No. A08-2206

State of Minnesota

In Supreme Court

Norm Coleman,

Petitioner,

vs.

The Minnesota State Canvassing Board, and Michelle DesJardin, Hennepin County Elections Manager, Cynthia Reichert, Minneapolis Elections Director, and Hennepin County Canvassing Board, individually and on behalf of all County and Local Election Officers and County Canvassing Boards,

Respondents,

and

Al Franken for Senate Committee and Al Franken,

Intervening Respondents.

ANSWER OF INTERVENING RESPONDENTS AL FRANKEN AND AL FRANKEN FOR SENATE COMMITTEE TO NORM COLEMAN'S PETITION FOR AN ORDER TO SHOW CAUSE PURSUANT TO MINN. STAT. § 204B.44

William Z. Pentelovitch (#85078)
Mary R. Vasaly (#152523)
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
Minneapolis, Minnesota 55402-4140
Telephone: 612.672.8200
Facsimile: 612.672.8397

Marc E. Elias (D.C. Bar # 442007)
Kevin J. Hamilton (WSBA # 15648)
Perkins Coie LLP
607 Fourteenth Street, NW, Suite 800
Washington, DC 20005-2011
Telephone: 202.628.6600
Of Counsel

David L. Lillehaug (#63186)
Steven Z. Kaplan (#53739)
Fredrikson & Byron, P.A.
200 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: 612.492.7000
Facsimile: 612.492.7077
Counsel for Al Franken for Senate Committee and Al Franken

For their Answer to Norm Coleman's Petition for an Order to Show Cause Pursuant to Minn. Stat. § 204B.44, Intervening Respondents Al Franken and Al Franken for Senate Committee (the "Franken Parties") state and allege as follows:

Petitioner's Paragraph 1: On December 18, 2008, this Court concluded that "[t]he legislature has created processes for correction by county canvassing boards of 'obvious errors in the counting and recording of the votes.'" (Slip Op. at 2). Where there are more votes than voters, an obvious error has occurred. As this Court noted, correction of such errors "should not be required to await an election contest in district court." *Id.* (citing *Andersen v. Donovan*, 119 N.W.2d 1 (1962); Minn. Stat. § 204B.44).

Franken Parties' Response: The allegation that more votes than voters creates an obvious error depends on the facts and circumstances and on the legal definition of "obvious." Otherwise admitted.

Petitioner's Paragraph 2: This action is necessary to redress errors and omissions made by the Minnesota State Canvassing Board ("Board") on December 19, 2008 related to the inaccurate counting of defective ballots during the recount of the election for United States Senator from the State of Minnesota ("Recount"), so that original ballots and duplicate ballots representing the same voter were both counted. As a result of denying candidate challenges to these ballots, the Board will certify an inaccurate vote in contravention of its duties under Minn. Stat. § 204C.33, subd. 3. The Board's overruling of these challenges will result in double-counting of votes because both unmarked duplicate ballots, which were counted on election night ("Unmarked Duplicates") and marked original ballots, which were located in envelopes containing original ballots for which duplicates were made by local election officials on election night but for which duplicates were not found during the Recount (the "Non-Matching Original Ballots"), will be counted.

Franken Parties' Response: Denied. There is no evidence that the State Canvassing Board's certification will include double counting votes, because there is no evidence to support the allegation that duplicates were included in the Recount where original ballots were counted. Petitioner assumes without evidence that duplicates were made in conformity with Minn. Stat. § 206.86 subd. 5, and also that such duplicates were both improperly labeled in violation of that same statute and included with the other ballots in every case in

which there were more Non-Matching Original Ballots. Petitioner has no evidentiary basis for those assumptions and in fact the record developed before the Minnesota Canvassing Board is inconsistent with them.

Petitioner's Paragraph 3: If the Non-Matching Original Ballots are included in the vote totals certified by the Board for the precincts in which the Non-Matching Original Ballots originated, the number of votes certified by the Board in such precincts will exceed the number of persons voting in these precincts on election night (either in-person or by absentee). Such double-counting will violate the principle of "one person, one vote" and will result in vote dilution, and hence, disenfranchisement, of persons whose votes were counted only once on Election Day. In addition, there is a very real possibility that the Board would "declare the loser to have won the election," and thus shifted the burden of proof during an election contest. *See Andersen,* 119 N.W.2d at 11.

Franken Parties' Response: The Franken Parties deny that the inclusion of Non-Matching Original Ballots will result in more votes certified by the Board in such precincts than the number of persons voting in these precincts on election night. Petitioner has in fact submitted no evidence regarding the number of persons who voted on election night in any precinct. Petitioner has only presented evidence regarding the number of ballots counted on election night (as recorded by the machine tapes) and the number of votes counted in the United States Senate race. Originals for which no duplicates were made would not have been included in either of these figures; for that reason an increase in the Recount vote totals over those figures is not an indication that double counting has taken place.

Petitioner's Paragraph 4: This Court must intervene, pursuant to Minn. Stat. § 204B.44, because the Board has committed and certain county canvassing boards have committed a "wrongful act" by improperly double-counting votes during the Recount. Because this is an issue that involves the proper tabulation of votes, it is a matter for the Board and/or the county canvassing boards to resolve, and should not await a contest. The Board and the county canvassing boards must simply follow Minnesota law, which states that in these circumstances only duplicate ballots should be counted.

Franken Parties' Response: The Franken Parties deny the allegation that the Board and county canvassing boards have committed a "wrongful act" by improperly double counting votes, for the reasons explained in the foregoing Response to ¶ 3. The Franken Parties also deny that Minnesota law states that only duplicate ballots should be counted in a hand recount under Minn. Stat. § 204C.35, as such a construction of law would make it impossible to consider either the voter's intent or any distinguishing marks placed on the original ballot by the voter, as required by Minn. Stat. § 204C.22.

PARTIES

Petitioner's Paragraph 5: Norm Coleman is a Minnesota resident and United States Senator from the State of Minnesota. Senator Coleman is a registered Minnesota voter who voted in the election and is one of the candidates in the election for office of U.S. Senator.

Franken Parties' Response: Admitted.

Petitioner's Paragraph 6: Respondent the Minnesota State Canvassing Board is comprised of Minnesota Secretary of State Mark Ritchie, the Honorable Eric J. Magnuson, Chief Justice of the Minnesota Supreme Court, the Honorable G. Barry Anderson, Associate Justice of the Minnesota Supreme Court, the Honorable Kathleen R. Gearin, Chief Judge of the Second Judicial District, and the Honorable Edward J. Cleary, Assistant Chief Judge of the Second Judicial District. The Board is charged with overseeing the statewide administrative Recount in the election for the office of United States Senator.

Franken Parties' Response: Admitted.

Petitioner's Paragraph 7: Hennepin County is a political subdivision of the State of Minnesota. Michelle DesJardin is the Hennepin County Elections Manager and is the principal officer charged with duties relating to elections in Hennepin County. Cynthia Reichert is the Director of Elections for Minneapolis. Hennepin County, Ms. DesJardin, and Ms. Reichert are nominal respondents and represent all county and local election officials, including county canvassing boards, in each of Minnesota's 87 counties.

Franken Parties' Response: Deny that it is proper to name "nominal respondents" and deny that the named respondents, as a matter of fact and law, represent all county and local election officials. Otherwise admitted.

FACTUAL BACKGROUND

Petitioner's Paragraph 8: On November 4, 2008, the State of Minnesota conducted an election for the office of United States Senator (the "General Election"). On November 18, 2008, the Board met and directed the Minnesota Secretary of State under Minn. Stat. § 204C.35 to oversee an administrative manual Recount of all votes cast for the office of United States Senator from Minnesota. Representatives from the Norm Coleman Campaign and the Al Franken Campaign participated in the Recount.

Franken Parties' Response: Admitted.

Petitioner's Paragraph 9: During the Recount, Recount Officials, comprised of local election officials, prepared "incident logs" relative to approximately 600 separate incidents that occurred during the Recount, including approximately 150 different instances involving questions or problems with duplicate and original ballots (with each incident involving at least one and up to more than twenty separate ballots). *See* Affidavit of Amy S. Walstien, ¶ 7.

Franken Parties' Response: The Franken Parties are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 or the Affidavit of Amy S. Walstien, and therefore deny the same and put Petitioner to his strict proof thereof.

Petitioner's Paragraph 10: Specifically, several precincts throughout the state had Non-Matching Original Ballots, which if included in the Recount total would produce more ballots counted than voters who had voted according to the election night tapes. Some examples include:

> In Minneapolis Ward 8, Precinct 7, the inability to find marked duplicates for eleven originals caused the Recount total (including challenged ballots) to *exceed* the election-night totals by eleven votes. The Recount Official's incident log for this precinct stated, "would have matched election day tape if [Original Ballots] left in envelope." Walstien Aff. Ex. 1 at 3.
>
> In Minneapolis Ward 9, Precinct 2, the inability to find marked duplicates for six originals caused the Recount total (including challenged ballots) to exceed the election-night totals by six votes. The Recount Official's incident log for this precinct stated, "count up by 6 [over election night]." *Id.* at 4.
>
> In St. Louis County, Cedar Valley, the inability to find a marked duplicate for a "proof" ballot caused the following incident log: "Proof

> ballot discovered in with machine ballots". The proof ballot found contained the indication "transcribed to official ballot"; meaning that counting the proof ballot would result in exceeding the election night total by one and double-counting. *Id.* at 6; Ex. 2.

The precincts which had Non-Matching Original Ballots over the election night tapes are listed in Walstien Aff. Ex. 1.

Franken Parties' Response: Denied. The election night machine tapes do not provide evidence of the number of "voters who had voted"; they provide evidence only of the number of ballots counted by the machines, which is not the same thing. Original ballots that were not duplicated would not have been included in these figures. Moreover, with respect to Minneapolis Ward 8, Precinct 7, a later search in fact discovered twelve uncounted ballots, eleven of which were identified as the duplicate ballots matching the eleven original ballots challenged by Petitioner. *See* Lillehaug Aff. ¶¶ 3-8. Thus, counting the eleven originals certainly did not result in double counting as alleged by Petitioner; instead, it ensured that these voters' votes were properly counted once and only once. Thus, Minneapolis Ward 8, Precinct 7 is a precinct where the ballots counted during the Recount exceed the number counted by machine on Election Night, for reasons other than Non-Matching Original Ballots.

With respect to Minneapolis Ward 9, Precinct 2, the six ballots of which Petitioner has included copies are not labeled "Original" and have no serial number as required by Minn. Stat. § 206.86, subd. 5. Under these circumstances there is no reason to believe, and there is no evidence to indicate, that they were ever in fact duplicated.

With respect to St. Louis County, Cedar Valley, although Petitioner quotes from the incident report describing a duplicated "proof" ballot, and includes the incident in his

Exhibit 6, Petitioner has neglected to include the last line of the incident report, which states: "Ballot was not included in recount totals." Thus, it appears that the one ballot that was properly duplicated was not included in the Recount. The same incident report also noted that the other proof ballots "contained no indications that they were properly duplicated" and "none of the other ballots for this precinct contained any indicia that the ballots constituted the statutorily required duplicate ballots." Thus, Petitioner's own proffered evidence indicates that duplicates were never made of these ballots, and to refuse to count the unduplicated proof ballots now—ballots challenged by Petitioner—would be to disenfranchise those voters entirely, a "cure" far worse than the dubious "disease."

Petitioner's Paragraph 11: In Hennepin County, where a large number of Non-Matching Original Ballots were found during the Recount, Cynthia Reichert, Minneapolis Director of Elections, explained to campaign representatives that in her opinion, at times on Election Day, a duplicate had been made without the placement of "DUPLICATE" at the top, as required by state law. Affidavit of Pat Shortridge, ¶ 2. For example, in referring to original ballots from Minneapolis Ward 7, Precinct 7 for which marked duplicates could not be found during the Recount, Ms. Reichert said of the duplicates: "I bet they were done and didn't get marked." *Id.* Gary Mazzota, an election judge that worked at Ward 7, Precinct 7 on Election Day also told campaign representatives that local election officials made duplicate ballots, but did not mark all of them with the word "Duplicate." *Id.* Ms. Reichert has since told the press that it appears election judges working late into the night at the end of a long day made mistakes and failed to properly create and mark duplicate ballots. *See* Walstien Aff. Ex. 8. Ms. Reichert has further stated: "I agree that there is a big issue here [as a result of the Unmarked Duplicates]," and "I know [the improper creation of duplicate ballots] happened in several precincts." *Id.*

Franken Parties' Response: Denied. The Franken Parties object to the hearsay testimony included in the Affidavit of Pat Shortridge to prove the truth of the matter asserted. Moreover, even if such hearsay could be considered, that hearsay does not support the conclusion that duplicate ballots were made, improperly labeled, and included in the ballots counted during the Recount. Indeed, it is equally likely that the failure "to properly

create and mark duplicate ballots," as Petitioner describes it, was a failure to make them at all, or a failure to include them with the other ballots after they were cast.

Petitioner's Paragraph 12: During the Recount, Recount Officials in Minneapolis permitted representatives from the campaigns to challenge original ballots if the matching duplicate could not be found. Similarly, Recount Officials permitted representatives from the campaigns to challenge duplicate ballots if no matching original ballot could be found. On information and belief, a similar procedure was followed in at least some other counties. Shortridge Aff. ¶ 3.

Franken Parties' Response: The Franken Parties admit that campaigns were permitted to challenge original ballots in Minneapolis, but deny that the procedure was followed in all counties. In other counties, challenges based on the existence of Non-Matching Original Ballots were rejected by local election officials. *See* Lavigne Aff. ¶ 4. Thus, the Franken Parties were not permitted to preserve their rights as to this issue and as a result, any remedy that relies on upholding challenges to Non-Matching Original Ballots will unfairly prejudice the Franken Parties and deny them the benefit of the bargain they made with Petitioner and the Secretary of State regarding how original and duplicate ballots were to be handled during the Recount.

Petitioner's Paragraph 13: In some cases where the number of original ballots did not match the number of duplicate ballots for a given precinct, Recount Officials completed an incident report. In other cases, Recount Officials did not complete an incident report. Shortridge Aff. ¶ 4.

Franken Parties' Response: Admitted.

Petitioner's Paragraph 14: The incident logs indicate that, if the Non-Matching Original Ballots are included in the Recount totals, the Recount totals will include more ballots than the number of persons voting in these precincts on Election Day (either in-person or by absentee). *See* Walstien Aff. ¶ 4.

Franken Parties' Response: Denied. Petitioners put forth no evidence regarding the number of persons voting in these precincts. Petitioner only includes evidence

regarding the number of ballots counted on Election Night (via the machine tapes) and the number of votes counted for United States Senate on Election Night. *Neither* of these totals would include originals for which no duplicates were made. Indeed, the incident logs cited by Petitioner contain evidence that some originals were not duplicated at all, contradicting Petitioner's central thesis. *See* Petitioner's Exhibit 4, p. 8.

Petitioner's Paragraph 15: Double-counting will occur because, on information and belief, contrary to Minn. Stat. § 206.86, subd. 5, local election officials created duplicate ballots for the Non-Matching Original Ballots on Election Day, but failed to mark these duplicates "DUPLICATES." The Unmarked Duplicates were, as required by Minnesota law, then run through the voting machines on Election Day, while the Non-Matching Original Ballots were placed in a separate envelope containing originals for which duplicates were made. Problems arise when the Unmarked Duplicates are fed into the machine with all the other counted ballots. This happened in numerous instances so that during the Recount, if the Unmarked Duplicates and the Non-Matching Original Ballots are all counted (as happened here), the total ballots counted during the Recount will exceed the number of persons who voted in those precincts on Election Day.

Franken Parties' Response: Denied. There is no supporting evidence for Petitioner's allegation. Indeed, Petitioner's "information and belief" is contradicted by his proffered evidence, which concludes that no duplicates were ever made of some originals, such as in Cedar Valley and Gnesen precincts. *See* Petitioner's Exhibit 4, p. 8, 10.

Petitioner's Paragraph 16: This double-counting is evidenced by comparing the total number of ballots counted in the Recount (including the Non-Matching Original Ballots), as reflected in the Recount Summary Statements with the number of votes cast on election night as recorded by the electronic voting machines (the "Machine Tapes"). See Walstien Aff. ¶ 7; Exs. 3, 5.

Franken Parties' Response: Denied. In fact, the difference between the number of ballots counted in the Recount and the machine tape totals is equally consistent with the theory that no duplicates were ever made of Non-Matching Original Ballots.

Petitioner's Paragraph 17: After completion of the Recount, a number of challenged ballots were presented to the Board, including all of the Non-Matching Original Ballots, for

consideration of whether these challenges should be upheld. These challenged Non Matching Original Ballots were included in the county canvassing board's summary statements as "challenged ballots." Walstien Aff. ¶ 8.

Franken Parties' Response: Admitted.

Petitioner's Paragraph 18: On December 19, 2008, the Board reached consensus that it would overrule the candidates' challenges to the Non-Matching Original Ballots, thereby determining that the Non-Matching Original Ballots should be included in the Recount vote totals for the counties.

Franken Parties' Response: Admitted. The Board made this decision for sound reasons: (i) there was no way to determine whether duplicates had ever been made for these ballots and, thus, whether votes had in fact been double counted, in part because almost none of the duplicate ballots at issue were available for the Board's review, being stored at the counties and municipalities across the state; (ii) it was practically impossible to identify whether and/or in which counties numerical discrepancies existed because comparing the originals to the duplicates was never a part of the recount process; (iii) in many instances, challenges had not been permitted to be made to originals on the grounds of numerical discrepancy during the recount process and, accordingly, a change in procedure would result in treating the ballots differently in different counties; and (iv) the duplicate ballots themselves were not before the Board but stored sealed at precincts scattered across 87 counties and numerous municipalities, making retrieving them (much less engaging in the extraordinarily complex analysis of each precinct's returns and reconciliation) simply impossible as a practical mater. Ultimately, and for these reasons, the Board concluded that its proceedings were not the proper forum to resolve the issue.

Petitioner's Paragraph 19: During the Board's discussion of the issue, certain members concluded that they could not determine whether local election officials had committed an error in counting both Non-Matching Original Ballots and Unmarked

Duplicates. Some Board members also noted their concern that votes would be double-counted as a result of counting both the Non-Matching Original Ballots and Unmarked Duplicate Ballots. The Board nonetheless felt it was not in a position to evaluate the challenges.

Franken Parties' Response: Deny Petitioner's characterization of the Board discussion, and allege that the statements by Board members are themselves the evidence of their discussion. Those statements reflect that some members came to quite different conclusions, deciding that there was no evidence that double counting had occurred, that the evidence was equally consistent with other explanations and that any dispute on this issue was properly resolved in an election contest where evidence could be examined, witnesses could testify and facts could be found pursuant to judicial procedures.

APPLICABLE LAW

Petitioner's Paragraph 20: Minnesota law requires the accurate creation of duplicate ballots. It also requires counting only duplicate ballots while preserving (but not counting) original ballots. *See* Minn. Stat. § 206.86, subd. 5.

Franken Parties' Response: The Franken Parties deny this allegation to the extent it alleges that Minn. Stat. § 206.86, which applies only "[i]n precincts where an electronic voting system is used," is applicable in a manual recount under Minn. Stat. § 206.35. The remainder of the allegations in paragraph 20 are admitted.

Petitioner's Paragraph 21: Minn. Stat. § 206.86, entitled "Counting Electronic Voting System Results," provides the procedure for the election-night counting of votes where a precinct uses an electronic voting system. This statute should also govern the recount of ballots that were counted on election night using an electronic voting machine.

Franken Parties' Response: Denied. Minn. Stat. § 206.86 by its very terms only applies "[i]n precincts where an electronic voting system is used." Moreover, during a manual recount under Minn. Stat. § 204C.35, the ballots are examined for the intent of the

voter and for distinguishing marks placed by the voter. *See id.* § 204C.22. To exclude original ballots from this process would frustrate the intent of a manual recount.

Petitioner's Paragraph 22: Minn. Stat. § 206.86, subd. 5 provides an explicit procedure for creating and counting duplicate ballots in the event "a ballot card is damaged or defective so that *it cannot be counted properly by the automatic tabulating equipment.*" *Id.* (emphasis added).

Franken Parties' Response: Admitted.

Petitioner's Paragraph 23: Where a ballot card is damaged or defective and cannot be counted properly by the automatic tabulating equipment, a "true duplicate copy" of the damaged ballot "must be made" in the presence of two judges not of the same party and "must be substituted" for the damaged ballot card. *Id.*

Franken Parties' Response: Admitted.

Petitioner's Paragraph 24: The statutorily mandated procedure for creating duplicate ballots further requires that the duplicate ballots: (1) be clearly labeled "duplicate"; (2) indicate the precinct in which the corresponding damaged or defective ballot was cast; and (3) bear a serial number, which also must be identified on the original, defective ballot. *Id.* For purposes of the automated tabulation of votes, the duplicate ballots are counted in lieu of the damaged or defective ballot cards. *Id.* The original, defective ballots—which must bear a serial number corresponding to their duplicates—nonetheless must be retained so that the accuracy of the duplicate ballot made by election officials can be checked.

Franken Parties' Response: Admitted.

Petitioner's Paragraph 25: Minnesota Rule 8230.3850 further supports the statutorily mandated procedures for creating and counting duplicate ballots, and for retaining the original ballots. It provides as follows:

> Any ballots requiring duplication at the polling place or central counting center must be duplicated in the following manner:
>
> A. Whenever a ballot is required to be duplicated, the duplication process must be performed by two election judges not of the same political party.
>
> B. *Whenever it is necessary to duplicate a ballot, the duplicate ballot and the original ballot must be identified with a single number written on both ballots. The number on the duplicate ballot must be the same number as on the original. When more than one ballot is being duplicated in a precinct, the numbering must be serial.*

> C. *The reason for duplication must be written on the duplicate ballot. The election judges duplicating the ballot shall initial the duplicated ballot and the original ballot.*
>
> D. When duplicating a ballot, one election judge shall call from the original ballot the valid selections of the voter; another election judge shall prepare the duplicate ballot with the voter's valid selections. The duplicate ballot must be compared against the original ballot to ensure it has been accurately duplicated.
>
> E. *All original ballots which require duplication must be placed in an envelope marked "ballots for which duplicates were or are to be made."* **The duplicate ballot must be placed with the other valid ballots to be tabulated.**

Minnesota Rule 8230.3850 (emphasis added).

Franken Parties' Response: The Franken Parties deny that Minnesota Rule 8230.3850 requires that duplicate ballots remain with the other ballots after they are tabulated. The remaining allegations of paragraph 25 are admitted.

Petitioner's Paragraph 26: During the Recount, the Board's review is limited by statute "to the determination of the number of votes validly cast for the office to be recounted. Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process." Minn. Stat. § 204C.35, subd. 3. To determine whether duplicate or original ballots were validly cast, the Court must apply Minn. Stat. § 206.86.

Franken Parties' Response: The Franken Parties deny that Minn. Stat. § 206.86 applies in a manual recount. The remaining allegations of paragraph 2 are admitted.

Petitioner's Paragraph 27: Minn. Stat. § 204C.39 provides that "[a] county canvassing board may determine by majority vote that the election judges have made an obvious error in counting or recording the votes for an office."

Franken Parties' Response: Admitted.

INSTRUCTIONS FROM THE BOARD AND THE SECRETARY OF STATE'S OFFICE

Petitioner's Paragraph 28: While Minnesota election law unambiguously creates the requirement that duplicate ballots be made according to the procedure outlined above, and that only duplicate ballots be tabulated and counted, the Board adopted recount rules

proposed by the Minnesota Secretary of State on how to handle a variety of issues during the Recount, including how to handle original and duplicate ballots.

Franken Parties' Response: The Franken Parties deny that Minn. Stat. § 206.86 applies in a manual recount. The Franken Parties also deny that the Secretary of State originally proposed the recount rule on how to handle original and duplicate ballots; in fact, that proposal originated with and was insisted upon by Petitioner. *See* Sautter Aff. The remaining allegations of paragraph 28 are admitted.

Petitioner's Paragraph 29: With respect to the counting of these duplicate and original ballots during the Recount, the recount rules provided in part as follows:

> 9. 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.**

Walstien Aff. Ex. 6 (italicized emphasis added). The foregoing rule is hereinafter referred to as "Rule 9."

Franken Parties' Response: Admitted.

Petitioner's Paragraph 30: When the campaigns agreed to the foregoing Recount Plan and Rule 9, they did so presuming that local election officials had created and marked duplicate ballots, as required by Minnesota law. Neither their agreement nor Rule 9 can bind the Board (or this Court) from applying Minnesota—and constitutional—law.

Franken Parties' Response: The Franken Parties are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that both campaigns presumed that the requirements of Minn. Stat. § 206.86 had been met in all instances. The Franken Parties also deny that the counting of Non-Matching Original

Ballots pursuant to the rule and the campaigns' agreement violates either the Constitution of the United States or applicable Minnesota law. Indeed, Minnesota law requires that original ballots must be used to determine voter intent.

Petitioner's Paragraph 31: Rule 9, on its face, does not mandate that Non-Matching Originals (for which no marked duplicates were found during the Recount) should be counted and included in the Recount totals. Rather, Rule 9 complements Minnesota law by enabling a comparison of the marked original ballots (found in the folder containing originals from which duplicates were made) to the corresponding marked and numbered duplicates.

Franken Parties' Response: Denied. In fact, Rule 9, as agreed to by Petitioner, specifically preferred the counting of original, and not duplicate ballots, in all instances where original ballots have been located for that precinct. Rule 9 does not require a comparison of the marked original ballots to the corresponding duplicates, nor does its procedure change in any way upon discovery of Non-Matching Duplicate Ballots.

Petitioner's Paragraph 32: However, in an email to all election officials dated November 19, 2008 purporting to "clarify" Rule 9, Deputy Secretary of State Gary Poser unilaterally stated that only the marked original ballots (located in the folder containing originals from which duplicates were to be made) were to be counted:

> It is the opinion of our Office that Rule 9 is clear about the process to be used when duplicate ballots are found during the sorting process. Those ballots are to be removed from the sorting process and placed in a seperate [sic] pile. If there is an envelope of original ballots, the original ballots should then be sorted. 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 exist, 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 [sic] ballots. I hope this provides additional clarity.

Walstien Aff. Ex. 7 (emphasis added). Mr. Poser circulated this e-mail without the consent or agreement of either campaign.

Franken Parties' Response: Admitted, except that Petitioner and the Franken Parties were all notified by the Office of the Secretary of State in advance of this guidance being circulated and were invited to comment. To the knowledge of the Franken Parties, neither Petitioner nor the Franken Parties objected to Rule 9, which embodied principles that had been insisted upon by Petitioner. In fact, Petitioner insisted on strict adherence to Rule 9 during the Recount, even when originals and duplicates did not match in some precincts. *See* Brooks Aff. ¶ 3; Sautter Aff., ¶ 18. Having insisted on the strict application of the rule, Petitioner is now estopped from objecting to Rule 9.

Petitioner's Paragraph 33: By following this interpretation of Rule 9, if "DUPLICATE" with a serial number was not correctly placed at the top of every duplicate, and some (but not all) originals corresponding to those (unmarked) duplicates were found in an envelope and then counted, the original ballot and the unmarked duplicate ballot corresponding to the same voter were both counted. The attempt to clarify Rule 9 thus resulted in the double-counting of votes.

Franken Parties' Response: Denied. Petitioner's allegation assumes that duplicates (a) were made; (b) were improperly labeled; and (c) were included with the ballots to be counted during the Recount. There is no evidence that (a), (b) or (c) took place anywhere, much less in each and every instance of Non-Matching Original Ballots as Petitioner's allegation assumes.

Petitioner's Paragraph 34: To preserve the integrity of the Recount and to avoid clear double-counting of certain ballots, the Board should have upheld the candidate challenges to the Non-Matching Original Ballots and excluded from the Recount totals original but

defective ballots for which there are no corresponding duplicate ballots. Only those originals for which there were corresponding duplicates should have been counted.

Franken Parties' Response: Denied. The remedy sought by Petitioner before the State Canvassing Board would have disenfranchised hundreds of voters; moreover, the Board had no way of verifying Petitioner's claims. The State Canvassing Board could not determine whether originals had corresponding duplicates, as the duplicates were in almost all instances *not* presented to the Board but remained with the other ballots in their corresponding precincts in the custody of local election officials, scattered throughout the state in 87 counties and multiple cities. The sheer task of identifying and collecting those ballots would have required reopening precincts throughout the state and painstaking review of thousands, and likely hundreds of thousands, of ballots. Even if Non-Matching Original Ballots could be identified, the Board could not ascertain (a) whether duplicate ballots had been made, were improperly labeled, and had been included with the other ballots and counted during the Recount; (b) whether duplicate ballots were made, set aside, and not counted during the Recount; or (c) duplicate ballots were never made in the first place.

THE BOARD'S ERRORS AND OMISSIONS

Petitioner's Paragraph 35: In overruling the candidates' challenges to the Non-Matching Original Ballots and ensuring that both the Non-Matching Original Ballots and the corresponding Unmarked Duplicates are counted in the Recount, the Board has enabled double-counting of votes in excess of the number of persons who voted on Election Day.

Franken Parties' Response: Denied. There is no evidence of the double counting of votes, for the reasons noted hereinabove.

Petitioner's Paragraph 36: The principle that each citizen is entitled to one (but not more than one) vote is deeply engrained in the American tradition of voting rights. As the Supreme Court has explained, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and

Nineteenth Amendments can mean only one thing - one person, one vote." *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (internal quotation omitted).

Franken Parties' Response: The Franken Parties have no obligation to admit or deny Petitioner's citation of authorities. The Franken Parties allege that they believe deeply in the right to vote and to have one's vote counted, whether the voter appears in person or by absentee ballot.

Petitioner's Paragraph 37: When one person casts two votes, or has his vote counted twice due to mistake on the part of election officials, all other citizens are disenfranchised (no less than the disenfranchisement that occurs when a legally-cast ballot is not counted at all). *See Crawford v. Marion County Election Bd., 128* S.Ct. 1610, 1619 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.") Moreover, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. . . [v] others who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, *4* (2006).

Franken Parties' Response: The quotations from decisions of the United States Supreme Court are accurate and cited correctly. Petitioner, however, has presented no credible evidence that any voter voted twice in the November 4, 2008, election for United States Senator, nor has Petitioner presented any credible evidence that due to a mistake by election officials any voter's vote was counted twice in said election; to the extent Petitioner alleges that such a mistake has occurred, such allegation is denied. With respect to the issue of the counting of original instead of duplicate ballots, the Petitioner has not presented any credible evidence that a legally cast ballot was not counted; to the extent Petitioner alleges that such has occurred, such allegation is denied. To the extent a legally cast absentee ballot was not counted, such votes are the subject of the Order of this Court entered in the matter of *Coleman v. Ritchie* on December 18, 2008, and no further relief is necessary.

Petitioner's Paragraph 38: In other words, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v.* Sims, 377 U.S. at 555.

Franken Parties' Response: The quotation from a decision of the United States Supreme Court is accurate and cited correctly. Petitioner, however, has presented no credible evidence that any citizen's vote has been debased or diluted by the manner in which original votes were counted, and to the extent Paragraph 38 alleges that such has occurred, it is denied.

Petitioner's Paragraph 39: The Board had the duty, discretion and authority to prevent such unfairness from occurring. *See Eu v. San Francisco County Democratic Central Comm., 489 U.S.* 214, 231 (1989) ("[a] State indisputably has a compelling interest in preserving the integrity of its election process"); *Crawford*, 128 S.Ct. at 1620 (2008) (recognizing Indiana's interest in maintaining "the integrity and legitimacy of representative government"); *id.* at 1619 ("the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process"). In fact, it already had exercised this discretion and authority with respect to counting the election-night totals, as opposed to the recount totals, for a Minneapolis precinct where an envelope of ballots was alleged to have become missing; this discretion similarly should have been exercised with respect to the Non-Matching Original Ballots. Walstien Aff. ¶ 11.

Franken Parties' Response: The quotations from decisions of the United States Supreme Court are accurate and cited correctly. The remainder of Paragraph 39 is denied. The Board's decision regarding ballots in Minneapolis Precinct 3-1 that disappeared after machine counting, in response to a request from the City of Minneapolis, is not analogous to this issue. Moreover, the State Canvassing Board had no evidence before it, or any reason to believe, that double counting of votes had occurred; moreover, even if such evidence had been presented and were proven to be true, the State Canvassing Board does not have authority to remedy such a situation. This is precisely the sort of allegation that is left for

consideration in an election contest, where evidence may be gathered and presented, witnesses may be heard (and cross-examined), and factfinding may occur.

Petitioner's Paragraph 40: Although there is no Minnesota case law addressing whether original ballots without properly created duplicate ballots should be counted, and if so, in what manner, other jurisdictions have addressed the issue. In *Wright v. Gettinger*, 428 N.E.2d 1212 (Ind. 1981), the statute then in effect (but since repealed) in Indiana was similar to Minnesota's statute. It provided that "all duplicate ballots shall be clearly labeled duplicate" and "shall bear a serial number which shall be recorded on the damaged or defective ballot and shall be counted in lieu of the damaged or defective ballot." *Id.* at 1221.

Franken Parties' Response: The Franken Parties are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 40. Furthermore, a decision by the courts of a sister state regarding a long-since repealed statute is, with all due respect, irrelevant to the interpretation of a Minnesota statute that is part of a comprehensive statutory scheme regulating elections adopted by the Minnesota legislature.

Petitioner's Paragraph 41: The court in Wright considered twenty-one ballots in which there were various issues, including an original ballot for which there was no matching duplicate, a duplicate for which no original was found, and other ballots that did not contain serial numbers such that the originals and duplicates could be tied together. *Id.* at 1221. The Court held that the ballots at issue would not be counted because, to do so, would be to "ignore the clear written law on the subject, and create a situation that would authorize procedures that would frustrate the proper handling of ballots and even create methods for fraudulent mischief in the counting of the votes." *Id.* at 1223. Thus, under a comparable Indiana law, originals without corresponding properly-marked duplicates should not be counted (because, per statute, duplicates are the ballots to be counted on election night). *See generally id.*

Franken Parties' Response: The Franken Parties repeat and incorporate their Response to Paragraph 40 of the Petition as set forth above.

Petitioner's Paragraph 41: By counting both a Non-Matching Original Ballot and an Unmarked Duplicate corresponding to the same voter, one person's vote will be double-counted and other voters who have only voted once will be disenfranchised. *See* Minn. Stat. 204C.35, subd. 3 (the scope of the Recount is limited to "the determination of the number

of votes validly cast"). The Board does not have the authority to count Non-Matching Original Ballots because they were not "votes validly cast" in the election and therefore are not ballots that can be considered during the Recount. *See id.*

Franken Parties' Response: Denied. There is no support for the proposition that Non-Matching Original Ballots were not "votes validly cast." Indeed, the only reason that the original ballots themselves were not counted on Election Night and had to be duplicated was damage to the physical ballot or an inability of the voting machines to read it; there is no legal or evidentiary reason why these are not valid ballots properly considered in a manual recount. The intent of the voter, and the existence of any distinguishing marks on the ballot placed there by the voter, can only be determined during the Recount by inspecting and counting the original ballots. Intent cannot be determined from the duplicate ballots, because they were prepared by election officials, not by the voters whose intent must be determined.

Petitioner's Paragraph 43: The campaigns' early agreement that Rule 9 was the appropriate procedure is irrelevant as it did not contemplate the situation where some ballots would be properly marked as duplicates and originals, but where there would also be additional Non Matching Original Ballots. In any event, no agreement can displace applicable law, including the "one person, one vote" principle.

Franken Parties' Response: Denied. Indeed, it has long been established that a person may waive constitutional or statutory rights in a variety of circumstances; for example, a defendant in a criminal matter may waive his or her constitutional right against self-incrimination, and parties to civil or criminal trials may waive their constitutional rights to a trial by jury. Because Petitioner entered into (and indeed insisted upon) the agreement to count original ballots instead of duplicate ballots, he has waived any federal or state constitutional rights he may have had to have the duplicate ballots counted, and Petitioner

does not have standing to assert the state or constitutional rights of any other person in this regard. In any event, the agreement by Petitioner, the Franken Parties and the State Canvassing Board to count original ballots instead of duplicate ballots, does not, as Petitioner contends, violate the Constitutions of the United States or the State of Minnesota.

Petitioner's Paragraph 44: By overruling the challenges to the Non-Matching Original Ballots, the Board will certify vote totals in the Recount which exceed the number of persons that voted in these precincts on Election Day, thereby resulting in double-voting. The Board, which has a duty to determine the number of votes "legally cast," cannot approve numbers that show more votes than voters.

Franken Parties' Response: Denied. Petitioner has not presented any credible evidence that the vote totals will exceed the number of persons who voted in these precincts, or that double counting has in fact occurred. Petitioner in fact has put forth no evidence regarding the number of voters in any precinct; Petitioner has only presented evidence regarding the number of ballots counted manually, and the number of votes tabulated by machine in the United States Senate election.

Petitioner's Paragraph 45: The Board should have upheld the challenges to the Non-Matching Original Ballots and excluded those ballots from the certified totals because the corresponding Unmarked Duplicates were already counted during the Recount. Alternatively, the county canvassing boards should be permitted to correct this obvious error. "[K]eeping in mind that the object of all elections ought to be to declare elected the candidate who receives the most legal votes, it should follow that the method of arriving at the correct result, *[a]fter it* is *in fact accomplished,* should not be permitted to control so as to declare the loser to have won the election. To do so would be to permit the outcome of an election to rest on admitted mistake rather than on known fact." *Andersen,* 119 N.W.2d at 10-11 (emphasis in original).

Franken Parties' Response: The quotation from a decision of the Minnesota Supreme Court is accurate and cited correctly. The Franken Parties deny the remaining allegations contained in Paragraph 45. Petitioner has presented no credible evidence that

any ballots were counted twice during the recount or that any errors, let alone "obvious errors," occurred during the Recount.

The Franken Parties' Affirmative Defenses

First Affirmative Defense. The Petition fails to state a claim upon which relief can be granted for the reasons set forth in this First Affirmative Defense. Minn. Stat. § 206.86, subd. 5, provides in pertinent part:

> If a ballot card is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, a true duplicate copy must be made of the damaged ballot card . . . . Duplicate ballot cards must be clearly labeled "duplicate," indicate the precinct in which the corresponding damaged or defective ballot was cast, bear a serial number which must be recorded on the damaged or defective ballot card, and be counted in lieu of the damaged or defective ballot card.

When duplicates are not found to match the number of original ballots found, at least one of four events has occurred. First, as Petitioner alleges, it is possible that duplicate ballots were made, improperly labeled, and inserted into the rest of the ballots. This is a clear violation of the requirement of Minn. Stat. § 206.86, subd. 5., to ensure that the duplicate ballots are "clearly labeled." Second, it is possible that duplicate ballots were in fact never made of the original ballots. This is also a violation of Minnesota law, but undoubtedly occurred; indeed, Petitioner includes evidence that this happened in the Cedar Valley and Gnesen precincts in St. Louis County. *See* Petitioner Ex. 4, p. 8, 10. Third, it is possible that the statute was followed, and duplicate ballots were made, counted on election night, and then set aside. Fourth, it is possible that the duplicates were created but simply were not processed on Election Night. Each of these possibilities is equally likely to have occurred, and Petitioner has presented no credible evidence that the first possibility—which is the possibility upon which his Petition is based—actually occurred during the November 4, 2008, election.

The State Canvassing Board, an administrative body, was without the evidentiary record before it (or the means to develop or entertain the presentation of evidence) to examine and make factual findings with respect to these issues. Its decision to refrain from doing so and to defer the consideration of such issues was, accordingly, entirely appropriate and, indeed, mandated by application of Minnesota law.

Second Affirmative Defense. The Petition also fails to state a claim upon which relief can be granted for the reasons set forth in this Second Affirmative Defense. Petitioner alleges that when there are more ballots or votes for Senate counted during the Recount than were counted on Election Night, that is evidence that duplicates were made and improperly duplicated, and therefore counted as well as their matching originals during the Recount. That conclusion is simply wrong. If there are more votes for Senate counted during the Recount than on Election Night, that is evidence only that additional votes were counted by hand that were not counted by machine—which is, after all, the very point of a manual recount under Minn. Stat. § 204C.35. And if there are more *ballots as a whole* (as measured by the machine tapes) counted during the Recount than on Election Night, that fact is equally consistent with the hypothesis that the "extra" originals were never duplicated, or the duplicates were not counted.

Third Affirmative Defense: The Petition fails to state a claim upon which relief can be granted for the reasons set forth in this Third Affirmative Defense. Petitioner asks this Court to assume that every time there are more original than duplicate ballots, and more ballots counted during the Recount than on Election Night, the facts indicate that the votes were counted once on Election Night and double counted during the Recount. But that

assumption is not necessarily correct, and Petitioner is unable to prove that it is (and certainly failed to do so before the State Canvassing Board). Indeed, it is at least equally likely that the ballots in question were mistakenly not included in the Election Night tally because they were not properly duplicated or the duplicates were not counted. To fail to count the originals now would be to disenfranchise these voters entirely.

Fourth Affirmative Defense: The Petition is barred by waiver and estoppel because Petitioner agreed to the Recount procedures of which he now complains.

Fifth Affirmative Defense: The Petition is barred by the doctrine of unclean hands, because Petitioner is seeking equitable relief from this Court even though during the Recount Petitioner insisted on strict compliance with the very Recount procedures of which he now complains.

Sixth Affirmative Defense: The Petition is barred by the doctrine of laches, because although Petitioner has been aware of the Recount procedures set forth in Rule 9 (to which he agreed) since the beginning of the Recount, and although he insisted on strict compliance with Rule 9 during the Recount, Petitioner waited until near the end of the proceedings before the State Canvassing Board before seeking review in this Court, and then only when it became apparent that Petitioner might lose the election. Petitioner could have sought review in this Court when he was first informed of Rule 9, and had he done so and his petition had been granted, the Recount would have proceeded in a different manner and would not have been conducted on the premise that Petitioner was in agreement with Rule 9 and that Rule 9 governed the Recount. The Franken Parties, the election officials of the 87 counties of the State of Minnesota and their municipalities, the Secretary of State and his

staff, and the public, all of whom in good faith acted in reliance upon Petitioner's agreement with, and adamant insistence that it be complied with during the recount, will now be harmed—if Petitioner's Petition is granted—by the cost and delay that changing the method for counting original and duplicate ballots would entail. Petitioner's delay in bringing this Petitioner equitably bars him from the relief he seeks.

WHEREFORE, the Franken Parties request that Petitioner's Petition be dismissed, with prejudice and on the merits, and that the Franken Parties be awarded their costs and disbursements herein.

Dated: December 22, 2008.

Respectfully Submitted,

William Z. Pentelovitch (#85078)
Mary R. Vasaly (#152523)
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
Minneapolis, Minnesota 55402-4140
Telephone: 612.672.8200
Facsimile: 612.672.8397

David L. Lillehaug (#63186)
Steven Z. Kaplan (#53739)
Fredrikson & Byron, P.A.
200 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: 612.492.7000
Facsimile: 612.492.7077

Counsel for Al Franken for Senate Committee and Al Franken

Marc E. Elias (D.C. Bar # 442007)
Kevin J. Hamilton (WSBA # 15648)
Perkins Coie LLP
607 Fourteenth Street, NW, Suite 800
Washington, DC 20005-2011
Telephone: 202.628.6600

Of Counsel