review rejected absentee ballots. (Ex. F1679.)

72. During the recount, Coleman's representatives took the position that the statutory grounds for rejecting absentee ballots were "very clear and objective," that the "decisions of local election officials should be presumed to have been accurate and correct," that "the absentee voter statutes, so far as the acts and duties of the voter are concerned, must be held to be mandatory in all their substantial requirements;" and that neither the "substantial compliance" standard nor the Equal Protection Clause applies to absentee ballots. (Ex. F1679; *see also* Ex. F88.)

73. On December 2, 2008, in response to an inquiry by the Board, the Minnesota Secretary of State coordinated a review of rejected absentee ballots by the counties. (Test'y of Gelbmann, Jan. 27, 2009 at 67, Jan. 28, 2009 at 146-58.)

74. Most counties and cities followed the review process. Approximately ten counties refused to participate in this informal review. (Test'y of Gelbmann, Jan. 27, 2009 at 69.) The participating counties sorted the rejected absentee ballots into piles based on the statutory reason for rejection. Officials then placed those believed to have been wrongfully rejected into a pile identified as "Pile 5." (Test'y of Gelbmann, Jan. 27, 2009 at 65-66.)

75. Coleman objected to this review process and tried to halt it by filing a petition with the Minnesota Supreme Court. On December 18, 2008, the Minnesota Supreme Court issued an order mandating that local election officials review their rejected absentee ballots and identify those they believed were wrongfully rejected. This order stated:

> [C]andidates 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 local election officials shall 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 (2006), or in Minn. Stat § 203B.24 (2006) for overseas absentee ballots. Any absentee ballot envelopes so identified that the local election officials and the candidates agree were rejected in error shall be opened, the ballot shall be counted, and its vote for United States Senator added to the total votes cast for that office in that precinct.

(Ex. F106.)

76. On December 19, 2008, county election officials met with staff from the Secretary of State's office and representatives of the parties to develop a protocol consistent with the Supreme Court's order. (Ex. F109.)

77. Pursuant to the Absentee Ballot Protocol, local election officials identified 1,346 absentee ballots as improperly rejected. (Test'y of Gelbmann Jan. 28, 2009 at 166.) Franken offered to accept the decisions of local election officials and count all of these ballots. Coleman rejected this proposal. (Exs. F119 & F121.)

78. Coleman failed to propose any additional absentee ballots for reconsideration by the deadline that he agreed to in the Absentee Ballot Protocol. (Test'y of Gelbmann, Jan. 29, 2009 at 43-44.) He did however, after the deadline, propose that 587 additional absentee ballots not on the list identified by local election officials be opened and counted. (Ex. F130.) The Secretary of State's office explained that this untimely request for review of additional absentee ballots could not be granted. (Ex. F1685.)

79. After his request to open additional absentee ballots was rejected, Coleman filed a motion for an emergency order with the Minnesota Supreme Court seeking an order "requiring that local election officials convey all absentee ballots identified by any party as having been wrongfully rejected to the Secretary of State's office for a uniform review by the parties." (Ex. F136.) The Minnesota Supreme Court denied this motion and ruled that Contestant's claims could be brought in an election contest. *Coleman v. Ritchie*, 759 N.W.2d 47, 49 (Minn. 2009).

80. The parties agreed that 933 of the absentee ballots identified by the counties as wrongfully rejected should be opened and counted. The Minnesota Secretary of State opened and counted these ballots on January 3, 2009 and incorporated them into the recount totals. (Test'y of Gelbmann, Jan. 27, 2009 at 83, 104; Jan. 28, 2009 at 87, 203-04; *see also* Exs. C245 & Ex. F141.) When those ballots were opened on January 3, 2009, Franken gained 481 votes, Coleman gained 305 votes, and others gained 147 votes.

81. During the election contest, Contestants and Contestee stipulated that these ballots were properly opened and counted. (Stipulation and Order Re: Absentee Ballots, Feb. 3, 2009 at 1; *see also* Order Denying Temporary Injunction, Feb. 24, 2009 at 3.) They further stipulated and this Court ordered that any identifying marks tying a ballot to a particular voter's ballot envelope be redacted. (Stipulation and Order Re: Absentee Ballots, Feb. 3, 2009 at 2.)

82. The remaining rejected absentee ballots that the parties seek to have opened and counted in this proceeding were reviewed at least twice by either election judges or local election officials – first on Election Day or by an absentee ballot board before Election Day and again pursuant to the Minnesota Supreme Court's Orders dated December 18 and December 24. (*See, e.g.*, Test'y of Farber, Feb. 19, 2009 at 160-61 (detailing the second review of rejected absentee ballots undertaken by Bloomington and explaining that the review was diligent and undertaken by experienced election staff).) In addition, the vast majority of these ballots were reviewed a third time by election officials who did a voluntary review of rejected absentee ballots pursuant to the Minnesota Secretary of State's request in early December 2008. (*Cf.* Test'y of Corbid, Feb. 4, 2009 at 178-80; Test'y of Anderson, Feb. 19, 2009 at 133-34.).)

83. Both Contestants and Contestee allege that legally cast absentee ballots were erroneously excluded from the vote totals certified by the Board. (Not. of Contest at ¶¶ 10 & 11; Amended Answer & Counterclaims at 18-19.) Contestants' Notice of Contest specifically referenced approximately 650 absentee ballots as wrongfully rejected. (Not. of Contest at ¶ 10.)

84. On February 3, 2009, this Court ruled that Contestants' Notice of Contest limited their claim to approximately 4, 800 absentee ballots that they specifically identified prior to the beginning of trial. (Order on Contestee's Mot. in Limine to Limit Absentee-Ballot Evidence to Ballots Pleaded in the Notice of Contest, Feb. 3, 2009 at 4-5.)

85. Contestants argued that certain categories of absentee ballots had been improperly rejected by local election officials and should be counted. (*See, e.g.*, Contestants' Mem. in Supp. of Mot. For Summ. J. at 22-53.). On February 13, 2009, this Court rejected this argument, but identified errors in absentee ballots that rendered them invalid as a matter of law. (Order Following Hearing, Feb. 13, 2009.)

86. In their Notice of Contest, Contestants alleged that county election officials wrongfully accepted absentee ballots that were opened and counted on Election Day. (Notice of Contest ¶¶ 12(d) & 12(e).) Contestants failed to identify any such ballots in response to Contestee's interrogatories. (*See* Contestee's Mot. to Strike, Ex. A at Answer 10; *see also* Tr. Feb. 3, 2009 at 158 (highlighting the parties' obligation to supplement their responses to interrogatories).)

87. Moreover, even if absentee ballots were wrongfully accepted by election officials and counted, this Court has received no evidence that these votes would have changed the outcome of the election and that Coleman would have received the highest number of votes.

88. No evidence was presented by either party that facially invalid ballots were wrongfully included in the vote totals certified by the Board. *Bell v. Gannaway*, 227 N.W.2d 797, 805 (Minn. 1975.)

89. Minnesota law does not provide for a pro rata reduction in each candidates' votes based on "wrongfully accepted" absentee ballots. Furthermore, there is no evidence in the record as to what numbers should be used.

90. Following seven weeks of trial, the Court reviewed all evidence provided by the parties related to their claims that absentee ballots were legally cast and wrongfully rejected.

91. Both parties and the Court agreed that only the votes of registered voters should be counted. To find that a voter was registered the Court considered the voter's testimony, SVRS data, voter rosters, voter registration applications, and testimony from election officials regarding their review of rejected absentee ballots pursuant to the Supreme Court's order. (*See, e.g.* Test'y of Clemmer, Feb. 5, 2009 at 141; Test'y of Smith, Feb. 6, 2009 at 98.) By the conclusion of trial, the parties presented evidence of valid voter registration for fewer than 700 absentee voters.

92. After reviewing the evidence and applying the standards set forth in its February 13, 2009 Order, the Court ordered 400 absentee ballot envelopes to be delivered to the Secretary of State for further review by the Court. (Order for Delivery of Ballots to Office of the Minnesota Secretary of State for Review by the Court, Mar. 31, 2009.)

93. Following its review the Court, on April 7, 2009, ordered that 351 of the 400 ballots be opened and counted. (Order for Opening and Counting of Ballots, Apr. 7, 2009.) As result of the counting of these ballots, Coleman received an additional 111 votes and Franken received an additional 198 votes to add to the vote totals certified by the Board on January 5, 2009.

94. The percentages of votes received by the candidates from the ballots counted on April 7, 2009 are very similar to the percentages each of them received from the ballots counted on January 3, 2009.

The Administrative Recount and the Adoption of Rule 9

95. Contestants claimed in this election contest that Rule 9 of the Administrative Recount Procedures was contrary to law. Rule 9 dealt with the counting of original and duplicate ballots. (Test'y of Poser, February 23, 2009 at 112.) On Election Day, a number of absentee ballots were received that were damaged or defective (e.g. folded, torn, dirty, etc.) and could not be processed by the electronic vote counting machines. (Test'y of Poser, February 23, 2009, at 113; Test'y of Gelbmann, January 28, 2009 at 133.) In these situations, Minnesota law requires that a duplicate copy be made of the damaged or defective ballot. Minn. Stat. § 206.86. Two election judges of different political parties must work together to make a duplicate by hand. *Id.*; Minn. R. 8230.3850. The election judges are instructed to mark the original ballot as "Original" with a number (e.g. "Original 1"), and mark a blank ballot as "Duplicate" with a corresponding number (e.g. "Duplicate 1"). Minn. Stat. § 206.86; Minn. R. 8230.3850; (Test'y of Gelbmann, Jan. 28, 2009 at 134;

Test'y of Poser, Feb. 23, 2009 at 113.) If a duplicate is created for more than one original ballot in a precinct, the election judges must number the originals and duplicates sequentially. Minn. R. 8230.3850. The election judges are to note the reason for duplication on the duplicate ballot, and initial both the original and duplicate ballots. *Id.* One election judge should call out the selections of the voter on the original ballot, and the other election judge marks the selections on the duplicate ballot. *Id.* After marking, the duplicate ballot must be compared to the original ballot to ensure it has been accurately duplicated. *Id.* All original ballots must be segregated and put into an envelope labeled "ballots for which duplicates were or are to be made," and the duplicates must be run through the automatic tabulating machine to be counted. *Id.* (Test'y of Gelbmann, Jan. 28, 2009 at 135; Test'y of Poser, Feb. 23, 2009 at 114.)

96. Rule 9 states:

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

(Ex. F10.)

97. Rule 9 was included in the Recount Procedures after the representatives of both candidates and the Minnesota Attorney General's Office agreed that counting originals instead of duplicates was the best way to determine voter intent. (Test'y of Gelbmann, Jan. 28, 2009 at 135-37.)

98. The Secretary of State's Office, however, had concerns with counting original ballots rather than duplicates during the recount, but understood that there were problems with either counting method. (*Id.* at 138-39.) The Secretary of State's Office assumed that since both candidates had agreed to Rule 9, there would be no dispute about the process after the recount was completed. (Test'y of Gelbmann, Jan. 29, 2009 at 88.)

99. The recount began on November 19, 2008. (Test'y of Gelbmann, January 28, 2009 at 110.)

100. Upon the request of the candidates and several county officials, Poser provided election officials with additional guidance on the issue of counting original and duplicate ballots in the recount. *See* (Exs. F21; F27 & F28.) His email to those officials, dated November 19, 2008 stated:

> If there are no duplicate ballots found during the sorting process, the canvass board has not authorized the envelope of original ballots to be opened and the original ballots envelope should remain sealed. If no envelope of original ballots exists, the duplicate ballots should then be sorted. While there is no requirement to compare the number of duplicate ballots to the

> number of original ballots, if there is an apparent significant discrepancy in the numbers, the candidates' representatives should attempt to agree on whether to sort the original or duplicate ballots. The Deputy recount official shall note on the incident log if the duplicates rather than original ballots were counted. If the two candidate representatives can not agree, the Deputy Recount Official shall sort and count the original ballots.

(Ex. F28.) In reply to this clarification, counsel for Contestant responded, "[t]his is perfectly clear." (Ex. F24.)

101. During the recount some precincts reported an unequal number of marked duplicate and marked original ballots. (Test'y of Gelbmann, Jan. 28, 2009 at 124, 137; Test'y of Gelbmann, Jan. 29, 2009 at 84; Test'y of Poser, Feb. 23, 2009 at 151-54) Many of these instances occurred on the first day of the recount, November 19, 2009. (Exs. F1976; F1977.) Contestants' representatives continued to support the enforcement of Rule 9 after the discrepancy in the number of marked "duplicate" and "original" ballots was discovered. (*See* Exs. F25; F40.) Contestants were aware during the recount that original ballots were being counted despite the absence of a matching duplicate, and in fact insisted on this procedure. (*See, e.g.,* Test'y of Poser, Feb. 23, 2009 at 184-205; Ex. F42 (counsel for Contestants objecting that Rule 9 was not being properly applied in Anoka County); Ex. F21 (counsel for Contestants insisting that originals be counted in Cass County); Ex. C612 (Wright County recount incident log).) Contestants' representatives did not dispute the use of Rule 9 until after the entire recount had been completed. (Test'y of Poser, Feb. 23, 2009 at 176-81; Ex. F1995.)

102. Contestants now claim that the application of Rule 9 during the recount resulted in the double counting of votes in precincts where the number of marked original ballots was greater than the number of marked duplicate ballots. This issue was not raised until after the hand recount had been completed. (*See* Ex. F1995.) In some precincts, reliance on the originals rather than the duplicates resulted in a net gain of votes for Coleman. (*See, e.g.*, Test'y of Boyle, Feb. 11, 2009 at 173-74 (discussing Lakeville Precinct 6); *see also* Ex. C612 (Wright County Recount Incident Report).) In other precincts, reliance on the originals rather than the duplicates resulted in a net gain of votes for Franken. (*See, e.g.*, Test'y of Boyle, Feb. 11, 2009 at 191-96 (discussing Lakeville Precinct 10).)

103. If the number of marked original ballots is greater than the number of marked duplicate ballots, it does not necessarily mean that double counting occurred. For example, election officials may have marked the originals, placed them in the envelope labeled "ballots for which duplicates were or are to be made" and neglected to make duplicates for all or some of the originals. (Test'y of Corbid, Feb. 4, 2009 at 19; Test'y of Reichert, Feb. 25, 2009 at 52-56; Test'y of Mansky, Feb. 2, 2009 at 22-23.)

104. Another explanation for this discrepancy is that marked duplicates could have been lost between Election Day and the recount. (*See, e.g.*, Test'y of Reichert, Feb. 26, 2009 at 40-46; Test'y of Smith, Feb. 5, 2009 at 181-85.) This situation occurred in Minneapolis Ward 8 Precinct 7 where eleven duplicate ballots and one original ballot were lost. These were not counted on Election Day and were not found until the recount in Minneapolis was

completed. (Test'y of Reichert, Feb. 26, 2009 at 40-46, 148-51; *see also* Ex. F85 (e-mail from S. Graffunder to C. Reichert, Nov. 9, 2008).) If the original ballots for these eleven duplicates had not been counted during the recount, eleven voters would not have had their validly cast ballots counted. A similar situation occurred in Eagan Precinct 3 where duplicates were made, marked and put into the envelope without being counted. (*See* Ex. C356 (Dakota County Recount Incident Log); Test'y of Boyle, Feb. 11, 209 at 72-74.) These duplicate ballots were not discovered until the envelope containing original ballots was opened during the recount. (*Id.*)

105. Discrepancies between the number of votes and the number of persons whose names appear on the election-day roster as having voted are not unusual. For example, some voters may have voted without signing the roster. (Test'y of Reichert, Feb. 26, 2009 at 61, 152; Test'y of Gelbmann, Jan. 29, 2009 at 86; Test'y of Mansky, Feb. 2, 2009 at 16-17.) This particular error occurs with some frequency. (Test'y of Mansky, Feb. 2, 2009 at 143.) Conversely, sometimes voters signed the roster and fail to vote. (Mansky Test'y, Jan. 29, 2009 at 227-29; Test'y of Reichert, Feb. 26, at 63.)

106. Additional problems can occur when election judges fail to note on the roster that certain voters cast absentee ballots. When an absentee ballot is accepted and run through the electronic voting machine, election officials are supposed to stamp or write "AB" next to the voter's name on the roster. (*See* Ex. F1677 (2008 Election Judges Guide).) This procedure however is not always followed. (*See* Test'y of Arnold, Feb. 20, 2009 at 83-95; Ex. F1962 (incident report and testimony regarding an absentee ballot in Sherburne County that was counted on Election Day but not recorded in roster); Test'y of Mansky, Feb. 2, 2009 at 14.)

107. Election officials often forget to note errors of this sort in precinct incident logs. (Test'y of Reichert, Jan. 26, 2009 at 153; Test'y of Mansky, Feb. 2, 2009 at 16, 22.)

108. The number of marked duplicate and marked original ballots did not match in ten Minneapolis precincts. (Exs. C55; C85; C93; C101; C109; C116; C130; C152; C159; C166 (original ballots that were challenged by Contestants in the recount because a marked duplicate count not be located[1]).) In these ten precincts, the number of votes counted during the recount exceeded the number of voter signatures on the rosters, and marked accepted absentee and UOCAVA ballots. (*See* Exs. C56; C57; C60; C62; C86; C87; C90; C92; C94; C95; C98; C100; C102; C103; C106; C108; C110; C111; C114; C115; C117; C118; C120; C121; C138; C139; C142; C144; C146; C147; C149; C150; C153; C154; C157; C158; C160; C161; C164; C165 (Election Day pre-registered voter sign-in rosters, same-day registration voter sign in-rosters, UOCAVA rosters, and machine tape totals);

1 The Court is uncertain as to whether all of these exhibits pertain to the Minneapolis precincts Contestants claim are in issue. No testimony was presented as to what ward and precinct the ballot contained in Exhibit C130 relates to. According to the face of the ballot it is from either Ward 7, Precinct 4 or Ward 10, Precinct 10, neither of which are precincts Contestants claim are in issue. Similarly, both the face of the ballot and testimony at trial states that the ballot contained in Exhibit C166 is from Ward 13, Precinct 3. Contestant has not claimed Ward 13, Precinct 3 is at issue. In addition, Contestants claim that Ward 11, Precinct 7 and Ward 13, Precinct 1 are in issue, but have not presented any ballots with regard to these precincts.

C603 (Secretary of State's Statewide Recount Summary Statement).) But in only two of these precincts did the difference between the number of marked duplicate and original ballots equal the number of original ballots for which no marked duplicate ballots could be found.

109. Contestants claim that double counting occurred in Minneapolis Ward 12, Precinct 8 when election judges failed to mark duplicate ballots. As a result, the original damaged ballots were counted along with their unmarked duplicates. This claim was based on testimony by Pam Howell, the head election judge for this precinct, who testified that she overheard another election judge exclaim, "Oh no, we forgot to label the ballots." (Test'y of Howell, Feb. 25, 2009 at 68-69.) Howell did not discuss the situation further with that election judge. (*Id.* at 69.) Howell concluded that they had no way to retrieve the ballots, and that the only remedy was to follow her training and write what had happened on the incident log. (*Id.*) However, Howell cannot recall doing so, and the Incident Log from Minneapolis Ward 12, Precinct 8 was not offered into evidence. (*Id.*) No other election judges from that precinct, including the judge who allegedly made the exclamation, were called to testify.

110. Furthermore, a comparison of a list of ballots cast with a list of ballots counted in Minneapolis provides evidence that eighteen accepted absentee ballots in Minneapolis Ward 12 Precinct 8 were not marked on the Election Day rosters. (*See* Exs. C153, C154, C623, F141, F2054.) This alone would make it appear that there were 18 more ballots cast than voters.

111. The Court did not hear testimony from any precinct election judge that they duplicated damaged ballots and failed to mark the duplicates or the originals.

112. When there is a discrepancy between the number of marked duplicate and marked original ballots, any such errors would have occurred with the active participation of at least two election judges from different political parties. (Test'y of Mansky, Feb. 2, 2009 at 27.)

Discrepancies Between Election-Night Totals and Totals from the Administrative Recount

113. During the course of the trial, the Court heard testimony that additional ballots were discovered after the administrative recount was completed. (*See, e.g.* Exs. C351 & C594.)

114. Neither party introduced specific evidence relating to many of these "found" ballots during the course of the trial.

115. Contestants ask this Court to overturn the decision of the Board to include 132 ballots from Minneapolis Precinct 3-1 in the certified vote totals from the recount. Contestants claimed that these 132 ballots were "not located or viewed during the Recount but . . . were 'counted' during the Recount and included within the Recount totals because they were deemed 'missing' by the Board." (Notice of Contest ¶ 12(b).)

116. After Election Day, Minneapolis election officials began expressing concern that an envelope containing ballots from Minneapolis Precinct 3-1 had been lost sometime after

the votes from the precinct had been tallied on Election Day. (Test'y of Gelbmann, Jan. 29 at 97-107; Test'y of Reichert, Feb. 25, 2009 at 156.)

117. Election officials found the ballots from Minneapolis Precinct 3-1 contained within four Tyvek ballot envelopes and a separate envelope containing federal write-in ballots. (Test'y of Reichert, Feb. 25, 2009 at 167-69; Ex. F87.) The four Tyvek envelopes were labeled "2 of 5," "3 of 5," "4 of 5" and "5 of 5." (Test'y of Gelbmann, Jan. 29, 2009 at 98-99; Test'y of Reichert, Feb. 25, 2009 at 168; Ex. F87.) Gelbmann from the Secretary of State's office along with Minneapolis Director of Elections Cindy Reichert and other officials participated in an exhaustive search for the missing envelope. (Test'y of Gelbmann Jan. 29, 2009 at 100-01; Test'y of Reichert, Feb. 26, 2009 at 27.) An envelope labeled "1 of 5" containing ballots from Minneapolis Precinct 3-1 has not been found. (F87.)

118. Machine tapes from Minneapolis Precinct 3-1, show that a total of 2,028 ballots were cast and counted in the precinct on Election Day. (Ex. F87.) However, because of the missing envelope of ballots, only 1,896 ballots from Minneapolis Precinct 3-1 were available for the recount. (*Id.*) Given the evidence before it, the Board determined that a ballot envelope had been lost. It accepted the Election Day returns from Minneapolis Precinct 3-1 when determining the vote totals in the recount. (Test'y of Gelbmann, Jan. 29, 2009 at 106-08, 177 (testifying that such a course was recommended to the Board by the Attorney General's office); Test'y of Reichert, Feb. 26, 2009 at 107; Exs. F65, F67 & F88.)

119. The record contains no allegations or evidence of fraud or foul play with respect to the missing envelope of ballots. The record contains no evidence to suggest that the Election Day totals from Minneapolis Precinct 3-1 are unreliable. Every indication is that the Election Day totals from Minneapolis Precinct 3-1 are an accurate count of the ballots cast. (Reichert Test'y Feb. 26, 2009 at 105-06.)

120. Given the evidence presented, the Court finds that 132 ballots from Minneapolis Precinct 3-1 were cast and properly counted on Election Day and were lost at some point after they were counted on Election Day but before the administrative recount.

121. In his counterclaims, Contestee alleged that ballots in certain precincts other than Minneapolis Precinct 3-1 could not be located after Election Day and requested that this Court amend the totals certified by the Board after the recount for these precincts. (*See* Contestee's First Amended Answer and Counterclaims at 19.)

122. The Court heard testimony that there were a variety of reasons why the number of ballots reflected on a precinct's voting machine tape on Election Night could differ from the number of ballots from the recount number. (*See, e.g.*, Test'y of Mansky, Jan. 29, 2009 at 224 (noting that discrepancies occur "on a regular basis"); Test'y of Mansky, Feb. 2, 2009 at 11-13,141-42; Test'y of Corbid, Feb. 3, 2009 at 67-70; Test'y of Boyle, Feb. 11, 2009 at 156; (noting that the discrepancy could be due to the loss of ballots or ballots were tabulated by the machine more than once).) Election officials testified that the Election Day total could be off due to machine jams resulting in the overtallying or undertallying of votes on the machine tape or due to shutting off machines before all ballots are actually tallied. (*See, e.g.*, Test'y of Mansky, Jan. 29, 2009 at 227-31; Test'y of Corbid, Feb. 4,

2009 at 204-05 ("Our investigation led me to the conclusion that ballots were run through the voting machines more than once on Election Day, which is the most likely scenario."); Test'y of Gibbs, Mar. 10, 2009 at 43-44 (testifying to the possibility of over-counting of ballots by machines on Election Day); Test'y of Boyle, Feb. 11, 2009 at 157; Ex. C394 (incident log).) Election officials also testified that it was possible that ballots could have been lost between Election Day and the recount. (Test'y of Gibbs, Mar. 10, 2009 at 43 (recognizing that it was possible that ballots were lost between Election Day and the recount); Test'y of Manksy, Mar. 9, 2009 at 151-52.)

123. The Court also heard testimony from many election officials explaining the steps they take to ensure that all ballots cast and counted on Election Night are returned and stored securely. (*See, e.g.*, Test'y of Gelbmann, Jan. 29, 2009 at 92; Test'y of Mansky, Feb. 2, 2009 at 41-42; Test'y of Fuller, Feb. 19, 2009 at 31.)

124. Given the testimony that machine-tape counts and Election Night counts may contain minor inaccuracies and the testimony that cast ballots are securely retained by election officials after Election Day, the Court finds that Contestee has failed to show that it is more likely than not that the discrepancies between the Election Night totals and the hand-recount totals for the following precincts are due to a loss of ballots by election officials: (1) Oakport Township in Clay County; (2) Inver Grove Heights Precinct 4 in Dakota County; (3) Rosemount Precinct 4 in Dakota County; (4) Minneapolis Precinct 3-3 in Hennepin County; (5) Plymouth Precinct 3-18 in Hennepin County; (6) Richfield Precinct 1-4 in Hennepin County; (7) Rochester Precinct 3-6 in Olmsted County; (8) Saint Paul Precinct 5-2 in Ramsey County; (9) Saint Paul Precinct 5-8 in Ramsey County; (10) St. Cloud Precinct 3-1 in Stearns County; (11) Cottage Grove Precinct 9 in Washington County; (12) Oak Park Heights Precinct 2 in Washington County; and (13) Woodbury Precinct 10 in Washington County.

125. There was no evidence of fraud in the conduct of this election and no showing of bad faith on the part of any election official at any point during the election or recount. (*See, e.g.*, Test'y of Gelbmann, Jan. 27, 2009, at 97; Test'y of Mansky, Feb. 2, 2009 at 18, 43.)

Vote Total

126. Accordingly, Coleman received a total of 1,212,317 votes and Franken received a total of 1,212,629 votes in the race for United States Senator in the November 4, 2008 general election.

127. Franken received the highest number of votes legally cast in the race for United States Senator for the State of Minnesota in the November 4, 2008 general election.

128. Franken is entitled to receive the certificate of election.

CONCLUSIONS OF LAW

Additional Wrongfully Rejected Absentee Ballots Should Be Included in the Certified Vote Totals

129. Contestants' claim is limited to the approximately 4,800 ballots that they identified as wrongfully rejected prior to the commencement of trial. An election contest is limited to claims identified in the Notice of Contest, which must "specify the grounds on which the contest will be made." Minn. Stat. § 209.021; *see also Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Ct. App. 1986) (requiring a contestant in an election contest to "clearly state the points [upon which he or she brings suit]" in the Notice of Contest) (emphasis added).

130. A party claiming that unopened ballots should be opened and counted has the burden to prove that such ballots were legally cast under relevant law. (Order Following Hearing, Feb. 13, 2009 at 4-5.)

131. Voting by absentee ballot has the characteristics of a privilege rather than a right. *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 n.8 (Minn. 2004) (quoting *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975)); (*see also* Order on Contestants' Mot. For Summ. J., Feb. 3, 2009 at 6.)

132. The Legislature imposed statutory requirements for the exercise of this privilege to prevent voter fraud. *See Bell,* 227 N.W.2d at 802 (identifying "the prevention of fraud" as a central purpose of absentee ballot legislation); *Wichelmann v. City of Glencoe*, 273 N.W. 638, 639 (Minn. 1937) ("The lawmaking power, being fully cognizant of the possibilities of illegal voting, frauds and dishonesty in elections, prescribed many safeguards in the Absent Voters Law to prevent such abuses").

133. Whether a voter casts a ballot in person at the polling place or by absentee ballot, the voter must comply with all statutory requirements enacted by the Legislature. *See Bell*, 227 N.W.2d at 803; *In re Sch. Dist. Election*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988); *see also Wichelmann*, 273 N.W. at 639.

134. The voter has the ultimate responsibility for complying with the absentee ballot requirements. (Order Following Hearing, Feb. 13, 2009 at 12.) "The provisions of election laws requiring acts to be done and imposing obligations upon the elector which are personal to him, are mandatory. He is personally at fault if he violates them. If his vote is rejected for such violations, it is because of his own fault, not that of election officials." *Wichelmann*, 273 N.W. at 640.

135. A voter must be properly registered to cast a valid ballot. Minn. Stat. § 201.018, subd. 2. Even if a voter's failure to register is due to official errors or omissions, votes submitted by non-registered voters are not legally cast. Minn. Stat. § 201.061, subd. 5.

136. Before this Court ordered the opening and counting of a rejected absentee ballot, the party seeking to open such ballot had to prove by a preponderance of the evidence the following elements:

a. The absentee ballot was submitted by a voter who is properly registered to vote in the precinct in which he or she seeks to vote by absentee ballot, whose registration status was active and who was properly registered at his or her current address. *See* Minn. Stat. §§ 201.018, 201.05, 201.061 & 201.071; Minn. R. 8210.0500.

b. The voter completed an absentee ballot application, but in the case of a UOCAVA ballot it is sufficient for the voter to attest to the submission of a completed application. Minn. Stat. §§ 203B.04 & 203B.12, subd. 2; *Bush v. Hillsborough*, 123 F. Supp.2d 1305 (N.D. Fla. 2000.)

c. The voter information provided on the absentee ballot return envelope matches the information provided on the absentee ballot application. Minn. Stat. § 203B.12, subd. 2(1);

d. The absentee ballot application was properly signed by the voter. Minn. Stat. §§ 203B.04 & 203B.12, subd. 2(2); *see also* Minn. Stat. § 645.44, subd. 14 (recognizing circumstances in which those physically unable to sign their name may direct others to provide a signature on their behalf);

e. The absentee ballot was submitted in a return envelope with a completed voter certification, unless there was evidence that the envelope was hand-delivered and accepted by a local official who failed to provide the voter the opportunity to correct the certification. Minn. Stat. § 203B.12 & Minn. R. 8210.2200;

f. The voter's signature appears on the absentee ballot return envelope and the signature matches "the signature of the individual who made the application for ballots." Minn. Stat. § 203B.12, subd. 2(2); *see also* Minn. R. 8210.0500 (directing voter's to sign their absentee ballot return envelopes);

g. The absentee ballot was properly witnessed. Minn. Stat. § 203B.07, subd. 3 (requiring a witness to an absentee ballot to be "a person who is registered to vote in Minnesota or . . . a notary public or other individual authorized to administer oaths");

h. The witness signed the witness certification and provided sufficient information to substantiate the validity of the witnessing, through (1) notarial stamp or seal; (2) identification as an individual authorized to administer oaths, e.g., an election official; or (3) provision of an address in Minnesota. Minn. Stat. § 359.03; Minn. R. 8210.0500, subps. 2 & 3.

i. In the case of a voter who had to submit a voter-registration application with his or her absentee ballot, there was an indication that the witness checked the voter's proof of residence. Minn. Stat. §§ 203B.07 & 201.061;

j. The absentee ballot was timely received and properly delivered by Election Day. Minn. Stat. § 203B.08, subds. 1 & 4; Minn. R. 8210.0500 (directing voters to ensure that their absentee ballot is received by Election Day);

k. The voter did not otherwise have a vote counted in the November 4, 2008 general election. Minn. Stat. §§ 203B.12, subd. 4; 204C.14(b).

137. The evidence was sufficient to prove that the absentee ballots of the persons identified in Attachment A were legally cast and wrongfully rejected.

138. The following additions shall be made to the vote totals certified by the Board on January 5, 2009: 111 additional votes for Coleman and 198 additional votes for Franken.

The Court Shall Not Set Aside the Totals Certified by the Board

139. By their stipulation of February 3, 2009, Contestants are barred from asserting any claim that the absentee ballots opened and counted by the Minnesota Secretary of State on January 3, 2009 were improperly accepted.

140. A contestant cannot overturn a certified result in an election contest simply by establishing that irregularities occurred in the election. The burden of proof is on the contestant to show not only that there were irregularities, but "that they affected the result." *Berg v. Veit*, 162 N.W. 522, 523 (Minn. 1917). "Where a contestant bases his contest upon the fact that illegal votes were cast, it is incumbent upon him to show that enough of such votes were cast for the contestee to change the result." *Id.*

141. Contestants failed to meet their burden of proving that wrongfully accepted absentee ballots affected the result of the election. In addition, Contestants waived these claims by failing to identify specific ballots in response to Contestee's interrogatories.

142. Minnesota law does not provide a remedy for Constestants' claim that absentee ballots were wrongfully accepted and counted.

143. Once an allegedly invalid absentee ballot return envelope has been opened by election officials, no remedy exists under Minnesota law to identify and retract the ballot from vote totals. *See Bell*, 227 N.W.2d at 805 ("[A]n absentee ballot may not be challenged at any time after the ballot has been deposited in the ballot box . . . [O]nly facially invalid ballots may be subject to postelection challenges").

144. No Minnesota case supports this Court ordering the pro-rata reduction remedy suggested by Contestants. *Cf. Berg*, 162 N.W. at 523 (recognizing that pro rata reduction is not appropriate if a contestant fails to attempt to show for whom allegedly illegal votes were cast or show an inability to do so).

145. Likewise, Minnesota law does not vest this Court with the authority to order a new election for alleged errors or impropriety in the conduct of the election. *Contra* Ga. Code Ann. § 21-2-527(d); Mo. Rev. Stat. § 115.593; Tex. Election Code Ann. § 221.015.

146. The Court gives deference to the Board's determination as to the number of votes received by each candidate. The parties failed to prove that the vote totals certified after the recount should be amended in any way other than through inclusion of additional wrongfully rejected absentee ballots as set forth in Paragraph 138 above.

Rule 9 Does Not Violate Minnesota Law[2]

147. Rule 9 of the Administrative Recount Procedure does not violate Minnesota Statute § 206.86, subd. 5.

148. Contestant's claim that Rule 9 of the Administrative Recount Procedure violates Minnesota law is barred by the doctrine of laches.

149. The adoption of Rule 9 of the Administrative Recount Procedures by the Minnesota Secretary of State and the Board is entitled to deference by this Court.

150. Contestants did not prove by a preponderance of the evidence that any double counting of votes occurred.

Contestants Have Failed to Establish Their Equal Protection Claim[3]

151. The Court lacks jurisdiction to consider Contestants' Equal Protection claim regarding "deliberate, serious, and material violation[s]" of Minnesota Election Law. Minn. Stat. § 209.12. Evidence relating to these claims is preserved for the United States Senate. *Id.*; U.S. CONST. Art. I, § 5, Cl. 1.

152. The Court has jurisdiction 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." Minn. Stat. § 209.12; *see also Coleman v. Ritchie*, 758 N.W.2d 306, 310-11 (Minn. 2008) (Page, J. dissenting). Contestants' claim that election officials violated the Equal Protection Clauses of the United States and Minnesota Constitutions fails on the merits.

153. Errors or irregularities identified by Contestants in the general election do not violate the mandates of equal protection. *Draganosky v. Minnesota Bd. of Psychology*, 367 N.W.2d 521, 526 (Minn. 1985) (citing *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1944)); *see also Programmed Land, Inc. v. O'Connor*, 633 N.W.2d 517, 530 (Minn. 2001).

154. The Minnesota legislature enacted clear, uniform standards regulating absentee voting in this state. *See* Minn. Stat. § 203B.12. Election officials exercised reasonable discretion within the confines of Minnesota election law and under a comprehensive, state-wide

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[2] The Court incorporates herein by reference the attached Rule 9 Memorandum.

[3] The Court incorporates herein by reference the attached Equal Protection Memorandum.

training program in determining whether a voter met the statutory requirements of absentee voting. *Cf. Bush v. Gore*, 531 U.S. 98, 109 (2000).

155. The Court will not order the opening and counting of any absentee ballot that fails to comply with Minnesota law. *Wichelmann*, 273 N.W. at 639-40; *Bell v. Gannaway*, 227 N.W.2d at 802. Opening absentee ballots that do not meet Minnesota's statutory requirements solely because similar ballots have been opened and counted is not a remedy authorized by Minnesota law.

156. Contestants have not met their burden of proof. *See Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. Ct. App. 1986). Specifically, Contestants have not shown discrimination, arbitrary treatment, ill-will or malfeasance on the part of Minnesota election officials, or that errors or irregularities affected the outcome of the election. *Hahn v. Graham*, 225 N.W.2d 385, 386-87 (Minn. 1975).

Franken Received the Highest Number of Lawfully Cast Ballots

157. Franken received the highest number of lawfully cast ballots in the November 4, 2008 general election for United States Senator for the State of Minnesota and is entitled to receive the certificate of election.

ORDER FOR JUDGMENT

Based on the above findings of fact and conclusions of law, and pursuant to Minn. Stat. § 209.12, the Court DECIDES, DECLARES, AND ADJUDGES that Contestee Al Franken is the party to the contest who received the highest number of votes legally cast in the 2008 United States Senate general election and is therefore entitled to receive the certificate of election.

Accordingly, IT IS ORDERED that:

1. Contestants' Notice of Contest is dismissed with prejudice;

2. Contestee's Counterclaims are dismissed without prejudice as moot;

3. Pursuant to Minn. Stat. § 209.07, subd. 3, costs of the contest must be paid by Contestants, and Contestee and the Court shall prove up the applicable costs by affidavit after all proceedings in this matter are concluded; and

4. For the reasons stated in the Court's Order of March 2, 2009, imposing a sanction on Contestants, Contestee is awarded his reasonable costs and attorneys' fees in connection with Contestants' failure to disclose, such costs and fees to be proved up by affidavit.

5. Any request for relief in these proceedings not specifically granted herein is denied.

There being no just reason for delay,

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 13, 2009.

BY THE COURT:

Elizabeth A. Hayden	Kurt J. Marben	Denise D. Reilly
Judge of District Court	Judge of District Court	Judge of District Court

RULE 9/DOUBLE COUNTING MEMORANDUM

I. Rule 9 of the Administrative Recount Procedure does not violate Minn. Stat. § 206.86, subd. 5.

Contestants argue that Rule 9 of the Administrative Recount Procedures violates Minnesota law because it provides for the counting of damaged original ballots instead of marked duplicates. They claim that Minn. Stat. § 206.86, subd. 5 requires that duplicate marked ballots "be counted in lieu of the damaged or defective ballot card." This argument, however, misinterprets the purpose and scope of this statute.

Minnesota Statutes § 206.86, subd. 5 details the procedure that election judges are to follow when a damaged or defective ballot cannot be counted by the automatic tabulating equipment on election day. It directs two election judges of different political parties to make a true duplicate copy of the damaged ballot, label it "duplicate", record a serial number on it, and count it in lieu of the damaged or defective ballot. *Id.*

By its terms, Minn. Stat. § 206.86 only applies to the machine counting of ballots. Minn. Stat. § 206.86, subd. 1. The title of the statutory section is "Counting Electronic Voting System Results". The statute does not deal with hand recounts, but with the process for electronically tabulating ballots on election day. *See State v., Northwestern States Portland Cement Co.,* 285 Minn. 162, 166, 103 N.W.2d 225, 227-28 (1960) (title of statute may be considered for the purpose of ascertaining legislative intent). In an administrative hand recount, it is unnecessary to count the duplicate ballots because the intent of the voter can most easily be ascertained from the face of the original ballot. *See* Minn. Stat. § 204C.22, subd. 2 ("Intent shall be ascertained only from the face of the ballot.").

Contrary to Contestants' argument, Minn. Stat. § 206.86, subd. 5 does not dictate that once a duplicate ballot is created the original becomes invalid. This conclusion is supported by

the Minnesota Supreme Court ruling that, "[t]here can be no dispute that unmatched original damaged ballots are valid ballots and the votes marked on those ballots should be counted in the election." *Coleman v. Minnesota State Canvassing Bd.*, 759 N.W.2d 44, 46 (Minn. 2008). An original ballot is a legally cast vote regardless of whether a duplicate ballot is made if it complies with all other applicable law. Rule 9's policy of counting original ballots does not violate Minn. Stat. § 206.86, subd. 5.

II. Contestant's claim that Rule 9 of the Administrative Recount Procedure violates Minnesota law is barred by the doctrine of laches

a. Laches

Laches is an equitable doctrine applied to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Winters v. Kiffmeyer,* 650 N.W.2d 167, 169 (Minn. 2002). Minnesota courts have repeatedly applied the doctrine in election cases because the "very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by courts". *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992); s*ee, e.g., Clark v. Pawlenty,*755 N.W.2d 293, 303 (Minn. 2008) ("Given petitioners' unreasonable delay in asserting the interpretations of the constitution and election statutes that they espouse here, and balanced against the significant potential prejudice to respondents, to other election officials, to [the candidate] and potentially to other candidates, and to the electorate, we conclude that it would be inequitable to grant the relief sought by petitioners with respect to the primary ballot even if we were to conclude that their arguments had merit."); *Marsh v. Holm,* 55 N.W.2d 302, 304 (Minn. 1952) (declining to consider the merits of a ballot challenge because "the petitioner ha[d] not proceeded with diligence and expedition in asserting his claim").

Both Contestants and Contestee were given an opportunity to participate in drafting of the Administrative Recount Procedures approved by the State Canvassing Board. Contestants agreed to the adoption of Rule 9 and the counting of damaged original ballots before the hand recount started. Both parties knew on the first day of the recount, November 19, 2008, that counties were reporting differences between the number of marked original and duplicate ballots in various precincts. Despite these reports, Contestants insisted on the strict application of Rule 9. They did not raise any objection to the counting of original marked ballots in lieu of duplicates until December 16, 2008. (*See* Ex. F1995.). Any argument that Contestants did not realize that Rule 9 might lead to possible "double counting" of ballots has been waived by their conduct and delay in raising this issue. This court emphasized in earlier orders that this is an expedited proceeding. Contestants' unreasonably delayed raising their claim and are now barred from asserting it.

b. Judicial Estoppel

Contestee also argues that Contestants are estopped from pursuing their duplicate ballot claims under the doctrine of judicial estoppel. "Judicial estoppel prevents a party that has taken one position in litigating a particular set of facts from later reversing its position when it is to its advantage to do so." *Bauer v. Blackduck Ambulance Ass'n, Inc.*, 614 N.W.2d 747, 749-50 (Minn. Ct. App. 2000). However, judicial estoppel does not apply in this situation because the recount was not a litigation process and thus the parties have not previously litigated this set of facts.[4]

[4] Minnesota has not yet applied the doctrine of equitable estoppel to election law cases. However, other jurisdictions have applied the doctrine holding that a candidate is estopped from contesting an election for irregularity where he has consented to or been responsible for the irregularity. *State ex. Rel. Bowdon v. Blackman et al.*, 208 La.475, 489, 23 So2d. 188, 192 (La. 1945); *Robinson v. Plano Bd. of Ed., Plano Independent School Dist.*, 513 S.W.2d 135, 137 (Tex. Civ. App. 1974).

III. The adoption of Rule 9 of the Administrative Recount Procedures by the Minnesota Secretary of State and the State Canvassing Board is entitled to deference.

Minn. Stat. § 204C.361(a), grants the Secretary of State specific authority to adopt rules to establish a uniform recount procedure. The Secretary of State exercised this authority, with the endorsement of the State Canvassing Board, by promulgating the Administrative Recount Procedures. The Secretary of State's interpretation of relevant statutes in promulgating the Administrative Recount Procedures is entitled to deference. *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) ("[A]n agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature."). Accordingly, this Court defers to the Secretary of State's interpretation that Minn. Stat. § 206.86, subd. 5 does not require the counting of duplicate ballots in an election contest or hand recount.

IV. Contestants did not prove by a preponderance of the evidence that double counting occurred.

The burden of proof in an election contest rests upon Contestants. *Green v. Independent Consol. School Dist. No. 1 of Lyon County.*, 252 Minn. 36, 42, 89 N.W.2d 12, 16 (1958). Contestants claim that double counting of ballots occurred in ten Minneapolis precincts. They rely upon evidence that the number of votes counted during the recount was greater than the number of voters shown on the voter rosters. Contestants, however, have not sustained their burden of proof on this claim.

This Court received evidence that it is not uncommon for discrepancies to exist between the number of ballots cast in a precinct and the number of voters shown on Election Day rosters. These Election Day discrepancies can be caused by voters failing to sign rosters before voting and election judges failing to mark the acceptance of absentee ballots on the rosters. The Court

cannot conclude that double counting occurred simply because the number of votes counted during the recount is greater than the number of voters on the rosters.

In Minneapolis Ward 12 Precinct 8, the Contestants claim that double counting must have occurred because the precinct had thirteen more ballots counted in the recount than voters listed on the Election Day rosters. Contestants introduced the testimony of Pamela Howell, the head election judge of the precinct, to support this claim. She testified that when ballots were counted on Election Day, another election judge exclaimed that they forgot to label the ballots. Howell, however, did not have personal knowledge on whether judges marked duplicate ballots or how many ballots were potentially affected by this error. No incident log was introduced during the trial, and no other election officials from this precinct testified.

Moreover, the Court received evidence that in this precinct, eighteen accepted absentee ballots were not marked on the Election Day rosters. If these ballots were added to the roster, the precinct would show more voters than ballots counted during the recount. While this still creates a discrepancy between the number of counted ballots and voters, it does not support the claim of double counting. As in the other nine Minneapolis precincts, this Court has not been presented sufficient evidence to determine that it is more likely than not that double counting occurred during the recount.

EQUAL PROTECTION MEMORANDUM

I. Introduction

Contestants argue that similarly-situated absentee ballots were treated differently throughout Minnesota's counties and cities, and that this inconsistent treatment implicates the Equal Protection Clauses of the United States and Minnesota Constitutions. The Court reviewed this argument respectfully in light of the mandates of the United States Constitution and the Minnesota Constitution that all persons similarly-situated be treated alike under the law. *See* U.S. CONST. amend. XIV, § 1; MINN. CONST. Art. 1, § 2.

The Equal Protection Clause of the Fourteenth Amendment provides in relevant part that "[no state shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Similarly, the Minnesota Constitution provides that "[n]o member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." MINN. CONST. Art. 1, § 2. Minnesota courts have long recognized that the federal and state constitutions require that all persons similarly-situated be treated alike under the law. *Matter of Harhut*, 385 N.W.2d 305, 311 (Minn. 1986) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Price v. Amdal*, 256 N.W.2d 461, 468 (Minn. 1977)); *see also Kolton v. County of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002).

a. Minnesota Has the Right to Regulate its Elections.

It is a well-established principle of constitutional law that the right to vote is "regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). "[T]he right to vote is considered fundamental under both the U.S. Constitution and the Minnesota Constitution." *Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005). *See also*

Erlandson v. Kiffmeyer, 659 N.W.2d 724, 730 (Minn. 2003) (recognizing that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.") (citing *Burson v. Freeman*, 504 U.S. 191, 199 (1992)).

Accordingly, the Minnesota Supreme Court has held that our election laws should be given a "liberal interpretation." *Allen v. Holm*, 66 N.W.2d 610, 614 (Minn. 1954) ("Statutory regulations of the election franchise must be so construed as to insure, rather than defeat, full exercise thereof when and wherever possible."); *see also Dougherty v. Holm*, 44 N.W.2d 83, 85 (Minn. 1950) ("Election laws should be liberally construed so as to secure to the people their right freely to express their choice.").

Nevertheless, it is well-settled that a state may impose reasonable restrictions on voting. The United States Constitution clearly provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . ." U.S. CONST. Art. I § 4, cl. 1.

The United States Supreme Court recognizes that states "have considerable leeway to protect the integrity and reliability of . . . election processes generally." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191-192 (1999); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (recognizing that "States retain the power to regulate their own elections."). The United States Supreme Court further acknowledges a state's interest "in protecting the integrity and reliability of the electoral process," including "deterring and detecting voter fraud." *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1617 (2008). *See generally* John C. Fortier and Norman J. Ornstein, *The Absentee Ballot and The Secret Ballot: Challenges for Election Reform,* 36 U. Mich. J.L. Reform 483, 512 (2003).

The Court previously recognized the Minnesota legislature's preference for in-person voting. Minn. Stat. § 201.061, subd. 3 (discussing Minnesota's same-day registration procedures); Order, Mar. 31, 2009 at 11; Order, Feb. 23, 2009 at 8 (noting the Minnesota legislature set a "high bar" for voting by absentee ballot).

The purpose behind Minnesota's absentee voting legislation is "the preservation of the enfranchisement of qualified voters, the preservation of the secrecy of the ballot, the prevention of fraud, and the achievement of a reasonably prompt determination of the election result." *Matter of Contest of School Dist. Election Held on May 17, 1988*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988) (citing *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975)). The Minnesota Supreme Court specifically held that "[t]he lawmaking power, being fully cognizant of the possibilities of illegal voting, frauds and dishonesty in elections, prescribed many safeguards in the Absent Voters Law to prevent such abuses. While the purpose of the statute is to extend the privilege of voting, its provisions clearly indicate an intention not to let down the bars necessary for honest elections." *Wichelmann v. City of Glencoe*, 273 N.W. 638, 639-40 (1937).

b. Absentee Voting is a Privilege in Minnesota.

Minnesota's power to regulate its elections includes the power to place reasonable restrictions on absentee voting. *See Erlandson*, 659 N.W.2d at 733, n. 8. The Minnesota Supreme Court previously considered the nature of absentee voting in the election process and expressly found that:

> The opportunity of an absentee voter to cast his vote at a public election by mail has the characteristics of a privilege rather than of a right. Since the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.

Bell, 227 N.W.2d at 802 (citing *Wichelmann*, 273 N.W. at 640 ("Absentee voting is an exception to the general rule and is in the nature of a special right or privilege which enables the absentee

voter to exercise his right to vote in a manner not enjoyed by voters generally.")); *see also Matter of Contest of School Dist. Election Held on May 17, 1988*, 431 N.W.2d at 915.

Because the Minnesota Supreme Court views the opportunity to vote by absentee ballot as having "the characteristics of a privilege rather than of a right," *Erlandson*, 659 N.W.2d at 733, n. 8, the state's treatment of absentee ballots is analyzed under a rational basis standard. *See id.* at 733 ("[W]here only the ability to vote by absentee ballot, and not the right to vote generally, has been at issue, the United States Supreme Court has applied rational basis analysis.") (citing *McDonald v. Board of Election Comm'rs of Chicago,* 394 U.S. 802 (1969)); *see also Burdick*, 504 U.S. at 433 ("[T]o subject every voting regulation to strict scrutiny. . .would tie the hands of States seeking to assure that elections are operated equitably and efficiently.") Thus, the Minnesota Supreme Court mandates that a statute regulating absentee voting "must bear some rational relationship to a legitimate state end." *Erlandson*, 659 N.W.2d at 733. According to the United States Supreme Court, "[l]egislatures are presumed to have acted constitutionally" and "their statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald*, 394 U.S. at 809.

In considering this issue, other states have likewise recognized that absentee voting is distinct from in-person voting. *See, e.g., The American Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) ("Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures."); *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 840 (S.D. Ind. 2006) ("[A]bsentee voting is an *inherently* different procedure from voting in person, requiring a state which allows both in-person and absentee voting to apply different "standards, practices, or procedures" to these two groups of voters.") (emphasis in original).

II. The Court Lacks Jurisdiction to Consider Contestants' Equal Protection Claim Regarding "Deliberate, Serious, and Material Violation[s]" of Minnesota Election Law and Evidence Relating to these Claims is Preserved for the United States Senate.

Minnesota statutes charge this Court with two responsibilities: (1) to determine which party received "the highest number of votes legally cast" in the November 4, 2008 general election, and (2) to take and preserve evidence "on any other points specified in the notice of contest" for the United States Senate. Minn. Stat. § 209.12.

As a threshold matter, the Court's jurisdiction in this election contest is limited to a determination of "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." Minn. Stat. § 209.12; *see also Coleman v. Ritchie*, 758 N.W.2d 306, 310-11 (Minn. 2008) (Page, J. dissenting) ("[T]he scope of an election contest under chapter 209 is primarily concerned with which party received the highest number of votes, not the protection of the fundamental right to vote."); (Order, Jan. 22, 2009 at 3; Order, Feb. 24, 2009 at 5-6; Order Feb. 18, 2009 at 3.)

Thus, to the extent Contestants' equal protection argument alleges "deliberate, serious, and material violation[s]" of Minnesota's election laws, this Court lacks jurisdiction to make findings or conclusions on these points and the matter is preserved for the United States Senate. *See* Minn. Stat. § 209.12 ("Evidence...including...the question of the right of any person to nomination or office on the ground of deliberate, serious, and material violation of the provisions of the Minnesota Election Law, must be taken and preserved by the judge trying the contest. . . ."); U.S. CONST. Art. I, § 5, Cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."); *see also Odegard v. Olson*, 119 N.W.2d 717, 719 (Minn. 1963). The Minnesota Supreme Court recently addressed this issue directly and ruled as follows:

> When the election contest concerns a congressional office, the only question to be decided is which candidate received the highest number of votes legally cast at

> the election. Minn. Stat. § 209.12 (2008). Nevertheless, evidence on any other issues specified in the notice of election contest is to be preserved and forwarded to the presiding officer of the Senate or House of Representatives of the United States, as the case may be. *Id.*

Coleman v. Ritchie, 762 N.W.2d 218, 226 (Minn. 2009).

III. The Court Has Jurisdiction to Determine "Which Party to the Contest Received the Highest Number of Votes Legally Cast at the Election," and Hereby Concludes that Contestants' Claim that Election Officials Violated the Equal Protection Clauses of the United States and Minnesota Constitutions Fails on the Merits.

This Court has a statutory mandate to determine the number of votes "legally cast." Minn. Stat. § 209.12. Contestants' equal protection argument challenges, in part, the manner in which election officials in different counties exercised their discretion in determining whether an absentee ballot had been "legally cast." To the extent Contestants' equal protection argument raises the issue of whether a vote has been "legally cast," this Court may properly "make findings of facts and conclusions of law upon that question." Minn. Stat. § 209.12.

a. Errors or Irregularities Identified by Contestants in the General Election Do Not Violate the Mandates of Equal Protection.

Contestants argue that election judges made errors in determining whether to accept or reject certain absentee ballots. There is evidence in the factual record to support Contestants' allegations. *(See, e.g.,* Test'y of Mansky, Feb. 2, 2009 at 11-19 (acknowledging minor errors); Test'y of Mansky, Mar. 4, 2009 at 226 & 241 (same).)

Equal protection, however, cannot be interpreted as raising every error in an election to the level of a constitutional violation. Although not ideal, errors occur in every election. *See Black v. McGuffage*, 209 F.Supp.2d 889, 891 (N.D. Ill. 2002) ("Neither the federal courts, nor likely anyone, can guarantee to every eligible voter in this country a perfect election with 100% accuracy."); *see also Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) ("No balloting system is perfect."); *Bush v. Hillsborough County Canvassing Bd.*, 123 F.Supp.2d 1305,

1317 (N.D. Fla. 2000) ("The Court recognizes that much can be done to guarantee a fair election; but no matter how hard we try, regrettably we may never be able to guarantee a perfect election."); *Taylor v. Taylor*, 10 Minn. 107, 1865 WL 940, 3 (Minn. 1865) ("There is hardly an election held in any county at which in some town irregularities do not occur, and to declare every such election void would work a manifest hardship and injustice.").

Equal protection does not guarantee a perfect election. *See, e.g., Gross v. Albany County Bd. of Elections*, 819 N.E.2d 197, 201 (N.Y. 2004) (holding "inconsequential deviations from the letter of the law will not be fatal"); *Hennings v. Grafton*, 523 F.2d 861, 865 (7th Cir. 1975) ("[T]he work of conducting elections in our society is typically carried on by volunteers and recruits for whom it is at most an avocation and whose experience and intelligence vary widely. Given these conditions, errors and irregularities ... are inevitable, and no constitutional guarantee exists to remedy them.").

Other jurisdictions to consider the issue have likewise refused to find constitutional violations due to "garden variety" errors or inconsistencies. *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (holding "garden variety" election irregularities do not invalidate election); *Gold v. Feinberg*, 101 F.3d 796, 802 (2nd Cir. 1996) (holding election irregularities "do not constitute constitutional violations" actionable under federal law); *Pettengill v. Putnam County R-1 School Dist., Unionville, Mo.*, 472 F.2d 121, 122 (8th Cir. 1973) (declining to exercise power of federal court "to be the arbiter of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots."); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (holding election irregularities "do not usually rise to the level of constitutional violations where adequate state corrective procedures exist[.]"); Minn. Stat. § 204B.44.

b. The Minnesota Legislature Enacted Clear, Uniform Standards Regulating Absentee Voting in this State. Election Officials Exercised Reasonable Discretion Within the Confines of Minnesota Election Law and under a Comprehensive, State-Wide Training Program in Determining Whether a Voter Met the Statutory Requirements of Absentee Voting.

i. Equal Protection Does Not Demand "Rigid Sameness."

Contestants argue that different counties adopted different procedures for evaluating absentee ballots, with the result that a voter's ability to have an absentee ballot opened and counted depended to some extent on where in the state the voter resided. The Court heard testimony that different counties adopted different procedures in their handling of absentee ballots. (*See* Test'y of Reichert, Feb. 26, 2009 at 32 ("There are some procedures which differ between jurisdictions."); *see also* Test'y of Gelbmann, Jan. 27, 2009 at 120-21 (discussing differences in determining whether an absentee voter's signature was genuine); Test'y of Mansky, Jan. 30, 2009 at 39-40 (same); Test'y of Corbid, Feb. 3, 2009 at 60 (same); Test'y of Mansky, Jan. 30, 2009 at 71-72 (discussing treatment of witness address on absentee ballot return envelope); Test'y of Schreifels, Feb. 18, 2009 at 129 & 149 (same).)

However, the implementation of procedures unique to each county does not, without more, create an equal protection problem. "The equal protection clause does not demand that laws operate with rigid sameness upon all persons within a state." *Fairview Hospital Ass'n v. Public Bldg. Service and Hospital and Institutional Emp. Union Local No. 113 A. F. L.*, 64 N.W.2d 16, 29 (Minn. 1954) (citing *Stebbins v. Riley*, 268 U.S. 137 (1925)). Other states likewise recognize that "[e]qual protection does not require that persons be dealt with identically, only that the classifications rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classifications are made, and that their treatment be not so disparate as to be arbitrary." *Dukes v. Norris*, 256 S.W.3d 483, 487 (Ark. 2007); *see also People v. Gonzales*, 87 Cal.App.4th 1, 12 (Cal.App. 2 Dist. 2001); *People v. Green*, 79

Cal.App.4th 921, 924 (Cal.App. 1 Dist. 2000); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442, 448 (8th Cir. 1984) ("[R]ational distinctions may be made with substantially less than mathematical exactitude."); *People v. Romo*, 534 P.2d 1015, 1020 (Cal. 1975).

ii. Local Election Officials Have Discretion to Adopt County-Specific Procedures in Determining Whether a Voter Met the Statutory Requirements of Absentee Voting.

Election officials must comply with the requirements of Minnesota statute. Nonetheless, election officials at the local level must have some discretion to operate elections in a manner that best harmonizes with the unique circumstances present in their jurisdiction. The Minnesota legislature conferred authority upon county and municipal officials to oversee the administration of absentee balloting procedures within their jurisdictions. *See, e.g.*, Minn. Stat. §§ 203B.07; 203B.08; 203B.13 & 203B.23.

Minnesota's counties and cities have varying levels of resources, personnel, and technology available to them. Absentee voting laws do not presume a "uniformity of resources." *See Dobson v. Dunlap*, 576 F.Supp.2d 181, 191 (D. Me. 2008) ("[W]hat may be possible in more urban areas of the state may well be wholly impractical in the isolated villages [of the state]."). "[V]ariations in local resources are insufficient to establish a constitutional violation." *Florida State Conference of N.A.A.C.P. v. Browning*, 569 F.Supp.2d 1237, 1258 (N.D. Fla. 2008) (recognizing that different officials have different resources "and are thus differently equipped to assist applicants," but that "as with countless public services delivered through [the state's] political subdivisions . . . resource disparities are to some degree inevitable. They are not, however, unconstitutional.") (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973)); *see also Diaz v. Cobb*, 541 F.Supp.2d 1319, 1339 -1340 (S.D. Fla. 2008)

("The ability of Supervisors of Elections to fulfill their duties capably and competently depends in great measure on the resources available to them.").

Counties and cities adopted different procedures and methods, consistent with their resources and personnel, in determining whether an absentee voter complied with the statutory requirements of Minnesota law. Election officials were governed by uniform laws and did not arbitrarily disregard the statutory elements of absentee voting in adopting these procedures.

By way of example, the Court heard testimony from the Pine County auditor regarding eight mail-ballot precincts within her jurisdiction. (*See* Test'y of Clemmer, Feb. 5, 2009 at 88.) A mail-ballot precinct comprising fewer than 400 voters can apply to the county auditor, with town or city board approval, to conduct their elections by mail ballot rather than voting in person at a polling place. (*Id.*) Upon approval by the county auditor, ballots are automatically mailed to voters in mail-ballot precincts at the beginning of the election cycle. (*Id.*) If an individual from a mail-ballot precinct is not registered, they are treated as an absentee voter. (*Id.*) On election night, each mail-ballot precinct sends two election judges to the county auditor's office to go through the process of accepting or rejecting those ballots. (*Id.* at 89.) Mail-in ballots are returned to the Auditor's office instead of the precinct and are treated essentially the same as absentee ballots as a whole. (*Id.* at 89-90.) A local procedure governing mail-in ballots is necessarily different in Pine County, a sparsely-populated county, than in, for example, Hennepin County, a more densely-populated county. *See also* Minn. Stat. § 204C.05, subd. 1(b) (authorizing unorganized territories to petition for shorter polling hours).

The Court also heard testimony that not all counties have the technology or the personnel necessary to check the statewide voter registration system ("SVRS") with respect to every absentee ballot. For example, election officials in Ramsey and Carver Counties search the

voter's witness's name in SVRS to confirm the witness's registration status. (*See* Test'y of Mansky, Jan. 30, 2009 at 71-72.) Other county and city election officials have only limited access to the SVRS and cannot confirm the witness's registration status. (*See* Test'y of Mangen, Feb. 19, 2009 at 177 (testifying that Edina has only limited access to SVRS); Test'y of Lock, Feb. 19, 2009 at 216 (testifying that jurisdictions within Meeker County do not have access to SVRS on Election Day); Test'y of Ferber, Feb. 19, 2009 at 153 (testifying that election judges at the precinct-level do not have access to SVRS).) Those counties and cities accept a witness as a registered Minnesota voter if he or she provided a Minnesota address. (*Id.*) By all accounts, election officials performed their duties on Election Day to the best of their abilities, given the resources available to them.

The Court's ruling is not inconsistent with *Bush v. Gore*, 531 U.S. 98 (2000). The United States Supreme Court in *Bush* expressly declined to address the equal protection implications, if any, of counties adopting procedures unique to their jurisdictions. *See Bush*, 531 U.S. at 109 ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."). Indeed, the *Bush* Court contemplated that voting machines could differ between and among jurisdictions without creating an equal protection problem, stating: "the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions[.]" *Bush*, 531 U.S. at 134. *See also* Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience,* 92 Cal. L. Rev. 927, 955 (2004); Minn. Stat. § 206.58, subds. 1 & 3 (authorizing governing bodies of municipalities and counties, with Secretary of State approval, to provide for the use of electronic voting systems); *cf. Black*,

209 F.Supp.2d at 898. *See also* Vikram David Amar & Alan E. Brownstein, Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law, 48 Fed. Law. 27, 28-29 (2001) (arguing that "[j]ust as the physical equipment varies from county to county, so too do the people who use it[,]" and taking into account the different demographics and economics in the various locales is not arbitrary); (Test'y of Clemmer, Feb. 5, 2009 at 99-100) (testifying that although witness address was missing from face of absentee ballot envelope, envelope was opened because "[t]his is a small precinct" and witness was "known to the judges.").)

In light of the state's goal of enfranchising voters whenever possible under the law, *Allen*, 66 N.W.2d at 614, election officials must be vested with reasonable discretion to address election issues unique to their jurisdictions while still operating under the uniform standards of Minnesota law. *See also State of N.M. ex rel. League of Woman Voters v. Herrera*, WL 386927, 5 (N.M. 2009) ("[T]here must be some room for discretion by local officials in order to guard against disenfranchisement.").

iii. The Conduct of Election Officials in the November 4, 2008 Election Does Not Violate the Equal Protection Clause of the United States Constitution under *Bush v. Gore*.

1. *Bush v. Gore*'s Applicability to the Present Election Contest is Limited.

Contestants allege the adoption of different procedures by local election officials violates the Equal Protection clauses of the United States and Minnesota Constitutions. Contestants rely exclusively on *Bush v. Gore*, 531 U.S. 98 (2000), in support of their equal protection argument.

The United States Supreme Court expressly limited the potential precedential reach of its opinion in *Bush*. *See Bush*, 531 at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.") *See also Austin v. Wilkinson*, 502 F.Supp.2d 660, 671, n. 6 (N.D. Ohio 2006)

(characterizing Bush as a "notable exception" to the general rule that "when the Supreme Court rules, it intends that its words will guide the future actions of those before and not before the Court. That is, it will create precedent[.]"); *Spears v. Stewart*, 283 F.3d 992, 997 (9th Cir. 2002) (comparing majority opinion to the *Bush* decision thusly: "good for this case and this case only[.]").

2. *Bush v. Gore* Is Factually Distinct from the Present Election Contest.

Notwithstanding *Bush*'s limited precedential value, the factual background of Minnesota's election contest is distinguishable from the facts in *Bush v. Gore*.

The Court first addressed Contestants' equal protection argument in its Order on Contestants' Motion for Summary Judgment, stating:

> Contestants repeatedly raised the specter of *Bush v. Gore*, 531 U.S. 98 (2000) in support of their motion for summary judgment. The Court questions the applicability of *Bush v. Gore* to the issues presented in Contestants' Notice of Contest. Florida's basic command for the count of legally cast votes was to consider the "intent of the voter." *Id.* at 105-06. The United States Supreme Court found that while this principle was "unobjectionable as an abstract proposition and a starting principle[,] [t]he problem inheres in the absence of specific standards to ensure its equal application." *Id.* at 106. Unlike the situation presented in Florida in *Bush v. Gore*, the Minnesota Legislature has enacted a standard clearly and unambiguously enumerating the grounds upon which an absentee ballot may be accepted or rejected, as codified in Minn. Stat.§ 203B.12, subd. 2. Minnesota has set forth the specific requirements a voter must meet in order to a legally-cast absentee ballot. The objective standards imposed on absentee ballots by Minn. Stat. § 203B.12 distinguishes the election systems of Minnesota and Florida.

Order, Feb. 3, 2009 at 6-7.

> The United States Supreme Court articulated the issue in *Bush v. Gore* as follows:
>
> The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance

> that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

Bush, 531 U.S. at 109.

Unlike the factual situation presented in Florida, the Minnesota legislature enacted a standard clearly and unambiguously enumerating the specific grounds upon which an election judge may accept or reject an absentee ballot. Minn. Stat. § 203B.12, subd. 2. *See also Graham v. Reid*, 779 N.E.2d 391, 395 (Ill. Ct. App. 2002) (distinguishing the electoral systems of Florida under *Bush* and Illinois by noting that "Illinois has long-established standards regarding recounts, which have been codified and which have also been made clear by the Illinois Supreme Court decisions."); *Pierce v. Allegheny County Bd. of Elections*, 324 F.Supp.2d 684, 697 (W.D. Pa. 2003) ("A state must impose uniform statewide standards in each county in order to protect the legality of a citizen's vote. Anything less implicates constitutional problems under the equal protection clause of the Fourteenth Amendment.").

The state-wide standards governing absentee voting in Minnesota are uniform and explicit and apply in every county and city in the state. Minn. Stat. § 203B.12; *see also Bush*, 531 U.S. at 106 ("The search for intent can be confined by specific rules designed to ensure uniform treatment.") The Court heard compelling testimony that election officials and election judges throughout the state's 87 counties and 4,128 polling stations were trained under a comprehensive training program based upon Minnesota law. Based upon the weight of the testimony and evidence presented, the Court finds local officials and election judges operated under uniform standards on Election Day.

Additionally, the same statutory standards governed the State Canvassing Board's treatment of uncounted absentee ballots following the recount. *Cf. Bush*, 531 U.S. at 109 (finding minimum constitutional safeguards lacking where, during recount process, "[t]he county

canvassing boards were forced to pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots.").

The Court's rulings during the pendency of the election contest also adhered to the clear language of the statute. (*See, e.g.*, Order, Feb. 23, 2009 at 8 ("It is the role of this Court to apply the law to the facts of the case before it, and not to re-write the requirements imposed by the legislature.")); *cf. Roe v. State of Ala. By and Through Evans*, 43 F.3d 574, 581 (11th Cir. 1995). Strict compliance with Minnesota election law is the best way to ensure equal treatment of similarly-situated voters. *See, e.g., Gross*, 819 N.E.2d at 201 (holding that "[t]he sanctity of the election process can best be guaranteed through uniform application of the law" and strict compliance "reduces the likelihood of unequal enforcement").

c. The Court Will Not Order the Opening and Counting of Any Absentee Ballot that Fails to Comply with Minnesota Law. Opening Absentee Ballots that Do Not Meet Minnesota's Statutory Requirements Solely Because Similar Ballots Have Been Opened and Counted is Not a Remedy Authorized by Minnesota Law.

Contestants argue the Court can avoid implicating the Equal Protection clause by opening and counting statutorily-invalid absentee ballots that are similar to absentee ballots that were previously opened and counted. In essence, Contestants ask the Court to ignore the clear requirements of Minnesota's absentee voting laws. The Court declines to adopt Contestants' argument.

The Court is mindful that laws enfranchising voters should be liberally interpreted. *Allen*, 66 N.W.2d at 614. However, equal protection does not compel the Court to go outside the clear parameters of Minnesota election law and open ballots cast by individuals who failed to meet threshold eligibility requirements for absentee voting. *See Crawford*, 128 S.Ct. at 1619 ("There is no question about the legitimacy or importance of the State's interest in counting

only the votes of eligible voters."). An individual does not have an equal protection right to have an invalid ballot counted.

Critically, an individual must be registered to vote. *See* Minn. Stat. §§ 201.018, subd. 2 ("An eligible voter must register in a manner specified by section 201.054, in order to vote in any primary, special primary, general, school district, or special election held in the county."); 201.054, subd. 1; 201.061, subds. 1, 3 & 4; (Order, Mar. 31, 2009 at 9 ("A vote submitted by a non-registered voter is not legally cast.")). The registration requirement is mandatory and may not be waived. Minn. Stat. §§ 201.061, subd. 5; (Order, Mar. 31, 2009 at 9; Order, Feb. 13, 2009 at 6.). Contestants agree that a voter must be registered to vote. Minn. Stat. §§ 201.018, subd. 2. Although Contestants argued that approximately 4,800 absentee ballots were wrongfully rejected, the Court only received evidence regarding the registration status of approximately 980 voters. (Order, Mar. 3000000000000210011, 2009 at 11-12.) Of these, approximately 300 voters failed to update their registration, leaving the Court with evidence of proper registration for fewer than 700 voters. (*Id.*)

Furthermore, it is critical that a voter's vote be counted only once. *See* Minn. Stat. §§ 203B.12, subd. 4; 204C.14(b) ("No individual shall intentionally...vote more than once at the same election."); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("Every voter's vote is entitled to be counted once."). (*See also* Order, Mar. 31, 2009 at 11 ("An absentee ballot is properly accepted if the election judges are satisfied that "the voter has not already voted at that election, either in person or by absentee ballot.""); Test'y of Gelbmann, Jan. 29, 2009 at 10 (testifying that voters who vote by absentee ballot may go to the polls in person on Election Day and cast another ballot).)

With limited exception, it is the voter's responsibility to meet each requirement of Minnesota's absentee voting laws. *See* Minn. Stat. §§ 203B.12; 203B.07, subd. 3; *see also* Minn. R. 8210.0500, subps. 2 & 3. With respect to the requirements imposed upon absentee voters, the Court's Orders of February 13, 2009 and March 31, 2009 are expressly incorporated herein.

As noted, the Minnesota Supreme Court views absentee voting as "purely optional," and ruled that "[i]f an elector decides to exercise the privilege of absentee voting, he can register and vote, by the terms of the law, only 'by complying with the provisions' thereof." *Wichelmann*, 273 N.W. at 640; *see also Bell*, 227 N.W.2d at 803 (placing duty on voter to comply with "mandatory" provisions of absentee-voter statutes and stating "voters who seek to vote under these provisions must be held to a strict compliance therewith."); (*see also* Order, Feb. 13, 2009 at 12.). An absentee voter is provided with instructions to assist the voter in completing the absentee ballot return envelope. *See* Minn. R. 8210.0500, subp. 1; (*see also* Order, Mar. 31, 2009 at 15; Ex. F-1743.).

Lastly, the Court notes that Contestants' position would lead to an absurd result. Following Contestants' argument to its conclusion, the Court would be compelled to conclude that if one county mistakenly allowed felons to vote, then all counties would have to count the votes of felons. *See Brendtro v. Nelson*, 720 N.W.2d 670, 680 (S.D. 2006) (holding a court should not "construe a constitutional provision to arrive at a strained, unpractical or absurd result."); *State v. Oldner*, 206 S.W.3d 818, 824 (Ark. 2005) ("Just as we will not interpret statutory provisions so as to reach an absurd result, neither will we interpret a constitutional provision in such a manner.").

After careful consideration, the Court concludes that neither the Equal Protection clause nor the Supreme Court's ruling in *Bush v. Gore* compel this Court to order the opening and counting of ballots cast by individuals who failed to comply with the basic eligibility requirements codified in Minnesota law.

d. Contestants Have Not Met their Burden of Proof.

The burden of proof in this election contest lies with Contestants. *Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. Ct. App. 1986). As the Court previously ruled, "[t]he election contest is a civil action and the burden is on the party seeking relief to introduce evidence to the Court sufficient to meet its burden of proof." (Order, Mar. 31, 2009 at 8.) It is Contestants' burden to prove a constitutional violation. *See Vera v. Richards*, 861 F.Supp. 1304, 1337 (S.D.Tex. 1994) ("As in all Constitutional cases, the plaintiffs retain the ultimate burden of proof."); *see also Taylor*, 10 Minn. at 107. The Court did not limit Contestants' ability to present evidence supporting the elements required by Minnesota Statute section 203B.12, subd. 2. (*See also* Order, Mar. 31, 2009 at 8.) After a thorough review, the Court finds Contestants have not met their burden of proof.

i. Contestants Have Not Shown Clear and Intentional Discrimination on the Part of Election Officials.

For Contestants' equal protection claim to be viable, Contestants must show the disparate treatment of similarly-situated absentee ballots was intentional or purposeful. "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 9, 64 S.Ct. 397, 401 (1944); *reh'g denied,* 321 U.S. 804, 64 S.Ct. 778. Minnesota law likewise recognizes that the purpose underlying the equal protection

clause "is to secure every person within the state's jurisdiction against *intentional and arbitrary* discrimination...." *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. Ct. App. 2007) (emphasis added.) A discriminatory purpose is not presumed. *Snowden*, 321 U.S. at 9, 64 S.Ct. at 401. Instead, "there must be a showing of 'clear and intentional discrimination.'" *Id.* (internal citations omitted.) Thus, Contestants cannot meet their evidentiary burden of establishing an equal protection violation unless they can show the disparate treatment of similarly-situated absentee ballot return envelopes was intentional or arbitrary. *See United Nat. Corp. v. Hennepin County*, 299 N.W.2d 73, 76 (Minn. 1980).

Here, Contestants elicited testimony regarding errors or irregularities by election officials when accepting or rejecting absentee ballots. Assuming such errors occurred, however, "[e]rroneous or mistaken performance of statutory duty may constitute violation of statute but will not, without more, constitute denial of equal protection." *Draganosky v. Minnesota Bd. of Psychology*, 367 N.W.2d 521, 526 (Minn. 1985) (citing *Snowden*, 321 U.S. at 8, 64 S.Ct. at 401); *see also Programmed Land, Inc. v. O'Connor*, 633 N.W.2d 517, 530 (Minn. 2001) ("Where...the differential treatment is alleged to arise only from bureaucratic errors, the standard of intentional, arbitrary or systematic discrimination necessary to prove a violation of equal protection rights is not satisfied."). *See also In re Hawaiian Land Co.*, 487 P.2d 1070, 1075 (Hawaii 1971); *Seven Star, Inc. v. U.S.*, 873 F.2d 225, 227 (9th Cir. 1989); *Roma Outdoor Creations, Inc. v. City of Cumming, Ga.*, WL 511085, 8 (N.D. Ga. 2009); *In re City of Wichita*, 59 P.3d 336, 343 (Kan. 2002) (holding that errors arising out of "a mistake in judgment or mistake in the application of the law," absent a commensurate showing of intentional or arbitrary conduct, should not result in a "similar windfall to all similarly-situated parties."). The factual record is devoid of any evidence of clear or intentional discrimination on the part of election officials.

ii. Contestants Have Not Shown Arbitrary Treatment, Ill-Will or Malfeasance on the Part of Minnesota Election Officials.

Contestants have not shown that election officials acted "with such unbridled discretion that arbitrary or disparate treatment of similarly situated voters is almost certain to result." *American Civil Liberties Union of N.M. v. Santillanes*, 506 F.Supp.2d 598, 607 (D. N.M. 2007) (overruled on other grounds by *The American Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008)); *see also Romo*, 534 P.2d at 1020 ("[A] state may provide for differences as long as the result does not amount to invidious discrimination."); *but cf. Boustani v. Blackwell*, 460 F.Supp.2d 822, 825 (N.D. Ohio 2006) (holding unconstitutional provision that would allow election judges to demand proof of citizenship of some voters as part of challenge process)). Indeed, both parties agreed that election officials and precinct-level election judges did the best job they could, given the resources available to them. There is no evidence of malfeasance or ill-will on the part of Minnesota's election officials or volunteer election judges.

The discretion exercised by local officials in the general election was not arbitrary or irrational, but was exercised only as provided for by the uniform standards of Minnesota law and under a comprehensive, state-wide training program. There is a notable distinction between county-specific procedures adopted within the strictures of a uniform, statutory standard and those adopted without. *See Walz v. Tax Commission of City of New York*, 397 U.S. 664, 679 (1970) ("The argument that making 'fine distinctions' between what is and what is not absolute under the Constitution is to render us a government of men, not laws, gives too little weight to the fact that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution."). Consequently, the administration of elections in

Minnesota provides "some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Bush*, 531 U.S. at 109.

iii. Contestants Have Not Shown Election Officials Violated Minnesota Law.

Contestants failed to show that local election officials violated Minnesota statute in their treatment of absentee ballots. Even if such a statutory violation was shown, it is well-settled in Minnesota that a "violation of a statute regulating the conduct of an election is not fatal to the election in the absence of proof that the irregularity affected the outcome or was the product of fraud or bad faith." *Hahn v. Graham*, 225 N.W.2d 385, 386 (1975) (citing *Taylor*, 10 Minn. at 107 ("[T]he failure of [election officials] to perform their duties strictly as required by statute, does not invalidate the election.")).

iv. Contestants Have Not Shown that Errors or Irregularities Affected the Outcome of the Election.

Contestants have not shown that the alleged errors or irregularities regarding the treatment of absentee ballots affected the outcome of the election. *Hahn*, 225 N.W.2d at 386-87. On January 3, 2009, the Office of the Minnesota Secretary of State opened and counted 933 absentee ballot return envelopes pursuant to the Minnesota Supreme Court's order and an agreement between the candidates and their respective campaign representatives. On April 7, 2009, an additional 351 absentee ballot return envelopes were opened and counted by the Secretary of State, pursuant to this Court's Order of March 31, 2009. In both instances, Contestee's lead increased. There is no evidence to suggest that opening and counting additional ballots will reverse this trend.

Such a finding is considered "determinative." *Id.*; *Ganske v. Independent School Dist. No. 84*, 136 N.W.2d 405, 406 (Minn. 1965) ("Irregularities which are not shown to have directly affected the outcome will not invalidate an election unless they are of such a serious nature that

they impeach its integrity."); *see also Taylor*, 10 Minn. at 10 (holding the burden of proof is on the contestant to show that there were irregularities *and that they affected the result.*") (emphasis in original); *Bennett v. Mollis*, 590 F.Supp.2d 273, 279, n. 12 (D.R.I. 2008) ("A mere mathematical possibility, as opposed to solid probability, that an error affected the results is insufficient to disturb an outcome.").

e. The Equal Protection Clauses of the United States and Minnesota Constitutions Protect the Rights of Qualified Voters.

Equal protection protects the rights of Minnesota citizens who submitted legally cast ballots in accordance with the laws of this state. Minnesota law is clear that qualified voters are entitled to equal protection under the law. *See Erlandson*, 659 N.W.2d at 729; *see also Ziols v. Rice County Board of Com'rs*, 661 N.W.2d 283, 286 (Minn. Ct. App. 2003) ("[E]ach qualified voter must be given an equal opportunity to participate in [state and local] election[s]."); *Matter of Contest of School Dist. Election Held on May 17, 1988*, 431 N.W.2d at 915 (holding that one purpose of Minnesota's absentee voting legislation is "the preservation of the enfranchisement of qualified voters[.]").

The Equal Protection Clause guarantees qualified voters the right to vote "and to have their votes counted and not diluted in state elections. . . ." *Lake v. State Bd. of Elections of North Carolina*, 798 F.Supp. 1199, 1207 (M.D.N.C. 1992) (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he 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.")). Equal protection cannot be invoked to protect citizens who did not follow the law when casting absentee ballots. *See, e.g., Johnson v. Trnka*, 154 N.W.2d 185, 187 (Minn. 1967) ("The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes."). Rather, the benefits of Equal Protection should work to protect qualified

voters who conscientiously adhered to Minnesota's absentee voting laws. To hold to the contrary would work an injustice upon Minnesota citizens who cast their ballots in accordance with the law.

f. The November 4, 2008 Election Resulted in a "Fair Expression" of the Voters of Minnesota.

The overwhelming weight of the evidence indicates that the November 4, 2008 election was conducted fairly, impartially, and accurately. (*See* Test'y of Mansky, Feb. 2, 2009 at 19; Test'y of Corbid, Feb. 5, 2009 at 6 (testifying that "[t]his was as smooth of [an] election as we've had."); Test'y of Clemmer, Feb. 5, 2009 at 137; Test'y of Schulz, Feb. 20, 2009 at 196 (testifying that ballot security is so important to the county auditor that ballots were locked in the county jail for safekeeping.))

There is no evidence of a systemic problem of disenfranchisement in the state's election system, including in its absentee-balloting procedures. (*See* Order, Feb. 13, 2009 at 3.) After three weeks of trial, the Court issued an order in which it found that "[t]he facts presented thus far do not show a wholesale disenfranchisement of absentee voters in the 2008 general election." (Order, Feb. 13, 2009 at 3.) This conclusion applies with equal force today. After seven weeks of trial, the factual record is devoid of any allegations of fraud, tampering, or security breaches on Election Day, during the recount process, or during the election contest.

To the contrary, the general election resulted in a "fair expression" of the voters of Minnesota. *See Greenly v. Independent School Dist. No. 316*, 395 N.W.2d 86, 92 (Minn. Ct. App. 1986) ("[A]n election will not be invalidated by minor irregularities, including statutory violations, if the election nonetheless 'resulted in a free and fair expression of the will of the voters on the merits.'") (citing *Erickson v. Sammons,* 65 N.W.2d 198, 202 (1954)); *In re Contest of Election of Vetsch*, 71 N.W.2d 652, 658 (Minn. 1955). "The public good demands that the

will of the people as expressed at the ballot box should not be lightly disturbed." *Taylor*, 10 Minn. at 107

The citizens of Minnesota should be proud of their election system. Minnesota has one of the highest voter-participation rates in the country. The Office of the Minnesota Secretary of State and election officials throughout Minnesota's counties and cities are well-trained, fair, and conscientious and performed their duties admirably. Minnesota could not conduct elections without the hard work and diligence of its dedicated professionals and citizen volunteers, and the Court is proud of their service.

Attachment A

COUNTY	FIRST NAME	LAST NAME	RECORD[1]
AITKIN	TIM	STOCKE	F4000
ANOKA	CHRISTIAN M	DOMARUS	C332
ANOKA	EDWARD	KNARR	C332
ANOKA	AMIE	LASSERRE	F4311
ANOKA	ELIZABETH HERMINA	SCHRADER	C332
ANOKA	JAMES	SCOTT	F4002
ANOKA	MARIE	THEIS	C332
BECKER	KAILA	ASKELSON	F4119
BECKER	ANTHONY	GILSDORF	F4120
BECKER	WALTER	JUST	F4121
BECKER	JONI	RONNING	F4122
BENTON	JESSICA	FARK	C596
BENTON	EDDIE	MORGAN	C596
CARLTON	BRENDA	RENGO	Order Granting in Part and Denying in Part Petitioners' Renewed Motion for SJ (hereinafter "First Nauen SJ Order"), Mar. 11, 2009, *In re Peterson*, A09-65

[1] This column includes cites to the record relied upon by the Court in ordering the opening and counting of the absentee ballots of the identified voters. The list is non-exhaustive because information regarding these voters was introduced in numerous exhibits and through testimony of local election officials and voters. The Court relied on all of the evidence presented before it ordered ballots to be opened and counted, including testimony from local election officials regarding their investigation as to registration status of voters pursuant to the Supreme Court ordered review process of absentee ballots. (*See, e.g.*, Test'y of Mansky, Feb. 2, 2009 at 51-55; Ex. F1698; Test'y of Clemmer, Feb. 5, 2009 at 141; Ex. F1748; Test'y of Engdahl, Feb. 12, 2009 at 16-17; Ex. C368; Test'y of Engdahl, Feb. 13, 2009 at 46; Ex. F1834.)

The Court also relied upon testimony from individual voters. (Test'y of Anderson, Jan. 27, 2009; Test'y of Demuth, Jan. 29, 2009; Test'y of Hendrickson, Jan. 27, 2009; Test'y of Markman, Jan. 27, 2009; Test'y of Sampers, Jan. 27, 2009; Testy of Kohler, Feb. 3, 2009; Test'y of Adams, Feb. 9, 2009; Test'y of Woods, Feb. 9, 2009; Test'y of Banks, Feb. 16, 2009; Test'y of Amara, Mar. 3, 2009; Test'y of Anderson, Mar. 3, 2009; Test'y of Bednar, Mar. 3, 2009; Test'y of Jeerhee, Mar. 3, 2009; Test'y of Larson, Mar. 3, 2009; Test'y of Martin, Mar. 3, 2009; Test'y of Meyer, Mar. 3, 2009; Test'y of Nichols, Mar. 3, 2009; Test'y Okrzynski, Mar. 3, 2009; Test'y of Patton, Mar. 3, 2009; Test'y of Reetz, Mar. 3, 2009; Test'y of Sealey, Mar. 3, 2009; Test'y of Sealey, Mar. 3, 2009; Test'y of Slater, Mar. 3, 2009; Test'y of Awes, Mar. 4, 2009; Test'y of Cohen, Mar. 4, 2009; Test'y of Lund, Mar. 4, 2009; Test'y of Rootes, Mar. 4, 2009; Test'y of Schaffer, Mar. 4, 2009; Test'y of Spartz, Mar. 4, 2009; Test'y of Strong, Mar. 4, 2009; Test'y of Woodward, Mar. 4, 2009; Test'y of Gauer, Mar. 5, 2009; Test'y of Morgan, Mar. 5, 2009; Test'y of Olson, Mar. 5, 2009; Test'y of Schmit, Mar. 5, 2009; Test'y of Scott, Mar. 5, 2009; Test'y of Vogelgesang, Mar. 5, 2009; Test'y of Hyde, Mar. 6, 2009; Test'y of Kronenberg, Mar. 6, 2009; Test'y of Lloyd, Mar. 6, 2009; Test'y of Meziou, Mar. 6, 2009; Test'y of Richardson, Mar. 6, 2009; Test'y of Densinger, Mar. 9, 2009; Test'y of Hodena, Mar. 9, 2009; Test'y of Scott, Mar. 9, 2009; Test'y of Bowman, Mar. 10, 2009; Test'y of Boss, Mar. 12, 2009; Test'y of Brigham, Mar. 12, 2009; Test'y of Erickson, Mar. 12, 2009; Test'y of Robertus, Mar. 12, 2009.)

The Court also reviewed the certifications and documents provided by election officials set forth in Exhibits C700-C784 (exclusive of Exhibits C701, C717, C732, C748, C768, which were not admitted into evidence) and in Exhibits F3500-F3571.

CARLTON	DAVID	TUSHAR	F4010
CARVER	KELTON DEAN	ADAMS	F4011
CARVER	KEVIN CURTIS	ANDERSON	F4012
CARVER	MARY JO	BECK	F1881
CARVER	NICOLE RENEA	BOWMAN	F4013
CARVER	VERONA AMELIA	EDELSTEIN	F4015
CARVER	BETTY MAE	FREDRICKSEN	F4017
CARVER	JACQUELINE LEE	GAUER	F4019
CARVER	ANN	NIELSEN	F4028
CARVER	JASON LEE	OKRZYNSKI	F4029
CARVER	BARBARA ANN	REETZ	F4031
CARVER	AUSTIN TIMOTHY	SCHMITT	C615
CARVER	DAVID WARREN	SIME	F4033
CARVER	GRETCHEN K	SIME	F4034
CARVER	GARY LEE	SLATER	F4035
CARVER	CARI ANN	STURGIS	C613
CARVER	BRYAN MATHEW	WACHTER	F4038
CARVER	LAURA S	WOODS	C363
CARVER	DUANE EDWIN	YOUNG	C615
CASS	KATHY	GOFF	C615
CASS	CHARLAINE	PERKL	C569
CASS	DONALD	PERKL	C569
CASS	SHIRLEY	VANDYCK	Second Nauen SJ Order
CLAY	LINDA	HILLER	C615
CLAY	RONALD	HILLER	C615
CLAY	LUCAS	HULNE	C615
CLAY	ARLOS	MATTSON	C615
CLAY	EVANGELINE	MORSE	C626
CLAY	PAIGE	OLMSTEAD	F4195
CLAY	JONI	SMITH	C615
CROW WING	DOUGLAS	STANGE	Order Granting in Part and Denying in Part Petitioners' Motion for Summary Judgment, Feb. 10, 2009, *In re Peterson*, A09-65 (hereinafter "First Nauen SJ Order")
DAKOTA	FREDRICK	AMARA	F4196
DAKOTA	DANE P	ANDERSON	F4197

DAKOTA	LOIS R	ANDERSON	F4199
DAKOTA	SARA	BANKS	C615
51DAKOTA	JENNIFER	BARTHOLOMAY	First Nauen SJ Order
DAKOTA	ARVID	BLACKBIRD	Second Nauen SJ Order
DAKOTA	AMANDA RUTH	BLACKWELL	F4201
DAKOTA	JOSEPH	DABAT	C400
DAKOTA	SHUGURIA	DAHIR	F1782
DAKOTA	CAROLINE	DAHMS	C400
DAKOTA	JIM	DIEBOLD	C613
DAKOTA	LAURENCE	ENGEBRETSON	Second Nauen SJ Order
DAKOTA	KIM	FALDE	First Nauen SJ Order
DAKOTA	DAVID S.	FORBES	C400
DAKOTA	RACHEL SHAKUWA	FRANCOIS	F4203
DAKOTA	MARICRIS STEPHANIE	GAVINO	F1785
DAKOTA	SHIRLEY	GLENN	C400
DAKOTA	CAITLIN	HEINZ	Second Nauen SJ Order
DAKOTA	MARIA T	HIGHT	C400
DAKOTA	ANNA	HOLLEY	C400
DAKOTA	JEFFREY	HYDE	F4207
DAKOTA	KATIE LEE	KASZYNSKI	Order Granting Petitioners' Second Renewed Motion for Summary Judgment (hereinafter "Third Nauen SJ Order"), Mar. 31, 2009, *In re Peterson*, A09-65
DAKOTA	ANNA	KOEHLER	C294
DAKOTA	MARY	KOENIGSBERGER	Nauen SJ or F1807
DAKOTA	MARTIN ROBERT	KUEHNE	F4210
DAKOTA	MONEM	MEZIOU	F4212
DAKOTA	KRISTI	MOLER	F4214
DAKOTA	EMILY ELIZABETH	PATTON	F4217
DAKOTA	LEONA	QUINLAN	First Nauen SJ Order
DAKOTA	THOMAS	QUINLAN	First Nauen SJ Order
DAKOTA	CHARLES	QUINN	First Nauen SJ Order
DAKOTA	GERALD	RATZLAFF	First Nauen SJ Order
DAKOTA	JOAN	RATZLAFF	First Nauen SJ Order
DAKOTA	ANTHONY	RAUSCH	F4219
DAKOTA	BENJAMIN	RISLOV	F4221

DAKOTA	LAURA J	ROBISON	F1791
DAKOTA	MIJANOU	SAMPERS	C240
DAKOTA	ANNE	SMITH	F4223
DAKOTA	YANA	SOROKIN	F1795
DAKOTA	CHRISTOPHER ADAM	SOTOLONGO	C614
DAKOTA	REBECCA	SPARTZ	F4224
DAKOTA	MATTHEW	STOCKMAN	F4225
DAKOTA	SHERI	TILLEY	C400
DAKOTA	JORDAN	TRAUB	Order Granting in Part and Denying in Part Contestee's Conditional Motions for Partial Summary Judgment (hereinafter "Contestee's SJ Order"), Feb. 23, 2009
DAKOTA	MARY	WASHINGTON	Contestee's SJ Order
FARIBAULT	CARRIE	WALDER	F4051
FILMORE	ELIZABETH	FERRIER	C626
FREEBORN	DONNA	BALL	C626
FREEBORN	EDITH	CYSCZON	C626
FREEBORN	LEONA	RYSTROM	C614
FREEBORN	CHARLES	WILSON	F4052
FREEBORN	VALERIE	WILSON	F4053
GOODHUE	JOHN	ALBERT	F4227
GOODHUE	BRUCE	BEHRENS	Contestee's SJ Order
HENNEPIN-BLOOMINGTON	PHYLLIS	EBERT	F4125
HENNEPIN-BLOOMINGTON	SHARON	JOHNSON	C615
HENNEPIN-BLOOMINGTON	REBEKAH	NELSON	First Nauen SJ Order
HENNEPIN-BLOOMINGTON	GORDON	NYGREN	Contestee's SJ Order
HENNEPIN-BLOOMINGTON	LANCE	SEEMAN	C549
HENNEPIN-BLOOMINGTON	BEULAH	YANEY	F1938
HENNEPIN-BROOKLYN CENTER	JOHN	LARSON	F4245
HENNEPIN-BROOKLYN PARK	BELINDA	DAVIS	F4247
HENNEPIN-CHAMPLIN	JACK E	LARSEN	F4041

HENNEPIN-CHAMPLIN	AMANDA	MARTIN	F4042
HENNEPIN-CRYSTAL	HILARIA	JOST	F4046
HENNEPIN-CRYSTAL	SEAN	QUINLAN	F4047
HENNEPIN-CRYSTAL	DORIS	WHITE	F4048
HENNEPIN-DEEPHAVEN	CHARLES E.	MORGAN	C615
HENNEPIN-DEEPHAVEN	JOSE E.	MUNIZ	C615
HENNEPIN-DEEPHAVEN	JANE	REIMER-MORGAN	C615
HENNEPIN-EDEN PRAIRIE	CHARLES W.	GARDNER	F4049
HENNEPIN-EDEN PRAIRIE	PATRICK G.	MOONEY	F1971
HENNEPIN-EDEN PRAIRIE	ALEX K.	ORCUTT	F4050
HENNEPIN-EDINA	TIMOTHY J	BAER	C563
HENNEPIN-EDINA	CLAUDIA	BERNSTEN	C563
HENNEPIN-EDINA	BRIAN	CEPEK	C563
HENNEPIN-EDINA	AUDREY K	COHEN	C615
HENNEPIN-EDINA	LAUREN	DENSINGER	F4131
HENNEPIN-EDINA	DAVID	DUCKLER	F4267
HENNEPIN-EDINA	DONALD	GLEASON	Contestee's SJ Order
HENNEPIN-EDINA	EMMA M	HIDEM	F4133
HENNEPIN-EDINA	ROSEMARY	JAMES	F4134
HENNEPIN-EDINA	NATHAN T	KROSSCHELL	C615
HENNEPIN-EDINA	CYNTHIA	SHAPIRO	F4269
HENNEPIN-EDINA	NICHOLE	SPELL	C615
HENNEPIN-EDINA	MADELINE M	STARK	C615
HENNEPIN-EDINA	JENNIFER	TAFT	C615
HENNEPIN-EDINA	AMANDA C	WEBER	C615

HENNEPIN-GOLDEN VALLEY	MARGARET	COHEN	C615
HENNEPIN-GOLDEN VALLEY	LAUREN	SCHNECK	F4055
HENNEPIN-MAPLE GROVE	SHARI	ABRAMOVICH	F4056
HENNEPIN-MAPLE GROVE	KOURTNEY	DROPPS	Third Nauen SJ Order
HENNEPIN-MAPLE GROVE	SHERYL	ELLIOT	F4060
HENNEPIN-MAPLE GROVE	BENJAMIN	HARTLEY	C615
HENNEPIN-MAPLE GROVE	DAVID	KELLY	C615
HENNEPIN-MAPLE GROVE	GREG	MCCOOL A.K.A. MCCURL	First Nauen SJ Order
HENNEPIN-MAPLE GROVE	NEAL	ROOTES	F4060
HENNEPIN-MAPLE GROVE	HEATHER	SCHULTZ	C615
HENNEPIN-MAPLE GROVE	JEANETTE	STENSON	F4063
HENNEPIN-MAPLE GROVE	KENT	VANROEKEL	C615
HENNEPIN-MEDINA	JEFFREY	SETTLES	F4070
HENNEPIN-MINNEAPOLIS	BETTY R	BAKER	F4141
HENNEPIN-MINNEAPOLIS	JORDAN	BRANDT	First Nauen SJ Order
HENNEPIN-MINNEAPOLIS	NOEL	COLLIER-NIX	F4147
HENNEPIN-MINNEAPOLIS	TIPHANIE	COPELAND	F4148
HENNEPIN-MINNEAPOLIS	TYRON D	FULLER	F4155
HENNEPIN-MINNEAPOLIS	SHARON JEAN	KRUCKEBERG	F4161
HENNEPIN-MINNEAPOLIS	JOHN	KRYST	F4162
HENNEPIN-MINNEAPOLIS	ANDREW	LAROSE	F4163
HENNEPIN-MINNEAPOLIS	PAMELA NELSON	LITMAN	F4166
HENNEPIN-MINNEAPOLIS	CHAD	OLSON	F4169
HENNEPIN-MINNEAPOLIS	PATRICIA	PANAGOS	F4171
HENNEPIN-MINNEAPOLIS	TODD	TONER	Second Nauen SJ Order

HENNEPIN-MINNETONKA	JOHN	SULLIVAN-FEDOCK	Contestee's SJ Order
HENNEPIN-NEW HOPE	KARI	TORGERSON	F4067
HENNEPIN-PLYMOUTH	CHARLES	ACHTERKIRCH	C365
HENNEPIN-PLYMOUTH	KEVIN	ALEXON JR.	C365
HENNEPIN-PLYMOUTH	BARBARA	BENESH	C365
HENNEPIN-PLYMOUTH	ELLA	BJORKMAN	C365
HENNEPIN-PLYMOUTH	STEPHEN	BOSS	F4080
HENNEPIN-PLYMOUTH	TANIA	CLAVER	F4081
HENNEPIN-PLYMOUTH	PETER	DEMUTH	C285
HENNEPIN-PLYMOUTH	RUTH ANN	DRESSEL	Contestee's SJ Order
HENNEPIN-PLYMOUTH	JOESEPH	DUBOIS	F4082
HENNEPIN-PLYMOUTH	DENNIS	ERICKSON	SJ.
HENNEPIN-PLYMOUTH	ANITA	FUNDINGSLAND	C365
HENNEPIN-PLYMOUTH	JANICE	HAUGEN	C365
HENNEPIN-PLYMOUTH	HELLEN	KLEINFEHN	C365
HENNEPIN-PLYMOUTH	JOHN	MELCHISEDECH	F4118
HENNEPIN-PLYMOUTH	AGNES L.	MORGAN	F4086
HENNEPIN-PLYMOUTH	KATHRYN	MURPHY	F4087
HENNEPIN-PLYMOUTH	MARY	NELSON	F4088
HENNEPIN-PLYMOUTH	NICHOLE	PARRISH	F4090
HENNEPIN-PLYMOUTH	CARLY	QUARBERG	F4277
HENNEPIN-PLYMOUTH	CRAIG	STRONG	F4092
HENNEPIN-PLYMOUTH	JEFFREY	SWARTZ	F1865
HENNEPIN-PLYMOUTH	JOHN W.	VOGELGESANG	F4093
HENNEPIN-PLYMOUTH	ERVIN	ZINTER	C365
HENNEPIN-RICHFIELD	KATHLEEN	AWES	F4252

HENNEPIN-ROBBINSDALE	PATRICIA I	BURNS	C615
HENNEPIN-ROBBINSDALE	VICTORIA LEE	DENBLEYKER	C615
HENNEPIN-ROBBINSDALE	GARY	KISSELL	C615
HENNEPIN-ROBBINSDALE	JUDITH	OSTERMAN	F4257
HENNEPIN-ROBBINSDALE	MARIE	PUTNAM	F4258
HENNEPIN-ROBBINSDALE	ANTHONY	SEELEY	F4269
HENNEPIN-ROBBINSDALE	RACHAEL	SEELEY	F4261
HENNEPIN-ST LOUIS PARK	MICHELE	LARSON	Contestee's SJ Order
HENNEPIN-ST LOUIS PARK	KAREN	ROBITZ	First Nauen SJ Order
HENNEPIN-WAYZATA	SUSAN	ENGEBRETSON	C615
HENNEPIN-WAYZATA	VINCENT	HANSON JR	C615
HENNEPIN-WAYZATA	WILLIAM	HODENA	F4117
HENNEPIN-WAYZATA	JULIA	LEATH BROOK	C615
HENNEPIN-WAYZATA	EDNA	OELKERS	C615
ITASCA	MOLLY	RITTER	Contestee's SJ Order
KANDIYOHI	JESSUP	SCHIKS	F4069
KITTSON	DEBRA KAY	ERICKSON	First Nauen SJ Order
KOOCHICHING	DUANE	CARLSON	C626
LAC QUI PARLE	CHRISTOPHER	LUDVIGSON	First Nauen SJ Order
LAC QUI PARLE	HUBERT	REDEPENNING	First Nauen SJ Order
LAC QUI PARLE	CHRISTOPHER	SCHACHERER	F4231
LAC QUI PARLE	TRAVIS	SCHACHERER	F4233
LAKE	EILA	NELSON	Second Nauen SJ Order
LE SUEUR	ROBERT LAWRENCE	DVORAK	C614
MCLEOD	MAXWELL	BLOM	C591
MORRISON	REBECCA	HARAKEL	C615
MOWER	JOHN	ANKER	F4237
MOWER	FRANCES	HEINS	C614
MOWER	GAYLE	SPURGEON	F4271
NICOLLET	MICHAEL	GEORGE	C614

NICOLLET	KANDACE	SCHUFT	C614
NOBLES	KHAMPIANE	KEOPHIMPHONE	F4179
OLMSTED	BENJAMIN	BARNA	C615
OLMSTED	ANNABELLE WOODS	BENIKE	C1123
OLMSTED	KEVIN PATRICK	CROAL	F4073
OLMSTED	STEPHEN	DIESER	C1124
OLMSTED	RICHARD	HAEFNER	First Nauen SJ Order
OLMSTED	SAMUEL STEVEN	HAGEDORN	F4075
OLMSTED	DANA	HENDERSON	C1126
OLMSTED	EDWARD LAWRENCE	KURTZ	C1127
OLMSTED	MARGARET	LLOYD	F4076
OLMSTED	PAUL	MACKEY	C614
OLMSTED	THOMAS	MAHER	C1129
OLMSTED	ABDALLA	MURSAL	F4315
OLMSTED	KEVIN WILLIAM	PATTON	C1130
OLMSTED	DARLENE	RICHARDSON	F4078
OLMSTED	JENNIFER	SCHATTNER	C615
OLMSTED	THOMAS GARRETSON	SMITH	C615
OLMSTED	MELANEE	UPTON	C615
OTTER TAIL	JAMES	GILBERT	C626
OTTER TAIL	CATHERINE	KEETON	C626
PINE	JUDITH	CONLOW	Second Nauen SJ Order
PINE	SHANNON CORY	OSLIN	F1751
RAMSEY	GERALD	ANDERSON	C236
RAMSEY	ALEXANDER	BEDNAR	F2058
RAMSEY	CATHERINE	BRIGHAM	F44
RAMSEY	EMMA	BRUGGEMAN	Second Nauen SJ Order
RAMSEY	PATRICIA ANN	CARLSON	F1655
RAMSEY	DRU	DONOVAN	F1661
RAMSEY	MILDRED	FEYEREISN	F2207
RAMSEY	JOSEPHINE	GARCIA	Second Nauen SJ Order
RAMSEY	THOMAS	GELBMANN	F2209
RAMSEY	SOPHIA	HALL	Second Nauen SJ Order
RAMSEY	ZELDA LOTMAN	JANUS	F2213
RAMSEY	JYOTI MAHESH	JEERAGE	F2084

RAMSEY	GEORGE	JENKS	F1658
RAMSEY	JAVORKA	JOVICIC	F1659
RAMSEY	MILORAD	JOVICIC	F1660
RAMSEY	KRISTEN	KEGAN	F1662
RAMSEY	MICHAEL WILLIAM	KIENLEY	F1663
RAMSEY	TAMRA LYNN	KNIGHT	F2215
RAMSEY	NELL	KROMHOUT	F1664
RAMSEY	HEATHER	LEMAY	F1665
RAMSEY	PERNILLA	LEMBKE	F2216
RAMSEY	MICHAEL D.	LIEBIG	F1695
RAMSEY	AVERY	LUND	F2095
RAMSEY	DOUGLAS SCOTT	MELBY	C626
RAMSEY	PAMELA	MEYER	F1714
RAMSEY	TEMPEST	MOORE	Third Nauen SJ Order
RAMSEY	NICOLE A.	NICHOLS	F2069
RAMSEY	MATTHEW	NOBLE-OLSON	F2314
RAMSEY	LORRAIN	PADDEN	F4284
RAMSEY	CHRISTINE	PAULU	F2243
RAMSEY	ROBERT	PISH	F4283
RAMSEY	JOHN	REDMOND	F56
RAMSEY	ANNIE	RIEMER	F1694
RAMSEY	JOHN A.	ROBERTUS	F55
RAMSEY	SALLY	SCHAFFER	F2098
RAMSEY	DONALD	SIMMONS	F2232
RAMSEY	TASHA	TERRY	F2236
RAMSEY	WALTER	THOMPSON	First Nauen SJ Order
RAMSEY	MOLLY	VINEYARD-WILLIAMSON	F2245
RAMSEY	THOMAS	WEAVER	F2237
RICE	LISA A	BUSCH	C626
RICE	JASON A	KADERLIK	C626
RICE	NORMAN JEREMY	WALLENE	C626
SAINT LOUIS	MARIAN	ARRAS	F2251
SAINT LOUIS	JAY	BAKER	F2253
SAINT LOUIS	MARY	BELL	First Nauen SJ Order
SAINT LOUIS	BARBARA	BISCHOFF	F2254

SAINT LOUIS	DONNA	CAMPANELLA	F2255
SAINT LOUIS	DOROTHY	DOUGLAS	F2256
SAINT LOUIS	KENNETH	ENSELE	F2257
SAINT LOUIS	AMANDA	FEIRO	F2258
SAINT LOUIS	SUSAN	FRYBERGER	F2259
SAINT LOUIS	CHARLES	GRAUE	C614
SAINT LOUIS	SARAH	GROSS	F2260
SAINT LOUIS	DOROTHY	HALVORSON	F2261
SAINT LOUIS	LAUREN	HENDRICKS	F2262
SAINT LOUIS	JOAN	HUGHES	F2263
SAINT LOUIS	LEAN	IVERSON	F2264
SAINT LOUIS	DENIELLE LYNN	JOHNSON	F2048
SAINT LOUIS	JONATHAN MICHAEL	JOHNSON	F2048
SAINT LOUIS	LOREN	JOHNSON	F2265
SAINT LOUIS	SARAH	KNUTIE	F2266
SAINT LOUIS	CLAUDE	KOSBAB	F2267
SAINT LOUIS	DENNIS	KOTTKE	F2289
SAINT LOUIS	HELEN	KRAMPOTICH	F2048
SAINT LOUIS	STEPHANIE	KRIEG	F2268
SAINT LOUIS	ELLEN M	LAFAVE	F2124
SAINT LOUIS	GUILFORD	LEWIS	F2269
SAINT LOUIS	LORAINE	LOTT	F2270
SAINT LOUIS	GERALD	MARKEY	F2271
SAINT LOUIS	PATRICK	MCENANEY	F2272
SAINT LOUIS	LANCE	MEYER	F2273
SAINT LOUIS	GLADYS	NELSON	Test'y of Cox, Mar. 5, 2009 at 243
SAINT LOUIS	MARY	NORDIN	F2281
SAINT LOUIS	CASSANDRA	SAARI	F2276
SAINT LOUIS	PHYLLIS	SANDERSON	F2277
SAINT LOUIS	ANDREW	SCHEIDEL	F2278
SAINT LOUIS	JUNE	SROK	F2279
SAINT LOUIS	BRETT	UDESEN	C626
SAINT LOUIS	KRISTEN	WICKLUND	F2290
SAINT LOUIS	JOANNE	WOODS	F2280
SCOTT	MARY JO	MORRIS	C615

SCOTT	LAURA	NORRIS	F1894
SCOTT	DEAN	SENGSTOCK	F1894
SCOTT	OLIVIA	WEE	C615
SHERBURNE	KEVIN MATHEW	HENDRICKSON	C238
SHERBURNE	MARK JOSEPH	KLEIN	F4105
SHERBURNE	PATRICK FRANCIS	OLBERDING	F1605
SHERBURNE	PHILLIP HENRY	SEMMER	F4107
SHERBURNE	BRIAN JOSEPH	ZIEGLER	C580
SIBLEY	CHAD M.	ELLINGSON	C614
SIBLEY	LEE	EUSTIS	F4109
STEARNS	ASHLEY	ZARTNER	F4187
STEARNS	DARLENE	HOMMERDING	F1902
STEARNS	UTLEY	KRONENBERG	F4181
STEARNS	EUGENE	MARKMAN	C239
STEARNS	JANELLE	SCHMIT	F4185
STEARNS	LORA	WEST	Second Nauen SJ Order
STEELE	LINDSAY	THIES	Contestee's SJ Order
WABASHA	ANNA	WEICK	F4242
WABASHA	KATHLEEN	WETTERSTROM	F4317
WASHINGTON	ROSS	GRANDLIENARD	First Nauen SJ Order
WASHINGTON	GORDON RUSSELL	HOFFMANN	C615
WASHINGTON	GREGORY ALLEN	SAND	C615
WASHINGTON	BRYNN	WOLLAK	C615
WASHINGTON	DANIEL PAUL	ZEMKE	C615
WASHINGTON	JODI LEE MCKENZIE	ZEMKE	C615
WINONA	MATTHEW	ESSIG	C615
WINONA	RYAN	STOA	First Nauen SJ Order
WRIGHT	PAUL	BRUMMER	F4189
WRIGHT	ERIN	RICHARDSON	F1879
WRIGHT	CAITLIN	SCOTT	F4192
WRIGHT	JOEL	ULDRYCH	C614
WRIGHT	DENNIS	WOODWARD	F4194